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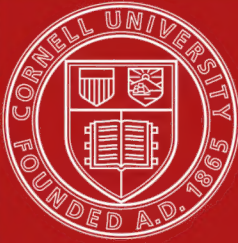
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A TREATISE
ON
FEDERAL PRACTICE
CIVIL AND CRIMINAL

- 80885
INCLUDING

PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES,
FORECLOSURE OF RAILWAY MORTGAGES, SUITS
UPON CLAIMS AGAINST THE UNITED STATES,

EQUITY PLEADING AND PRACTICE, RE-
CEIVERS AND INJUNCTIONS

IN THE STATE COURTS

BY

ROGER FOSTER

OF THE NEW YORK BAR,

AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES
TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE
FEDERAL INCOME TAX OF 1894, LIBERTY OF CONTRACT, ATTACH-
MENT, &C., AND LECTURER ON FEDERAL JURISPRUDENCE
AT THE LAW SCHOOL OF YALE UNIVERSITY.

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IN THREE VOLUMES

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FEDERAL PRACTICE

VOLUME II.

CHAPTER XXI.

EVIDENCE AT LAW AND IN EQUITY.

§ 329. **Evidence in general.** The Revised Statutes provide that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses, in open court, except as hereinafter provided:"¹ and "the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided for."² Evidence consists of admissions upon the record, documents, and the testimony of witnesses. No objection can be taken, on an appeal to the Supreme Court, to the admissibility in evidence of any deposition, deed, grant, or other exhibit found in the record, unless the record shows that objection was taken thereto in the court below.³ The Federal courts take judicial notice of all public statutes, whether State⁴ or

§ 329. ¹ U. S. R. S., § 861. See *Beardsley v. Littell*, 14 Blatchf. 102; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117.

² U. S. R. S., § 862. See *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521.

³ S. C. Rule 13.

⁴ *Owings v. Hull*, 9 Pet. 607, 8 L. ed. 1061; *Gormley v. Bunyan*, 138 U. S. 623, 635, 34 L. ed. 1086, 1090; *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed.

825; *Southern Pac. Co. v. De Valle Da Costa*, C. C. A., 190 Fed. 689. Acts which provide for the construction, operation and lease of railroads are public acts of which the courts take judicial notice. *Western & A. R. Co. v. Roberson*, C. C. A., 61 Fed. 592. The Federal courts will follow a State statute providing that judicial notice shall be taken of every act of the legislature whether public or private. *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513. They may take judicial notice of

Federal;⁵ of treaties of the United States,⁶ of executive regulations authorized by acts of Congress which have the force of statute,⁷ and in general of all facts of which judicial notice is taken by other courts.⁸

the State statutes which were in force before the adoption of the Federal Constitution. *Loree v. Abner*, C. C. A., 57 Fed. 159. They will also take judicial notice of any rule of law established by the decisions of the State courts. *Lamar v. Mitcou*, 114 U. S. 218, 29 L. ed. 94. But, it has been held, not always of a rule of practice. *Yarnell v. Felton*, 104 Fed. 161; *Randall v. New England Order of Protection*, 118 Fed. 782. Nor of a municipal ordinance. This must be pleaded and proved. *Choctaw, O. & G. R. Co. v. Hamilton*, 182 Fed. 117. They may take notice of a foreign statute regulating navigation. *The New York*, 175 U. S. 187, 44 L. ed. 126. And of public statutes of a foreign nation while exercising jurisdiction over territory since acquired by the United States. *U. S. v. Perot*, 98 U. S. 428, 25 L. ed. 251; *U. S. v. Chaves*, 159 U. S. 452, 40 L. ed. 215; *Bouldin v. Phelps*, 30 Fed. 547. Otherwise they do not take judicial notice of foreign statutes. *Liverpool & G. W. Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 32 L. ed. 788; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 35 L. ed. 951. The courts take judicial notice of the seals of State of foreign nations, but not of their inferior departments, officers and their seals. *Schoerken v. Swift & C. & B. Co.*, 7 Fed. 469, 471. Nor of the local laws of the various tribes in the Indian Territory. *Wilson v. Owens*, C. C. A., 86 Fed. 571. *Cf. Davison v. Gibson*, C. C. A., 56 Fed. 443.

Nor, it has been held, of the local rules and regulations of mines even when they are recognized by the mining laws of the United States. *Meyer v. Stevens*, 78 Fed. 787.

⁵ Such as an act of Congress authorizing the construction of a bridge. *Pennsylvania Ry. Co. v. Baltimore & N. Y. Ry. Co.*, 37 Fed. 129.

⁶ *Lacroix Fils v. Sarrazin*, 15 Fed. 489.

⁷ *Caba v. U. S.*, 152 U. S. 211, 222, 38 L. ed. 415, 419; *U. S. v. Williams*, 6 Mont. 379. *Ex parte Lair*, 177 Fed. 789, 795; *Leonard v. Lennox*, C. C. A., 181 Fed. 760.

⁸ It has been held that judicial notice will be taken of a public proclamation of general pardon and amnesty. *Jenkins v. Collard*, 145 U. S. 546, 36 L. ed. 812. Of the acts of the Executive Department in relation to a Guano island. *Jones v. U. S.*, 137 U. S. 202, 34 L. ed. 691. Of proclamations concerning a blockade and of the practice in the Navy Department in regard to captures. *The Paqueta Habana*, 175 U. S. 677, 44 L. ed. 320. Of the custom of issuing and dating land patents several years after the payment of the purchase-money and the issue of the certificates of entry. *Bigelow v. Chatterton*, C. C. A., 51 Fed. 614. Of the presence in Congress of representatives chosen at a particular election. *Jones v. Montague*, 194 U. S. 147, 153, 48 L. ed. 913, 915; *Richardson v. McChesney*, 218 U. S. 487, 54 L. ed. 1121. Of correspondence between

State and Federal officers concerning swamp lands. *Kirby v. Lewis*, 39 Fed. 66. *Perovich v. Perry*, C. C. A., 167 Fed. 789, where a telegram signed by the surname of the Attorney General was presumed to be authentic. Of an order of the Secretary of the Interior withdrawing from sale or other disposition certain public land. *So. Pac. R. Co. v. Groeck*, 68 Fed. 609. But *not*, it has been held, of the filing of the map of a railroad route in the Interior Department. *McKeoin v. No. Pac. R. Co.*, 45 Fed. 464. Nor of the regulations of the light-house board. *Smith v. Hakopee*, C. C. A., 97 Fed. 974. Nor of the issue of letters-patent for inventions. *Bottle Seal Co. v. De La Vergne B. & S. Co.*, 47 Fed. 59. Nor of the facts stated in reports and messages of Governors to State legislatures. *Houston & T. C. Ry. Co. v. Texas*, 177 U. S. 66, 94, 44 L. ed. 673, 686. But see *Coeur d'Alene C. & M. Co. v. Miners' Union*, 19 L.R.A. 382, 51 Fed. 260. Nor of a report of a State auditor concerning the amounts of the various kinds of property subject to taxation. *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. ed. 669. It has been held, however, that a court may take judicial notice of an established custom of State officers to assess property for taxation at less than its actual value. *Railroad & Tel. Cos. v. Board of Equalizers*, 85 Fed. 302; *contra*, *New York v. Barker*, 179 U. S. 279. The courts will take judicial notice of historical facts such as the existence of civil war in a foreign State. *Underhill v. Hernandez*, 168 U. S. 250, 42 L. ed. 456. That the Dominion of Canada is a British possession. *Ex parte Lane*, 6 Fed. 34; *Lumley v. Wabash*

Ry. Co., 71 Fed. 21; but see s. c., C. C. A., 76 Fed. 66, 69. That the civil law is the foundation of the jurisdiction of France, but not of any details of the same, such as the right of heirs to collect a claim due their ancestor without the appointment of a personal representative. *Barrielle v. Bettman*, 199 Fed. 838. That the lands surrounding Seattle harbor have for years been selected and known as the site of a city. *Ex parte Davidson*, 57 Fed. 883. But not, it has been held, of the fact that during the Civil War the courts of a county were closed. *Cross v. Sabin*, 13 Fed. 308. The courts will take judicial notice of the boundaries of the State or county where they hold their sessions, of the judicial districts and of the municipal subdivisions within such State, and of the distance from the State capital to any State subdivision when estimated by a public survey. *Hoyt v. Russell*, 117 U. S. 401, 29 L. ed. 914. Of the boundaries of all the States. *Thornton v. Peterson*, 9 Fed. 517. Of the boundaries of counties within the district. *Ross v. Fort Wayne*, C. C. A., 63 Fed. 466, 469; *Bluefield W. & Imp. Co. v. Sanders*, C. C. A., 63 Fed. 333. Of the existence or non-existence in a State of a port of entry, at which Europeans can be landed. *Ex parte Lair*, 177 Fed. 789, 795. That Asheville, N. C., is distant more than one hundred miles from Dubuque, Iowa. *Mut. B. L. I. Co. v. Robinson*, C. C. A., 22 L.R.A. 325, 58 Fed. 723. Of the States in which a railroad chartered by Congress is situated. *Farmers' L. & Tr. Co. v. No. Pac. R. Co.*, 69 Fed. 871, 881. That a river is navigable between two important cities. *Lands v. A., Cargo of 227 Tons of*

Coal, 4 Fed. 478. But not it seems, that a river is non-navigable at a certain point. *U. S. v. Rio Grande D. & I. Co.*, 174 U. S. 690, 698, 43 L. ed. 1136, 1139. Nor of the navigability of a river or lake of insignificant capacity, such as Big Lake and Little River in Northeastern Arkansas. *Harrison v. Fite*, C. C. A., 148 Fed. 781. It has been held that the Federal courts will take judicial notice in collateral proceedings of their own orders appointing receivers. *Pitkin v. Cowen*, 91 Fed. 559. Of the proceedings in the suit in which such an appointment was made. *Louisville Tr. Co. v. Cincinnati*, C. C. A., 76 Fed. 296, 318. Of the filing of a petition in bankruptcy upon an application in the same proceeding. *Re Goldberg*, 117 Fed. 692, 694. Of previous applications and orders in the same bankruptcy proceeding. *Re Sussman*, 190 Fed. 111. Of the terms of an order restoring property to the defendant. *Baltimore & O. R. Co. v. Burris*, C. C. A., 111 Fed. 882, 884. Of an order denying an application for a certiorari in a proceeding between the same parties. *Dimmick v. Tompkins*, 194 U. S. 540, 548, 48 L. ed. 1110. Of all proceedings in the same court between the same parties. *Dimmick v. Tompkins*, 194 U. S. 540, 48 L. ed. 1110, 1113; *Wilson v. Calculagraph Co.*, C. C. A., 153 Fed. 961; *Re Sussman*, 190 Fed. 111, *contra*, *Merriman v. Chicago, D. & V. R. Co.*, C. C. A., 120 Fed. 240; *U. S. v. McMahon*, 195 Fed. 296; or in connected litigation, even when the parties are not the same (*U. S. Fidelity & Guaranty Co. v. Sandoval*, 223 U. S. 227, 233, 56 L. ed. 415, 418; *Coram v. Davis*, 174 Fed. 664), such as a test case (*Rumford*

Chemical Works v. Hygienic Chemical Co., 159 Fed. 436). Of proceedings upon a former appeal in the same case. *Wilson v. Calculagraph Co.*, C. C. A., 153 Fed. 961. Even, it has been held upon an application for a *habeas corpus*, of the affirmance of a previous order denying the writ to the same petitioner. *Re Durant*, 84 Fed. 314; and of all proceedings between the same parties upon another appeal in a suit for the same relief. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217, 46 L. ed. 1132, 1134; *Cushman Paper Box Mach. Co. v. Goddard*, C. C. A., 95 Fed. 664, 665, 37 C. C. A. 221. See 11 L.R.A.(N.S.) 616. When sitting in admiralty, of proceedings in the same court in bankruptcy affecting the custody of the property. *Hudson Oil & Supply Co. v. Booraem*, 216 U. S. 604, 54 L. ed. 636. See *The Falcon*, C. C. A., 177 Fed. 916. But not in general of the pending of other proceedings in the same court. *Re Manderson*, C. C. A., 51 Fed. 501. Nor of the decisions upon the facts in other cases. *Stewart v. Master-son*, 131 U. S. 151, 33 L. ed. 114. A Federal court will take judicial notice that several clauses of a will have been considered and construed by the highest court of the state. *Barker v. Eastman*, 192 Fed. 659. Upon an appeal from an allowance of a claim in a foreclosure suit in which the appellant described himself as "the person having trustee of defendant's property," the court of review refused to take judicial notice of the orders of the court below in the same suit directing the sale of the property or of the proceedings thereunder. *Fitzgerald v. Evans*, C. C. A., 49 Fed. 426. But courts will not take judi-

§ 330. Admissions. Admissions upon the record are either actual or constructive. Actual admissions are made either in the pleadings or by agreement. Every statement of a fact material to the issues made in the pleadings,¹ affida-

cial notice of decisions of the Interstate Commerce Commission unless the official reports are offered in the manner required by statute. *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 56 L. ed. 288. A court will usually take notice of the dates of its own sessions. *George C. De Lacy v. William F. Kelly*, 147 App. Div. (N. Y.) 37. The court may take judicial notice of the history and state of an art or process of manufacture when that is generally known. *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *Heaton P. B. F. Co. v. Schlochtmeier*, 69 Fed. 592; *S. C., C. C. A.*, 72 Fed. 520; *Charles Boldt Co. v. Turner Bros. Co.*, C. C. A., 199 Fed. 139. Especially when that is disclosed by the court's own records in another case. *Cushman P. B. Mach. Co. v. Goddard*, C. C. A., 95 Fed. 664. But see § 367, *infra*. The courts will take judicial notice of the general facts of natural history. For example, that the imported native sheep of all countries produce fleeces the value of which is depreciated by an excess of hair. *Lyon v. Marine*, C. G. A., 55 Fed. 964. That a 'whiskey cocktail' is an intoxicating drink. *U. S. v. Ash*, 75 Fed. 651. That the pasturage upon uninclosed western lands is very slight evidence of possession. *Whitney v. U. S.*, 167 U. S. 529, 42 L. ed. 263. But not that there is any substantial difference between lead or other soft metal when wrought or drawn. *McCloskey v. Du Bois*, 8 Fed. 710, 712. Nor of statements

in encyclopaedias, dictionaries and text-books which are not matters of common knowledge. *Kaolatype Eng. Co. v. Hoke*, 30 Fed. 444. The Supreme Court of the United States has unanimously held that "champagne, is a beverage singularly grateful to the taste." *DeBary v. Arthur*, 93 U. S. 420, 423, 23 L. ed. 936, 937.

§ 330. 1 No. Pac. R. Co. v. Paine, 119 U. S. 561, 30 L. ed. 513. But see *Smith v. Davison*, 41 Fed. 172. It has been held that an admission in a pleading may be offered in evidence, although it has been amended so as to withdraw the same. *Greenhall v. Carnegie Tr. Co.*, 180 Fed. 812; *Ranken v. Probey*, 136 App. Div. (N. Y.) 134. But it is not conclusive. *Ibid*. An admission in an unverified pleading in another suit which was signed only by an attorney cannot be admitted in evidence. *Delaware Co. Com'rs v. Diebold S. & L. Co.*, 133 U. S. 473, 33 L. ed. 674. Statements in a pleading, verified by a party in another suit, are admissible in evidence. *Balloch v. Hooper*, 146 U. S. 363, 36 L. ed. 1008; *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393; *Cook v. Barr*, 44 N. Y. 156; but see *U. S. Gramophone Co. v. Nat. Gramophone Corp.*, 107 Fed. 129; *Am. Coat Pad Co. v. Phenix Pad Co.*, C. C. A., 113 Fed. 629, 632; except in a criminal prosecution or in an action to enforce a penalty or forfeiture. *U. S. R. S.*, § 860; *Daly v. Brady*, 69 Fed. 285. An admission that a town made a contract

vits,² or other documents used in support of the claim of any party to a suit, who is of full age, whether sworn to or not,³ may be used as evidence against him upon the hearing. The filing of the general replication did not waive the right to rely on admissions in an answer or plea.⁴ The statement by a defendant that he believes, or is informed and believes, that a certain fact occurred, is treated as an admission, unless coupled with some clause to prevent its being so considered.⁵ For it is a rule in equity that what the defendant believes, the court will believe in such a case.⁶ This rule, however, does not apply to the statement of a defendant that he believes that a bill was executed as charged in the bill.⁷ Admissions in an answer made on behalf of an infant in such a case cannot be used against him,⁸ unless he adopts the answer after he has reached his majority.⁹ An admission of one defendant, whether in his answer or otherwise, is not evidence against any of his co-defendants,¹⁰ who is not his partner,¹¹ or who does not derive his title from him.¹² An admission of facts by a demurrer was of no effect after the

admits that it had power to make it. *Plankington v. Gray*, C. C. A., 63 Fed. 415. As to the admissibility of testimony by a party in another case, see *Cimiotti Unhairing Co. v. Bowsky*, 113 Fed. 698; s. c., 113 Fed. 699. For the construction of an admission, see *Union Casualty Co. v. Gray*, C. C. A., 114 Fed. 422. An attorney has been allowed to testify that the admission was made as a matter of form, without information as to its truth and in order to raise a question of law. *Ranken v. Probey*, 136 App. Div. (N. Y.) 134.

² *Hyman v. Wheeler*, 29 Fed. 347; *Tugman v. National S. S. Co.*, 30 Fed. 802; *Nat. S. S. Co. v. Tugman*, 143 U. S. 28, 36 L. ed. 63. *Of. Carey v. Williams*, 79 Fed. 906.

³ *Smith v. Potter*, 3 Wis. 432.

⁴ *Cavender v. Cavender*, 8 Fed. 641.

⁵ *Potter v. Potter*, 1 Ves. Sen. 274; *Hill v. Binney*, 6 Ves. 738.

⁶ *Potter v. Potter*, 1 Ves. Sen. 274; *Hill v. Binney*, 6 Ves. 738.

⁷ *Potter v. Potter*, 1 Ves. Sen. 274; *Davies v. Davies*, 3 Deg. & Sm. 698.

⁸ *Leigh v. Ward*, 2 Vent. 72; *Ecclleston v. Petty*, Carth. 79; *Savage v. Carroll*, 1 B. & B. 548, 553; *Wrotesley v. Bendish*, 3 P. Wms. 235. See *Kingsbury v. Buckner*, 134 U. S. 650, 680, 33 L. ed. 1047, 1059.

⁹ *Hinde's Ch. Pr.* 422.

¹⁰ *Leeds v. Marine Ins. Co.*, 2 Wheat. 380, 4 L. ed. 266; *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch, 153, 3 L. ed. 688.

¹¹ *Crosse v. Bedingfield*, 12 Simons, 35; *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch, 153, 156, 3 L. ed. 688, 689.

¹² *Field v. Holland*, 6 Cranch, 8. 3 L. ed. 136; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. ed. 204.

demurrer had been withdrawn or overruled.¹³ The parties to a suit may, by an agreement signed by themselves or their solicitors or made in open court by their counsel, admit any fact as proven, or allow testimony to be taken in any manner, unless they thus commit an act repugnant to public policy.¹⁴ Where it had been stipulated that certain evidence should be treated as if taken and afterwards a commission was issued, which it was claimed was inconsistent with the stipulation, it was held that the stipulated evidence would only be expunged by a motion before the hearing, and that an objection to it at the hearing should be overruled.¹⁵ No agreement between counsel will ordinarily be enforced unless reduced to writing or made in open court.¹⁶ A stipulation made by a party who is represented by an attorney may be disregarded.¹⁷

§ 331. Constructive admissions. Constructive admissions are those which are implied by law from a party's act. Under the former practice a constructive admission was made by the plaintiff when he set the cause down for a hearing upon bill and answer only; or when, in his bill, he did not expressly waive an answer under oath. In the former case, he admitted for the purposes of the suit that all the allegations in the answer were true;¹ in the latter, that all were true which he could not contradict by the testimony of two witnesses, or of a single witness with corroborating circumstances.² This rule

¹³ *Anheuser-Busch B. Co. Ass'n v. Bond*, 66 Fed. 653.

¹⁴ *Barker v. Dixie*, Reports *temp.* Hardwicke, 252; *Owen v. Thomas*, 3 M. & K. 353, 357; *Nixon v. Albion Ins. Co.*, L. R. 2 Ex. 38; *Lyman v. Kansas C. & A. R. Co.*, 101 Fed. 636. For a case where the court refused to relieve a party from a stipulation, see *McNeill v. Andes*, 40 Fed. 45. As to the power of the next friend of an infant to stipulate, see *Kingsbury v. Buckner*, 134 U. S. 650, 680, 33 L. ed. 1047, 1059. As to the power of a receiver to bind the estate by a stipulation, or admission, see *Bosworth v. Terminal R. R. Ass'n of St.*

Louis, 174 U. S. 182, 43 L. ed. 941; *supra*, § 311.

¹⁵ *Dickerson v. Matheson*, 50 Fed. 73, 75.

¹⁶ *Evans v. State Nat. Bank*, 19 Fed. 676; *Lee v. Simpson*, 42 Fed. 434.

¹⁷ *Bonifield v. Thorp* (D. C.), 71 Fed. 924.

§ 331. 1 U. S. v. *Scott*, 3 Woods, 334; *Kennedy v. Baylor*, 1 Wash. (Va.) 162.

² *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch, 153, 160, 3 L. ed. 688, 690; *Union Bank of G. v. Geary*, 5 Pet. 99, 110, 8 L. ed. 60, 64; *Seitz v. Mitchell*, 94 U. S. 580, 582, 24 L. ed. 179, 180; *Vigel v. Hopp*, 104 U. S. 441. See § 153, *supra*.

did not apply, however, unless the allegations in the answer were made positively.³ Thus, a denial according to the defendant's recollection and belief was insufficient for this purpose.⁴ So was an allegation upon information and belief.⁵ Constructive admissions are also made by a default in pleading.⁶ Averments in a bill not denied in an answer are taken as confessed except when the defendant is an infant, a lunatic, or other person *non compos* and not under guardianship.⁷

§ 332. Documentary evidence in general. Documentary evidence consists of all matters not contained in depositions or affidavits, which are submitted to the court in the shape of written documents. The rules regulating its admissions are substantially the same in equity as at common law.¹ In equity, however, under the former practice such documents as merely required proof of their execution or of the handwriting contained in them might be admitted in evidence at the hearing of the cause if accompanied by an affidavit of these facts, provided that an order, which was granted as of course, had been obtained and served upon the opposite side at least two days before.² In some cases, the courts then permitted the proof of such documents by word of mouth under oath at the hearing, when their existence and execution was not denied by the answer.³ There seems to be no reason now why this cannot be done even when the answer denies their execution.⁴ Telegrams do not prove themselves, and are ordinarily inadmissible without evidence that they were sent by the persons whose names are signed to the copies delivered.⁵ It has been held that when a party

³ *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185, 11 L. ed. 931; *Taylor v. Luther*, 2 Sumn. 228; *Berry v. Sawyer*, 19 Fed. 286.

⁴ *Taylor v. Luther*, 2 Sumn. 228.

⁵ *Berry v. Sawyer*, 19 Fed. 286.

⁶ Eq. Rule 16, *supra*, §§ 171, 172.

⁷ Eq. Rule 30.

§ 332. ¹ *Lake v. Philips*, 1 Ch. R. 110; *Stevens v. Cooper*, 1 J. Ch. (N. Y.) 425, 429, 7 Am. Dec. 499. and cases cited.

² *Clare v. Wood*, 1 Hare, 314. For the English practice of admit-

ting exhibits upon the hearing, see *Wood v. Strickland*, 2 Mer. 461. Quoted with approval in *Utah Const. Co. v. Montana R. Co.*, 145 Fed. 981, 983.

³ *Wood v. Mann*, 2 Sumn. 316; *Nesmith v. Calvert*, 1 W. & M. 34; *Atty. Gen. v. Pearson*, 7 Sim. 290, 303.

⁴ Eq. Rule 46, § 352, *infra*.

⁵ *Drexel v. True*, C. C. A., 74 Fed. 12. See *Dunbar v. U. S.*, 156 U. S. 185, 195, 196, 39 L. ed. 390, 394; s. c., 60 Fed. 75.

inspects a document, which he has compelled his adversary to produce under a subpoena *duces tecum*, and then fails to offer it in evidence, his adversary may put it in.⁶ A party may be compelled to produce an application for a patent which has not been issued and correspondence with the Patent Office upon the subject, although he claims that the result will be to disclose confidential communications with his attorneys.⁷ When a party had filed an exhibit drawn in pencil, a motion requiring him to refile it drawn in ink was denied.⁸ Confidential documents, the publication of which would disclose State secrets of this⁹ or of a foreign government,¹⁰ are privileged when the government affected appears by counsel and objects to their admission, and if previously admitted they will be expunged from the record; but the privilege is that of the government and not of the witness.¹¹ The English rule was that in a suit against the heir-at-law to establish the validity of a will, all the witnesses to the will who were alive, sane, and within the jurisdiction of the court, must be examined;¹² and the testator's sanity must be proved affirmatively.¹³ This rule did not, however, apply to suits to establish the trusts of a will, or to appoint a new trustee, or in any other case when the validity of the will is not directly in issue.¹⁴ It has been held that a party cannot introduce in his own behalf letters written subsequent to one offered by his opponent, under the rule that, where part of a letter or document or conversation is received, the whole may come in for purpose of explanation which rule has been extended to admit prior letters referred to in the letter admitted.¹⁵ Under a rule of court requiring the parties to an action for the recovery of real property to file copies of their abstracts of title,

⁶ Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. 55. But see Treadwell v. Lennig, 50 Fed. 872.

⁷ Ibid; and s. c., 44 Fed. 294. But see Rule 15 of Patent Office; U. S. R. S., § 4902.

⁸ Tubman v. Wason Mfg. Co., 44 Fed. 429.

⁹ Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353, drawings by the Bureau of Ordinance of the Navy Department.

¹⁰ Kessler v. Best, 121 Fed. 439.

¹¹ Kessler v. Best, 121 Fed. 439.

¹² Bootle v. Blundell, 19 Ves. 494b, 505.

¹³ Harris v. Ingledew, 3 P. Wms. 91; Wallis v. Hodgeson, 2 Atk. 56.

¹⁴ Bootle v. Blundell, 19 Ves. 494b, 505; Concannon v. Cruise, 2 Molloy, 332.

¹⁵ Varley Duplex Magnet Co. v. Ostheimer, C. C. A., 159 Fed. 655.

in order to enable the court to learn whether they trace their title from a common source, and, if so, to limit the proofs to subsequent conveyances and transactions, the fact that an entry in an abstract is admitted in evidence as showing a source of title common to both parties does not render the subsequent entries admissible as evidence in favor of the proponent of such abstract.¹⁶ It has been held that entries in the books of a corporation showing a transfer of stock to a person and payment by him of instalments of the subscription thereto are not *prima facie* evidence that he is a stockholder.¹⁷ It has been held that a general offer of documentary evidence, without any statement of its purpose, is insufficient to support an exception to the exclusion of the same.¹⁸ It has been said that a party who has

¹⁶ *Davis v. Jennie Bros*, C. C. A., 152 Fed. 696.

¹⁷ *Carey v. Williams*, C. C. A., 79 Fed. 906. But see *Turnbull v. Payson*, 95 U. S. 418, 24 L. ed. 437; *Liggett v. Glenn*, C. C. A., 51 Fed. 381. In a criminal prosecution for defrauding the United States, it was held that entries of the weights made by city weighers, which were recorded in books by checkers employed by a corporation in which the defendant was employed, were admissible when they were so far as possible authenticated by the persons who made the entries, and it was shown that statements of the weights showing a discrepancy between these amounts and those at which the same merchandise was entered by the Government had been brought to the attention of the defendants. *Heike v. U. S.*, C. C. A., 192 Fed. 83, *aff'd*, 227 U. S. 131, 144, 57 L. ed. —. In the same case, it was held that dock books kept by assistant weighers in the custom service were admissible. *Ibid*. The entries in the books of a corporation are competent evidence against its officers and employees, upon

proof of such connection and familiarity therewith as to justify an inference of actual acquaintance with their contents. *Foster v. U. S.*, C. C. A., 178 Fed. 165. Where the receiver of a State court refused to obey a subpoena for the production of certain books, secondary evidence of their contents was admitted. *Foster v. U. S.*, C. C. A., 178 Fed. 165. The rule which governs the admissibility of entries in books, made by private parties, "with some exceptions, including the present case, requires for the admissibility of the entries, not merely that they should be contemporaneous with the facts to which they relate, but that they shall be made by parties having knowledge of the facts, and be corroborated by their testimony if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the jurisdiction of the court." *Field, J.*, in *Chaffee & Co. v. U. S.*, 18 Wall. 516, 541, 21 L. ed. 908, 612. See *Carlin v. Conlon*, 106 App. Div. (N. Y.) 204.

¹⁸ *Canada-Atlantic & Plant S. S. Co. v. Flanders*, C. C. A., 145 Fed. 875.

fraudulently altered documents which he offers in evidence is thereby debarred from all relief in equity.¹⁹

§ 333. Federal statutes regulating admission of documentary evidence. The Revised Statutes of the United States provide as follows concerning the admission of documentary evidence: "Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."¹ The mode of authentication prescribed by the statute must be strictly followed.² The words, "papers or documents," mean only such as

¹⁹ *Harton v. McKee*, 73 Fed. 556.
 § 333. ¹ U. S. R. S., § 862. See *Barney v. Schneider*, 9 Wall. 248, 19 L. ed. 648; *Chadwick v. U. S.*, 3 Fed. 750; *Block v. U. S.*, 7 Ct. Cl. 406; *U. S. v. Liddle*, 2 Wash. 205; *U. S. v. Benner*, 1 Bald. 234; *White v. St. Guirons, Minor (Ala.)*, 331, 12 Am. Dec. 56; *Catlett v. Pac. Ins. Co.*, 1 Paine, 594; *Bleecker v. Bond*, 3 Wash. 529; *Thompson v. Smith*, 2 Bond, 320; *Wetmore v. U. S.*, 10 Pet. 647, 9 L. ed. 567; *Wickliffe v. Hill*, 3 Litt. (Ky.) 330.

² *Smith v. U. S.*, 5 Pet. 291, 300, 8 L. ed. 130, 133; *Block v. U. S.*, 7 Ct. Cl. 406; *Bleecker v. Bond*, 3 Wash. 531; *U. S. v. Harrill, McAll.* 243; *Wickliffe v. Hill*, 3 Litt. (Ky.) 330. A certified copy of a record, which is made competent evidence by statute, establishes a presumption that the original was in the public office when the copy was made, and it has been held that the same is not overcome by testimony that seven years later the original cannot be found there. *U. S. v. Brelin*, C. C. A., 166 Fed. 104. If the officer having charge of the paper certifies that the copy is correct, and the head of a department certifies to the officer's character, the paper is sufficiently authenti-

cated, provided that the seal from the department is attached thereto. *Ballew v. U. S.*, 160 U. S. 187, 40 L. ed. 388. In the case of documents filed in the Treasury Department, an authentication under the seal of that department and the signature of the Secretary and the Assistant Secretary of the Treasury is sufficient. *Chadwicke v. U. S.*, 3 Fed. 750. The original canceled register of a lost vessel has been held to come within the statute. *Catlett v. Pacific Ins. Co.*, 1 Paine, 612. See *Bleecker v. Bond*, 3 Wash. 29. A letter from the President's secretary to a senator stating a commutation of a sentence, is not evidence thereof. It must be proved by a warrant of commutation or a certified copy of the same. *Ex parte Harlan*, 180 Fed. 119. A certified copy of a ship's manifest, delivered to the inspection officers as a report under 26 St. at L. 1085, and preserved in the immigration office, containing a list of the alien immigrants on board, with their names, nationality, last residence and destination, is competent evidence concerning the identity of an individual. *McInerney v. U. S.*, C. C. A., 143 Fed. 729. But see *U. S. v. Wilson*, 60 Fed. 890, 896. En-

are made by an officer and an agent of the government in the discharge of his official duty; and copies of such are not competent evidence unless it was the duty of the officer to file the originals.³ In cases described in section 886 of the Revised Statutes, proof must be given in accordance with the provisions of that section.⁴ The original papers may also be put in evidence.⁵ In cases where the government is a party, duly authenticated copies should be procured and the fees therefor paid, and a mere notice to produce the original is not sufficient.⁶

tries in a ship's log are strong evidence against the party making them. *The Newfoundland*, 89 Fed. 510. It has been said to be the better practice, to introduce the log of a vessel in evidence after the same has been duly authenticated, rather than to rely upon the testimony of the officer who made the entries, when he cannot do so without refreshing his recollection by reading the same. *Bacon v. Conroy*, C. C. A., 172 Fed. 532. A passport issued by the Secretary of State was held not to be evidence of the citizenship of the person who received the same. *Edsell v. D. Charlie Mark*, C. C. A., 179 Fed. 292. Accounts and papers filed in the office of the Quartermaster-General may thus be proved. *Thompson v. Smith*, 2 Bond, 320. See *Crowell v. Hopkinson*, 45 N. H. 9. Telegrams from a postmaster to the postmaster-general are competent. *U. S. v. McCoy*, 193 U. S. 593, 48 L. ed. 805. "The design and meaning of this rule is not to convert incompetent and irrelevant evidence into competent and relevant evidence simply because it is contained in an official communication. Had the officer been testifying under oath, such an assertion would have been excluded as inadmissible, upon the ground that the statement itself

implied the existence of primary and more original and explicit sources of information. The courts hold this rule which has been invoked to be limited to only such a statement in official documents as the officers are bound to make in the regular course of official duty. The statement of extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative, is no proof of such circumstances, and is therefore rejected." *U. S. v. Corwin*, 129 U. S. 381, 386, 32 L. ed. 710, 711. Cf. *The Ship Parkman*, 35 Ct. Cl. 406. A certificate of a State census enumerator for the information of the governor, compilations in the report of the State auditor and a certificate to the auditor by the county clerk, are not competent evidence. *Coffin v. Board of Commissioners of Kearney County*, 114 Fed. 518.

³ *Block v. U. S.*, 7 Ct. Cl. 406.

⁴ *Chadwicke v. U. S.*, 3 Fed. 750; *White v. St. Guirons, Minor (Ala.)*, 331; *U. S. v. Humason*, 8 Fed. 71.

⁵ *Bruce v. Manchester & K. R. Co.*, 19 Fed. 342.

⁶ *Barney v. Schneider*, 9 Wall. 248, 19 L. ed. 648; *Chadwick v. U. S.*, 3 Fed. 750; *U. S. v. Scott*, 25 Fed. 470; *U. S. v. Benner*, 1 Bald. 234; *U. S. v. Perchman*, 7 Pet. 51,

Papers which were a part of the archives of the late so-called "Confederate Government" must be proved by proper testimony.⁷ The certificate of the Secretary of the Spanish Governor of Florida is *prima facie* evidence of the existence of a grant of land.⁸ "The volume of public documents, printed by authority of the Senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the Senate, is as competent evidence as the original documents themselves."⁹ "Copies of any documents, records, books or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacated, by the officer acting as Solicitor for the time, shall be evidence equally with the originals."¹⁰ "Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office certified by him and authenticated by the said seal shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer."¹¹ "Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate."¹²

"When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department

8 L. ed. 604; Winn v. Patterson, 9 Pet. 663, 9 L. ed. 266; James v. Gordon, 1 Wash. 333.

7 Chorbin v. U. S., 6 Ct. Cl. 430.

8 U. S. v. Wiggins, 14 Pet. 334,

10 L. ed. 481; U. S. v. Acosta, 1 Hew. 24, 11 L. ed. 33.

9 Whiton v. Albany Ins. Co., 109 Mass. 30. Cf. Doe v. Roe, 13 Fla. 602.

10 U. S. R. S., § 883.

11 U. S. R. S., § 884.

12 U. S. R. S., § 885; First Nat. Bank v. Kidd, 20 Minn. 234; Washington Co. Nat. Bank v. Lee, 112 Mass. 521; Merchants' Nat. Bank v. Glendon Co., 120 Mass. 97. A certificate is sufficient in the absence of any evidence that there is any other national bank of the same name at the same place. Washington Co. Nat. Bank v. Lee, 112 Mass. 521.

certified by the" Secretary and Assistant Secretary "and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the Auditors respectively charged with the examination of those accounts and authenticated under the seal of the Treasury Department shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register or by such Auditor as the case may be "to be true copies of the original on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: provided, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads '*non est factum*,' or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears, to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit."¹³ "Upon

¹³ U. S. R. S., § 886, as amended by 28 Stat. 764, 809; *Bechtel v. U. S.*, 101 U. S. 597, 25 L. ed. 1019; *U. S. v. Bell*, 111 U. S. 477, 28 L. ed. 477; *U. S. v. Stone*, 106 U. S. 525, 27 L. ed. 163; *Moses v. U. S.*, 166 U. S. 571, 598, 41 L. ed. 1119, 1129; *U. S. v. Pierson*, C. C. A., 145 Fed. 814. This section applies to sureties as well as to principals. *U. S. v. Gaussen*, 19 Wall. 198, 22 L. ed. 41. It applies only to suits against persons accountable for public moneys as such. *U. S. v. Radowitz*, 8 Rep. 263. See *U. S. v. Griffith*, 2 Cranch, C. C. 666. It does not apply to an action on the official bond of a superintendent of the mint for failure to safely keep property intrusted to his care. *U. S. v. Bosby-*

shell (D. C.), 73 Fed. 616. "There are two kinds of transcripts which the statute authorizes the proper officer to certify. First, a transcript from the 'books and proceedings of the treasury;' and second, 'copies of bonds, contracts, and other papers, etc., which remain on file, and relate to the settlement.' Under the first head are included charges of moneys advanced or paid by the department to the agent, and an entry of items suspended, rejected, or placed to his credit. These all appear upon the books of the department. The decision made on the vouchers exhibited, and the statement of the amount, constitute, in part, the proceedings of the treasury. Under the second head

the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript

copies of papers which remain on file, and which have a relation to the settlement, may be certified. In this case it is essential that the officer certify that the transcripts 'are true copies of the originals which remain on file.'" *Smith v. U. S.*, 5 Pet. 291, 300, 301, 8 L. ed. 130, 133, per Mr. Justice McLean. "An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases, the officers may well certify, for they must have official knowledge of the facts stated. But where moneys come in to the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established not by the treasury statement, but by the evidence on which that statement was made." *U. S. v. Buford*, 3 pet. 12, 29, 7 L. ed. 585, 590; per Mr. Justice McLean. A copy of a bond certified by the Secretary of the Treasury without the certificate of the register and auditor is insufficient. *U. S. v. Humason*, 8 Fed. 71. The certificate should show that the transcript exhibits the final adjustment of the debits, as shown not by mere copies of orig-

inal papers on the files, but upon the books and records of the department. *U. S. v. Pinson*, 102 U. S. 548, 26 L. ed. 226; *Tiernan v. Jackson*, 5 Pet. 592, 8 L. ed. 239; *U. S. v. Buford*, 3 Pet. 12, 7 L. ed. 585; *Cox v. U. S.*, 6 Pet. 172, 8 L. ed. 359; *U. S. v. Jones*, 8 Pet. 375, 8 L. ed. 979; *Gratton v. U. S.*, 15 Pet. 336, 10 L. ed. 759; *Hoyt v. U. S.*, 10 How. 109, 13 L. ed. 348; *Bruce v. U. S.*, 17 How. 437, 15 L. ed. 129. It seems that the balances struck by the treasury and charged as such are not evidence, but that the items should be stated. *U. S. v. Edwards*, 1 McLean, 347; *U. S. v. Jones*, 8 Pet. 375, 8 L. ed. 979; *Gratiot v. U. S.*, 15 Pet. 336, 10 L. ed. 759; *Hoyt v. U. S.*, 10 How. 109, 13 L. ed. 348; *U. S. v. Martin*, 2 Paine, 68; *U. S. v. Gaussen*, 19 Wall. 198, 22 L. ed. 41; *U. S. v. Smith*, 35 Fed. 490; *U. S. v. Van Zandt*, 2 Cranch C. C. 338; *U. S. v. Kuhn*, 4 Cranch C. C. 401. A transcript from the books may be evidence of charges for moneys advanced or paid by the department to the agent, and claims, suspended, rejected, or placed to his credit; but not of moneys received by him for the benefit of the United States from other sources than the department. *U. S. v. Buford*, 3 Pet. 12, 7 L. ed. 585; *U. S. v. Jones*, 8 Pet. 375, 8 L. ed. 979. A transcript showing the moneys expended by the officers in supplying the default of the contractor to carry out his contract is competent evidence. *U. S. v. Griffith*, 2 Cranch C. C. 666. The government need not show that the party had notice of the adjust-

from the books and proceedings of the Treasury Department, as provided by the preceding section.”¹⁴ “A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against an officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract as required by law, to said returns-office.”¹⁵ An assessment by the commissioner of internal revenue, after a finding that a distiller has not accounted for all spirits produced by him, is *prima facie* evidence of its validity.¹⁶ The rules and regulations concerning the internal revenue, which are prescribed and promulgated by the

ment or of the balance against him in the transcript. *Watkins v. U. S.*, 9 Wall. 759, 19 L. ed. 820. “The statute says that a transcript from the books shall be admitted as evidence. A transcript or a transcribing is substantially a copy. A copy from the books and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books.” *U. S. v. Gaussén*, 19 Wall. 212, 214, 22 L. ed. 43, per Justice Hunt. Treasury statements

are only *prima facie* evidence of the correctness of the balance. The accounting officer may correct mistakes and restate balances. *Soule v. U. S.*, 100 U. S. 8, 11, 25 L. ed. 536, 537; *U. S. v. Ecksford*, 1 How. 250, 263, 11 L. ed. 120, 125; *U. S. v. Eggleston*, 4 Saw. 201; *U. S. v. Hunt*, 105 U. S. 183, 187, 26 L. ed. 1037, 1039. But see *U. S. v. Collier*, 3 Blatchf. 325; *Ex parte Randolph*, 2 Brock. 44. The errors made in striking the balance may be proved by the defendant by the procuring of the original vouchers, or otherwise. *Soule v. U. S.*, 100 U. S. 8, 25 L. ed. 536; *Bruce v. U. S.*, 17 How. 437, 15 L. ed. 129; *U. S. v. Stone*, 106 U. S. 525, 27 L. ed. 163. The defendant by accepting the credits given him does not waive the objection to the items on the debit side. *U. S. v. Jones*, 8 Pet. 375, 8 L. ed. 979.

¹⁴ *U. S. R. S.*, § 887. See *U. S. v. Gausson*, 19 Wall. 198, 22 L. ed. 41.

¹⁵ *U. S. R. S.*, § 888. See *U. S. R. S.*, § 3744.

¹⁶ *U. S. v. Cole*, 134 Fed. 697.

treasury department, have no force as rules of evidence in an action to collect an assessment for internal revenue.¹⁷ "Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account-books of the Post-Office Department, when certified by the sixth auditor under the seal of his office shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law to proceedings in such civil suits."¹⁸ "In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster-General, or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster, at the postoffice where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail, and the payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made on credits entered, it shall not be necessary to make a further demand for the new balance found to be due."¹⁹ A finding by the Postmaster General, that a contractor has abandoned the

¹⁷ U. S. v. Cole, 134 Fed. 697.

¹⁸ U. S. R. S., § 889; U. S. v. Dumas, 149 U. S. 278, 37 L. ed. 734; U. S. v. Carlowitz, C. C. A., 80 Fed. 852; Soule v. U. S., 100 U. S. 8, 11, 25 L. ed. 536, 537; U. S. v. Harrill, McAll. 243; U. S. v. Hodge, 13 How. 478; 14 L. ed. 231;

U. S. v. Hillirad, 3 McLean, 324; U. S. v. Wilkinson, 12 How. 246, 13 L. ed. 974; Postmaster-General v. Rice, Gilp. 554; Lawrence v. U. S., 2 McLean, 581; U. S. v. Snyder, 14 Fed. 554; U. S. v. McCoy, 193 U. S. 593, 48 L. ed. 805.

¹⁹ U. S. R. S., § 890.

performance of his contract is *prima facie* evidence of that fact.²⁰

"Copies of any records, books, or papers in the General Land Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record."²¹ "The Commissioner of

²⁰ U. S. v. McCoy, 193 U. S. 593, 601, 48 L. ed. 805, 808.

²¹ U. S. R. S., § 891. This section determines the question of competency but not of materiality. Howard v. Perrin, 200 U. S. 71, 73, 50 L. ed. 374, 376. It only applies to official documents. Block v. U. S., 7 Ct. Cl. 406. The words, "evidence equally with the originals," do not mean that in all cases the copy shall have the same probative force as the original, and that on a question as to some particular word or figure, the copy shall be as convincing as the original; it merely requires the copy to be regarded as of the same class in the grades of evidence, as to written and parol, and primary and secondary. Campbell v. Laclede Gas Co., 119 U. S. 445, 449, 30 L. ed. 459, 460. See Galt v. Galloway, 4 Pet. 331, 7 L. ed. 876. A party is not deprived of his title because of a defective record, if he has a perfect patent. A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way than by the record. McGarrahan v. Mining Co., 96 U. S.

316, 323, 24 L. ed. 630, 635; Campbell v. Laclede Gas Co., 119 U. S. 445, 449, 30 L. ed. 459, 460. The defective record in the General Land Office does not deprive a party of his rights, and the contents of the original may be shown if the record or transcript is not a true copy. McGarrahan v. Mining Co., 96 U. S. 316, 323, 24 L. ed. 630, 635; Campbell v. Laclede Gas Co., 119 U. S. 445, 30 L. ed. 459. "The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued." McGarrahan v. Mining Co., 96 U. S. 316, 323, 24 L. ed. 630, 635. A perfect record of a perfect patent is presumptive evidence of its delivery to and acceptance by the grantee. Ibid. An entry in the books of the Land Office, that the balance of the purchase-money was paid by the person "to whom the patent had issued," is some evidence that a patent issued, although no patent is produced. Willis v. Bucher, 3 Wash. C. C. 369. A certificate by a receiver that a party has made full payment is evidence that such party has taken the steps necessary for a pre-emption. McDonald v. Edmonds, 44 Cal. 328. A copy of a plat and description duly

the General Land Office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office as may be applied for, to be used in evidence in courts of justice.”²² “Literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed of the same validity in all proceedings, whether at law or in equity; wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record.”²³ “Written or printed copies of any records, books, papers, or drawings belonging to the patent office, and of letters-patent authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law, shall have certified copies thereof,”²⁴ “The

authenticated is admissible. *Harris v. Barnett*, 4 Blatchf. 369. A connected plat of sundry tracts of land made and put together by an officer of the Land office, which is not the copy of any record in such office, is not competent evidence. *Griffith v. Truckhomer*, Pet. C. C. 166. Under this statute a certified copy of the records of the Land Office at Washington, concerning the location of a land warrant containing a description of the various acts of the register and receiver, at the Land Office at Chicago, and of the locator in regard to the location, showing that the land was subject to location at the time, and that the land warrant was properly delivered up and deposited with the commissioner of the Land Office, is admissible in evidence. *Culver v. Uthe*, 133 U. S. 655, 33 L. ed. 776.

²² U. S. R. S., § 2469. This statute and U. S. R. S., § 891, do not forbid the testimony of a witness from a tract book used in his office, which is not certified by the com-

missioner. *Jesse D. Carr Land & Live Stock Co. v. U. S., C. C. A.*, 118 Fed. 821,

²³ U. S. R. S., § 2470. A certificate by a commissioner after he has made an adjudication is inadmissible, unless a copy of the adjudication is annexed. *U. S. v. Lew Poy Dew*, 119 Fed. 786.

²⁴ U. S. R. S., § 892, 29 St. at L. 692. *Cf. Edison E. L. Co. v. U. S. E. L. Co.*, 44 Fed. 294. A transcript of certain documents on file is competent, although not a transcript of the whole proceedings. *Toohy v. Harding*, 1 Fed. 174. Proof that there is no record must be made by deposition or attendance in court of the proper officer; and a mere certificate that diligent search has been made is not sufficient. *Stoner v. Ellis*, 6 Ind. 152; *Bullock v. Wallingford*, 55 N. H. 619; *Am. Depot Co. v. Sheldon*, 17 Blatchf. 210; *Stone v. Palmer*, 28 Mo. 539. It seems that the court will presume that a person who signs as “Acting Commissioner” holds such office, in

printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the District Courts, shall when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained."²⁵ "If any such assignment, grant, or conveyance of any patent shall be acknowledged before any notary public of the several States or Territories or the District of Columbia, or any commissioner of the United States circuit court, or before any secretary of legation or consular officer authorized to administer oaths or perform notarial acts under section seventeen hundred and fifty of the Revised Statutes, the certificate of such acknowledgment, under the hand and official seal of such notary or other officer, shall be *prima facie* evidence of the execution of such assignment, grant or conveyance."²⁶ "Copies of the specifications and drawings of foreign

the absence of evidence to the contrary. *Woodworth v. Hall*, 1 Wood. & M. 248. Letters written by an applicant for a patent, when properly certified as papers remaining in the department, are admissible in evidence. *Pettibone v. Deringer*, 4 Wash. C. C. 215, 219. The documents which make up the original papers belong to the public archives, and a duly certified copy thereof is competent evidence, although some of these documents may contain private stipulations between the parties concerned. *Hanrick v. Barton*, 16 Wall. 166, 21 L. ed. 350. Putting in evidence the file wrapper of a patent for which priority of invention is claimed, for the purpose of contradicting testimony of the inventor as to the date of the invention, does not make the depositions contained therein evidence in the case for all purposes. *Richardson v. Campbell*, 72 Fed. 525. A certified copy of a patent surrendered and canceled is admissible to

show that an improvement subsequently patented is not original, although the certificate does not show when it was canceled, or how or to what defect. *Delano v. Scott*, Gilp. 489. The Circuit Court may grant a certificate, that a certified copy of such a paper will be admitted in evidence in a suit in equity. *MacWilliam v. Connecticut Web Co.*, 119 Fed. 509. He who desires a copy of papers filed in the patent office must make demand therefor in a proper manner, without insulting or abusing the officers; but if a second demand is properly made, the commissioner cannot refuse to comply because of the applicant's previous improper conduct. *Boyden v. Burke*, 14 How. 575, 14 L. ed. 548.

²⁵ U. S. R. S., § 894. 29 St. at L. 693. *Of* U. S. R. S., § 4898.

²⁶ Mayor, etc., *City of New York v. American Cable R. Co.*, C. C. A., 60 Fed. 1016; *Paine v. Trask*, C. C. A., 56 Fed. 233; *Lee v. Blandy*, 1

letters-patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters-patent, and of the date and contents thereof.”²⁷ Testimony before the patent office, in interference proceedings between the same parties, is not ordinarily admissible in a suit to compel the issue of a patent.²⁸ The findings of fact set forth in a report of the Interstate Commerce Commission are, in all judicial proceedings, deemed *prima facie* evidence as to each and every act found.²⁹ “Extracts from the journals of the Senate, or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.”³⁰ “Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such officer, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.”³¹ “The transcripts into new books, made by the clerks

Bond, 361; Brooks v. Jenkins, 3 McLean, 432; Parker v. Haworth, 4 McLean, 370.

²⁷ Am. Graphophone Co. v. Leeds & Catlin Co., 140 Fed. 981. U. S. R. S., § 893. A copy of a French patent certified by the director of the Conservatoire National des Arts et Metiers of France, under the seal of that department, verified by the minister of foreign affairs, under their seals, but not by the great seal of France, may be admitted in evidence. Schoderken v. Swift C. & B. Co., 7 Fed. 469, 471. See Defflorz v. Reynolds, 17 Blatch. 436.

²⁸ Dover v. Greenwood, 154 Fed. 854.

²⁹ 26 St. at L. 209, Pars. 14 and 16; Robinson v. Baltimore & Ohio R. R. Co., 222 U. S. 500, 56 L. ed. 288; Tift v. Southern Ry. Co., 138

Fed. 753. This statute does not authorize the admission of a copy of testimony shown by a report of the Commission to have been given by a witness, but not otherwise authenticated. U. S. v. Reading Co., 83 Fed. 427.

³⁰ U. S. R. S., § 895. See Field v. Clark, 143 U. S. 649, 679, 36 L. ed. 294, 305; U. S. v. Burr, 159 U. S. 78, 85, 40 L. ed. 82, 84.

³¹ U. S. R. S., § 896; The Atlantic, Abbott's Adm. 451. The certificate of a consul is competent evidence to prove his official acts, but not acts which are not official or not within his personal knowledge. Brown v. The Independence, Crabbe, 54. The consul's certificate is competent to prove that the ship's papers were lodged with him, U. S. v. Mitchell, 2 Wash. 478; that a

of the District Courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seven, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the Circuit Courts in the said districts, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit Courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had.”³² “The transcripts into new books made by the clerks of the Circuit and District Courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit and District Courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were tran-

seaman was discharged in a foreign court with his own consent, *Lamb v. Briard*, Abb. Adm. 367; and when it sets out all the essential facts it is *prima facie* evidence that a master violated the law in refusing to receive a discharged seaman in a foreign port, *Matthews v. Offley*, 3 Sumn. 115. A consular certificate is not competent to prove facts to justify imprisonment of a seaman by the master in a foreign port, *Johnson v. Cariolanus*, Crabbe, 239. Cf. *The W. F. Babcock*, C. C. A., 85 Fed. 978; nor to authenticate the record of the condemnation of a vessel in a court of vice-admiralty, *Catlett v. Pacific Ins. Co.*, 1 Paine,

594; nor to prove a foreign law or the correctness of a translation, *Church v. Hubbard*, 2 Cranch, 187, 2 L. ed. 249; nor to prove any fact between third persons, unless made so by statute, *U. S. v. Mitchell*, 2 Wash. 478; *The Alice*, 12 Fed. 923; *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129; *Levy v. Burley*, 2 Sumn. 355; nor to prove a copy of a bill of lading in another's possession. *The Alice*, 12 Fed. 923. A certificate with an undecipherable seal and signature is not admissible in evidence. *The Atlantic*, Abb. Adm. 451.

³² U. S. R. S., § 897.

scribed.”³³ “When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had.”³⁴ “When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with a written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make the cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed.”³⁵ “When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court room from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have

³³ U. S. R. S., § 898.

³⁵ U. S. R. S., § 900.

³⁴ U. S. R. S., § 899; *Cornett v. Williams*, 20 Wall. 226, 22 L. ed. 254.

the same effect as the original record would have had if the same had not been lost or destroyed.”³⁶ “In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held any where within the jurisdiction of the United States, or in any foreign country, the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal.”³⁷ “A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect to all intents and purposes, as the originals thereof would have been entitled to.”³⁸ “Whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential

³⁶ U. S. R. S., § 901.

³⁸ U. S. R. S., § 903, as amended

³⁷ U. S. R. S., § 902, as amended by 20 St. at L. 277.
by 20 St. at L. 277.

to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation, for services in the matter and for lawful disbursements, as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.”³⁹ “The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”⁴⁰

³⁹ U. S. R. S., § 904, as amended by 20 St. at L. 277.

⁴⁰ U. S. R. S., § 905. The cases construing this section of the Revised Statutes are very numerous, and may be found collected in Greenleaf on Evidence, §§ 504-506. This statute applies to the Federal courts as well as to the State courts. *Gormley v. Bunyan*, 138 U. S. 623, 635, 34 L. ed. 1086, 1090; *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411; *Galpin v. Page*, 3 Saw. 93. Printed copies of State statutes purporting to be published by

authority of the State have been held to be *prima facie* evidence in the courts of the United States. *Beatrice v. Edminson*, C. C. A., 117 Fed. 427. It will be presumed that the seal of a State was annexed to a paper by the proper officer under due authority. *United States v. Johns*, 4 Dall. 412, 1 L. ed. 888; *s. c.*, 1 Wash. C. C. 363; *U. S. v. Amedy*, 11 Wheat. 392, 6 L. ed. 502. The certificate must show that the person who signed it as judge was, when he signed it, the judge, chief justice, or presiding magistrate of

This does not prevent the admission of evidence to prove that the court, which rendered the judgment had no jurisdiction over the person or subject matter.⁴¹

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand

the court in which the judgment is of record. *Stewart v. Gray*, Hamps. 94; *U. S. v. Biebusch*, 1 McCrary, 42, 32. If the laws of a State show that the court in which the judgment was rendered consisted of but a single judge, it is not material in a Federal court that the certificate to the attestation of the clerk did not show that the certifying officer was the sole judge, chief justice, or presiding magistrate. *Bennett v. Bennett*, Deady, 299. See *Bohlander v. Heikes*, C. C. A., (April 8, 1909) Fed. 167. The certificate of the judge that he is "one of the judges" of the court is insufficient. *Stewart v. Gray*, Hamps. 94; *Gardner v. Lindo*, 1 Cranch C. C. 78. The judge should certify that the attestation is in due form according to the laws of the State. *Craig v. Brown*, Pet. C. C. 352. If a clerk of a court certifies at the foot of a paper which purports to be a record that the foregoing is

truly taken from the record of proceedings of his court, and if the judge, chief justice, or presiding magistrate certifies that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is in due form, and is a full copy of the proceedings in the case, and is admissible in evidence; but if it proves to be a mere transcript of minutes taken from the docket of the court, it is not admissible. *Ferguson v. Harwood*, 7 Cranch, 408, 3 L. ed. 386. Cf. *Woodbridge & T. Eng. Co. v. Ritter*, 70 Fed. 677. If a judgment has been recovered against a corporation by a wrong name, there may be a recovery in a suit on such judgment in another State brought against it by the proper name. *La Fayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451.

⁴¹ *Cooper v. Brazelton*, C. C. A., 135 Fed. 476, *supra*, § 187.

and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.”⁴² “It shall be lawful for any keeper or person having custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under

⁴² U. S. R. S., § 906; *Hodge v. Palms*, C. C. A., 117 Fed. 396. See also *Snyder v. Wise*, 10 Pa. St. 157; *Lawrence v. Gaultney*, Cheves Law (S. C.), 7; *King v. Dale*, 2 Ill. 513; *Henthorn v. Doe*, 1 Blackf. (Ind.) 157; *Russell v. Kearney*, 27 Ga. 96; *Paca v. Dutton*, 4 Mo. 371; *Karr v. Jackson*, 28 Mo. 316; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208; and authorities cited in *Bump's Fed. Proc.*, 617-619. This section does not impart to the authenticated State record anything more than “faith and credit,” and does not extend the effect of a decision against a State to the United States, nor make an award or judgment which might be final against a State either obligatory in law or conclusive against the United States. *Williams v. U. S.*, 137 U. S. 113, 136, 34 L. ed. 590, 597. Where a deed of land in Texas had been executed in accordance with the civil laws in Louisiana, and a copy furnished to the grantee as a second original, this copy was admitted in evidence, upon proof by the witness that he had examined the originals on file in the notary's

book; that the copy was a true one; that the notary before whom the conveyance was executed was dead; that the witness knew the handwriting, which was genuine; that the witness knew the handwriting of one of the subscribing witnesses; that such witness was dead; and that the signature of such subscribing witness was genuine. *White v. Bromley*, 20 How. 235, 250, 15 L. ed. 886, 890. A pardon certified under the great seal of the State was admitted in evidence. *U. S. v. Wilson*, Baldw. 78. A copy of a survey certified by the register, by the judge, and by the Secretary of State under the great seal, was admitted in evidence. *Smith v. Redden*, 5 Harr. (Del.) 321. The clerk's certificate should show that the judge is the presiding judge, or that he is the presiding judge for the district. *Paca v. Dutton*, 4 Mo. 370. This statute does not apply to court records. *Tarleton v. Briscoe*, 1 A. K. Marsh. (Ky.) 67; U. S. R. S., § 905; *Snyder v. Wise*, 10 Pa. St. 157; *Law v. Gaultney*, Cheves (S. C.) Law, 7.

the United States, on the application of the head of one of the Departments, the Solicitor of the Treasury, or the Commissioner of the General Land Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed under or by the United States may come into question, equally with the originals.”⁴³ “The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof of authentication thereof.”⁴⁴ The publication by the government printing office of the supplements to the Revised Statutes are *prima facie* evidence, and the publication by that office of the pamphlet copies of the statutes and the bound copies of the acts of each Congress are “legal evidence of the laws and treaties therein contained in all courts of the United States and of the several States therein.”⁴⁵ “In suits or information brought, where any seizure is made pursuant to an act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant; provided that probable cause is shown for such prosecution, to be judged of by the court.”⁴⁶

⁴³ U. S. R. S., § 907; Ten Cases v. U. S., 34 Fed. 101; Chadwick v. U. S., 3 Fed. 753; Williams v. U. S., 137 U. S. 113, 136, 34 L. ed. 590, 597.

⁴⁴ U. S. R. S., § 908.

⁴⁵ 28 St., at L. 601; 26 St. at L. 50; 21 St. at L. 308.

⁴⁶ U. S. R. S., § 909. See also Locke v. U. S., 7 Cranch, 339, 3 L.

§ 334. **Definition and use of an affidavit.** An affidavit is a declaration upon oath or affirmation before some person having competent and lawful power and authority to administer the same. Affidavits are used in a suit in equity in three ways. In certain cases they must be annexed to a bill before it can be properly filed;¹ certain documents may be proved by them at the hearing;² and they are used in support of interlocutory applications.³ The manner of their use has been already described.⁴ *Ex parte* affidavits were not admissible before a general appraiser sitting as referee, for the introduction of evidence in the Circuit Court.⁵ Pending a reference concerning it, an affidavit cannot be used, except by leave of the court, which is usually granted only upon terms.⁶ In the absence of a State statute or a court rule it was held that a Federal court had no power to compel any one to have his affidavit taken,⁷ or to cross-examine an affiant.⁸ Such a cross-examination might perhaps be had by means of a feigned issue.⁹

§ 335. **Manner of verifying an affidavit.** An affidavit must be sworn to; unless the affiant is conscientiously scrupulous of taking an oath, when he may, in lieu thereof, make solemn affirmation of the truth of the facts stated by him.¹ If the deponent be blind or unable to read, the affidavit must be read over to him by the officer before whom he swears to its

ed. 364; *The Luminary*, 8 Wheat. 407, 5 L. ed. 647; *Wood v. U. S.*, 16 Pet. 342, 10 L. ed. 987; *The John Griffin*, 15 Wall. 29, 21 L. ed. 80; *Clifton v. U. S.*, 4 How. 242, 11 L. ed. 957; *Taylor v. U. S.*, 3 How. 197, 11 L. ed. 559; *Buckley v. U. S.*, 4 How. 251, 11 L. ed. 961; *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116; *U. S. v. Walla Walla*, 44 Fed. 796; *The Coquitlam*, 57 Fed. 706, 714.

§ 334. ¹ See § 87.

² See § 269.

³ See ch. xv.

⁴ *Supra*, §§ 198, 232.

⁵ *James F. White & Co. v. U. S.*, 154 Fed. 175. See *Importers' & Traders' Nat. Bk. v. Lyons*, 134 Fed. 510; *supra*, §§ 76, 77.

⁶ *Pearse v. Brook*, 3 Beav. 337; *Daniell's Ch. Pr.* 1777.

⁷ *Crenshaw v. Miller*, 111 Fed. 450. See *Hammerschlag Mfg. Co. v. Judd*, 26 Fed. 292; *Bacon v. Magee*, 7 Cowen (N. Y.), 515; *Day v. Boston B. Co.*, 6 Law R. (N. S.) 329. As to the right to compel a party to file an affidavit which he has read upon a motion, see *Sinnot v. First Nat. Bank*, 34 App. Div. 161.

⁸ See *Day v. Boston B. Co.*, 6 Law Reg. (N. S.) 329; *Hammerschlag Mfg. Co. v. Judd*, 26 Fed. 292.

⁹ *Infra*, §§ 378-383.

§ 335. ¹ Eq. Rule 78; *U. S. R. S.* §§ 1, 5013. Cf. *Loney v. Bailey*, 43 Md. 10.

truth.² Ordinarily an affidavit, if made within the United States, must be verified before a judge of the court in which it is to be used, or a United States commissioner, or a notary public.³ A verification before a city commissioner is insufficient.⁴ The Equity Rules provide: "Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public."⁵ If made without the United States, it may be verified before any secretary of legation, or consular officer within the limits of his legation, consulate, or commercial agency;⁶ or, perhaps, before any person who, by the laws of the country in which the affidavit is made is authorized to administer an oath or affirmation.⁷ It was said to be irregular to have an affidavit entitled to a suit in equity sworn to before the bill was filed.⁸

§ 336. Title of an affidavit. An affidavit should be correctly entitled in the cause or matter in which it is made.¹ For, otherwise, it is said that the affiant cannot be convicted of perjury if his statements are false.² But, it seems that, if there are several parties on either side or both sides, it will be sufficient to entitle it in the name of a single plaintiff and defendant, and after each to insert the word "others" or "another," according to the circumstances of the case.³ The omission of a party's

² *Matter of Christie*, 5 Paige (N. Y.), 242.

³ U. S. R. S., §§ 725, 945; L. 1876, ch. 304; 19 St. at L. 206; *Haight v. Morris* Ag., 4 Wash. C. C. 601. Cf. 27 St. at L. 7.

⁴ *Stationary Engineer Pub. Co. v. Comerford*, 155 Fed. 667.

⁵ Eq. Rule 36.

⁶ U. S. R. S., § 1750.

⁷ *Pinkerton v. Barnsley C. Co.*, 3 Y. & J. 277, n.

⁸ *Baldwin v. Bernard*, 9 Blatchf., note; s. c., Fed. Cas. No. 797. See *Blake Cr. Co. v. Ward*, Fed. Cas. No. 1,505. But see *Modox Co. v.*

Moxie Nerve Food Co., C. C. A., 162 Fed. 649.

§ 336. ¹ *Hawley v. Donnelly*, 8 Paige (N. Y.), 415; *Stafford v. Brown*, 4 Paige (N. Y.), 360; *Goldstein v. Whelan*, 62 Fed. 124. But see *Bowman v. Sheldon*, 5 Sand. (N. Y.) 657; *Shook v. Rankin*, 6 Biss. 477; s. c., Fed. Cas. 12,804. Cf. *supra*, § 335.

² *Hawley v. Donnelly*, 8 Paige (N. Y.), 415.

³ *White v. Hess*, 8 Paige (N. Y.), 544; *Seymour v. Bailey*, 66 Ill. 288. But see *Arnold v. Nye*, 11 Mich. 456.

christian name will not be a fatal defect.⁴ If the affidavit is correctly entitled when made, it can still be used after the title of the cause has been subsequently changed.⁵ If an affidavit of service be attached to papers which are themselves correctly entitled, it needs no separate title.⁶ An affidavit made or entitled in one cause cannot, it has been held, be used in another;⁷ unless, perhaps, when the affiant is dead, insane, imbecile, or beyond the jurisdiction of the court; but affidavits which were not entitled were admitted upon a motion for an injunction, when they were made and signed before the suit was begun and it appeared from their context that they were made for the purpose of being used in a suit between the same parties.⁸

§ 337. Form of an affidavit. Every affidavit should begin with the venire,—that is, the name of the county,¹ and in a Federal court the name of the judicial district;² and if sworn to elsewhere than in that where the court is held, with the name of the State where it is taken; which is usually followed by the abbreviation *ss. for scilicet*, or the English words *to wit*. Otherwise, it has been held, though not by a Federal court, that it may be disregarded as a nullity, even though the residence of an officer before whom it is sworn appear in the jurat.³ The English rule was that in all affidavits the true place of residence, description, and addition of every person swearing to the same, must be inserted; unless the affidavits were made by parties to the cause, who might describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without

⁴ Maury v. Van Arnum, 1 Hill (N. Y.), 370.

⁵ Hawes v. Bamford, 9 Sim. 653.

⁶ Anon., 4 Hill (N. Y.), 597.

⁷ Lumbrozo v. White, 1 Dick. 150; Daniell's Ch. Pr. 1774; Milliken v. Selye, 3 Denio (N. Y.), 54; Stacy v. Farnham, 2 How. Pr. (N. Y.) 26. But see Barnard v. Heydrick, 49 Barb. (N. Y.) 62, 72; s. c., 2 Abbott's Pr. N. S. (N. Y.) 47; Langston v. Wetherell, 14 Mees. & W. 104.

⁸ Modox Co. v. Moxie Nerve Food Co., C. C. A., 162 Fed. 649. See *supra*, § 293.

§ 337. ¹ Belden v. Devoe, 12 Wend. (N. Y.) 223.

² Sterrick v. Pugsley, 11 Flipp. 350.

³ Cook v. Staats, 18 Barb. (N. Y.) 407; Lane v. Morse, 6 How. Pr. (N. Y.) 394; Burns v. Doyle, 28 Wis. 460; Smith v. Richardson, 1 Utah, 194; Barhydt v. Alexander, 59 Mo. 189. But see Mosher v. Heydrick, 45 Barb. (N. Y.) 549; s. c., 30 How. Pr. (N. Y.) 161; Stone v. Williamson, 17 Ill. App. 175; Young v. Young, 18 Minn. 90; State v. Henning, 3 S. D. 492.

specifying any residence, or addition, or other description.⁴ This rule, however, is not always adhered to or insisted upon by practitioners in the courts of the United States. The English rule was that the stating part of the affidavit must be preceded by the statement that the deponent was duly sworn.⁵ The affidavit should state "sufficient to sustain the case made by the motion or petition of which it is the groundwork."⁶ Its statements must be made with sufficient certainty, and with all necessary circumstances of time, place, manner, and other material incidents.⁷ When, however, the affiant deposes to words spoken, the addition "or to that effect" is not improper.⁸ Special fullness is required of affidavits of service.⁹ Objections to the form of affidavits should be made before the hearing of the motion, when they have been previously served or filed.¹⁰ When the affidavit states matters not within the deponent's knowledge, it should show how he knows them to be true.¹¹ Otherwise it may be disregarded.¹² An affidavit should state

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1775. See also Hindes's Pr. 451; Crockett v. Bishton, 2 Madd. 446.

⁵ Phillips v. Prentice, 2 Hare, 542; Daniell's Ch. Pr. (2d Am. ed.) 1776.

⁶ Daniell's Ch. Pr. (2d Am. ed.) 1776; Hindes's Pr. 451; Van Wyck v. Reid, 10 How. Pr. (N. Y.) 366.

⁷ Sea Insurance Co. v. Stebbins, 8 Paige (N. Y.), 565; Meach v. Chappell, 8 Paige (N. Y.), 135.

⁸ Ayliffe v. Murray, 2 Atk. 58, 60.

⁹ Hindes's Pr. 453.

¹⁰ Modox Co. v. Moxie Nerve Food Co., C. C. A., 162 Fed. 649.

¹¹ U. S. v. Moore, 2 Low. 232; Thompson v. Ward, 199 Fed. 861; Lackner v. Dreher, 38 N. Y. App. Div. 75, 55 N. Y. Suppl. 979; Wallace v. Baring, 21 N. Y. App. Div. 477, 48 N. Y. Suppl. 692; Tucker v. E. L. Goddell Co., 14 N. Y. App. Div. 89, 43 N. Y. Suppl. 460; 4 N. Y. Annot. Cas. 86; Hoormann v. Climax Cycle Co., 9 N. Y. App. Div.

579, 41 N. Y. Suppl. 710, 75 N. Y. St. 1100; *affirming* 17 Misc. (N. Y.) 734, 40 N. Y. Suppl. 1067, 26 N. Y. Civ. Proc. 25, 3 N. Y. Annot. Cas. 201; Ladenburg v. Commercial Bank, 5 N. Y. App. Div. 219, 39 N. Y. Suppl. 119; Kahle v. Muller, 57 Hun (N. Y.) 144, 11 N. Y. Suppl. 26, 32 N. Y. St. 448; Crowns v. Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208; James v. Richardson, 39 Hun (N. Y.) 399; National Broadway Bank v. Barker, 16 N. Y. Suppl. 75, 40 N. Y. St. 771; Thomas v. Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786; Doctor v. Schnepf, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52; Ellison v. Bernstein, 60 How. Pr. (N. Y.) 145. See article by the author on "Attachment," 4 Cyc. 479-483. Cf. Crowns v. Vail, 51 Hun (N. Y.), 204; Cook v. de la Garza, 13 Tex. 431.

¹² Thompson v. Ward, 199 Fed. 861.

facts and not conclusions of law;¹³ and must be pertinent, material, and not scandalous.¹⁴ The court may, upon examination of the paper, order such matter expunged with costs, to be paid by the party or solicitor seeking to use the same;¹⁵ or a reference may be ordered to determine whether the statements in it are proper.¹⁶ A reference can only be demanded upon exceptions in writing similar to those to a pleading;¹⁷ and the filing or reading of affidavits in opposition to such parts of his opponent's affidavits as are excepted to may be construed as a waiver of the exceptions.¹⁸

§ 338. *Execution of an affidavit.* It is usual, though it seems not indispensable, for the affiant to subscribe his christian name and surname at the foot of the affidavit.¹ In England the signature had to be on the left side of the page;² but in this country it is usually at the right. In one case where a marksman had signed with his name at length, his hand having been guided for that purpose, the affidavit was ordered taken off the file.³ The jurat, which is indispensable, is placed upon the opposite side from the signature. It is usually in substantially the following form: "Sworn to before me this — day of —, 19—." If the affiant be blind or a marksman, the jurat should be in substance thus: "Sworn," &c., "the whole of the above affidavit having been first read over and explained to the said A. B., who appeared perfectly to understand the

¹³ *Powell v. Kane*, 5 Paige (N. Y.), 265; *Of. Spies v. Munroe*, 35 App. Div. 527, 528. An allegation that one is a creditor is a conclusion of law; *Wallace v. Chicago & E. S. Co.*, 46 Ill. App. 571.

¹⁴ *Powell v. Kane*, 5 Paige (N. Y.), 265.

¹⁵ *Powell v. Kane*, 5 Paige (N. Y.), 265; *Ex parte Smith*, 1 Atk. 139.

¹⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 1777. See § 68.

¹⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1777. See § 68.

¹⁸ *Bickford v. Skewes*, 8 Sim. 206; *Daniell's Ch. Pr.* 1777.

§ 338. ¹ *Noble v. U. S.*, Dev.; C.

C. A., 83; *Haff v. Spicer*, 3 Caines (N. Y.), 190; *Jackson ex dem. Kenyon v. Virgil*, 3 J. R. (N. Y.) 540; *Soule v. Chase*, 1 Rob. (N. Y.) 222; *Hitsman v. Gerrard*, 1 Harr (N. J.) 124; *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326; *Watts v. Womack*, 44 Ala. 605; *Alford v. McCarmac*, 90 N. C. 151; *Gill v. Ward*, 23 Ark. 16; *Redus v. Wofford*, 4 Sm. & M. (Miss.) 579; *Bates v. Robinson*, 8 Iowa, 318. But see *Laimbeer v. Allen*, 2 Sand. (N. Y.) 648; *Hathaway v. Scott*, 11 Paige, 173.

² *Daniell's Ch. Pr.* (2d Am. ed.) 1778.

³ — v. *Christopher*, 11 Sim. 409.

same, he made his mark in my presence." ⁴ If the affiant have been previously found by the inquisition of a jury to be an idiot, a lunatic, or imbecile, the officer before whom the affidavit is sworn should state in the jurat that he has examined the deponent for the purpose of ascertaining the state of his mind, and that the latter was apparently of sound mind and capable of understanding the nature and contents of the affidavit. ⁵ The omission of the addition to the officer's signature of his title, ⁶ and even the omission of his signature, will not, it seems, be a fatal defect. ⁷ It is usual and more prudent, even if not absolutely essential, for the officer to mark with his initials all interlineations and erasures in the body of the affidavit. ⁸ The better opinion is that the seal of a notary in another State needs no authentication. ⁹

§ 339. Competency of witnesses. The testimony of witnesses may be taken either solely for use in the court taking the same or for use in other courts as well. The Revised statutes as amended provide: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held." ¹ This statute is

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1776; Matter of Christie, 5 Paige (N. Y.) 242.

⁵ Matter of Christie, 5 Paige (N. Y.), 242.

⁶ Hunter v. Le Conte, 6 Cowen (N. Y.), 728; People v. Rensselaer C. P., 6 Wend. (N. Y.) 543.

⁷ Chase v. Edwards, 2 Wend. (N. Y.) 283.

⁸ Daniell's Ch. Pr. (2d Am. ed.) 1777; Didier v. Warner, 1 Code R. (N. Y.) 42.

⁹ Re Pancoast, 129 Fed. 643.

§ 339. ¹ U. S. R. S., § 558, as amended by 34 St. at L. 618. Formerly the Revised Statutes provided: "In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party or interested in the issue

tried: *provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." This may modify some of the rulings subsequently stated in this section. It was held not to apply to Territorial courts. Corbus v. Leonhardt, 114 Fed. 10. For its general

remedial, and deserves therefore, a liberal construction.² It applies as well to causes to which the United States is a party, as to those between private persons.³ It applies in equity,⁴ in admiralty.⁵ It has been held to apply to proceedings in bankruptcy.⁶ It applies in patent cases.⁷ It does not apply to

application see *James v. Atlantic D. Co.*, 3 Cliff. 614; *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275, 27 L. ed. 935; *Whitney v. Fox*, 166 U. S. 637, 41 L. ed. 1145; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940; *Jacksonville M. P. Ry. & N. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515; *Slavens v. No. Pac. Ry. Co.*, C. C. A., 97 Fed. 255; *McMullen v. Ritchie*, 64 Fed. 253. See § 359.

The cases where the court would require a party to testify when otherwise he would not be obliged or allowed so to do, were rare. It would usually only do so upon its own motion, and, if upon his suggestion, only after hearing the other party, if the latter objected. *Es-lava v. Mazange*, 1 Woods, 623. It would do so, however, when a party had died after his testimony had been taken and before trial, and his administrator insisted upon reading or submitting his testimony at the hearing. *Mumm v. Owens*, 2 Dill. 475. It was said that the court would not, of its own motion, require such testimony to be taken, if by so doing it would adopt a rule of decision for a Federal court different from that prescribed by the legislature for courts of the State wherein it was held. *Robinson v. Mandell*, 3 Cliff. 169. For competency of evidence concerning books, see § 418, *supra*.

² *Texas v. Chiles*, 21 Wall. 488, 22 L. ed. 650.

³ *Green v. U. S.*, 9 Wall. 655, 19

L. ed. 806. *Contra*, *Jones v. U. S.* 1 Ct. Cl. 383.

⁴ *Nash v. Williams*, 20 Wall. 226, 22 L. ed. 254; *Butler v. Fayerweather*, C. C. A., 91 Fed. 458; *Rowland v. Biesecker*, 181 Fed. 128, S. C., C. C. A., 185 Fed. 515.

⁵ *Downs v. Wall*, C. C. A., 176 Fed. 657.

⁶ *U. S. v. Sims*, 161 Fed. 1008; *U. S. v. Hughes*, 175 Fed. 238; *Re Hoffman*, 199 Fed. 448.

⁷ *Rowland v. Biesecker*, C. C. A., 185 Fed. 515; affirming 181 Fed. 128. It has been held, that where the direct testimony of an expert, called by the complainant, is confined to a description of the invention in suit, and the alleged infringing device, together with the expression of an opinion as to the infringement; the defendant cannot, upon cross-examination, require him to compare the patent in suit with one in the prior art. *Hussong Dyeing Mach. Co. v. Philadelphia Drying Machinery Co.*, 173 Fed. 236. See *Thomson-Houston El. Co. v. Johns Mfg. Co.*, 105 Fed. 249; *Aeolian Co. v. Simpson-Crawford Co.*, 157 Fed. 320. In a suit to compel the issue of the patent, evidence taken in interference proceedings is not admissible, except where it would, in ordinary cases, be admitted as secondary evidence. *Dover v. Greenwood*, 177 Fed. 946. Upon the issue of a prior invention, witnesses who testify as to the use of such invention by others may prop-

criminal cases.⁸ It regulates the admission of communications between husband and wife,⁹ client and attorney,¹⁰ physician and patient,¹¹ as to personal transactions with a dead man,¹² and as to the authentication of foreign stat-

erly refresh their memories as to the dates of such use by reference to contemporaneous newspaper articles describing the invention, which they read at the time. *Bragg Mfg. Co. v. N. Y.*, 141 Fed. 118.

⁸ See *U. S. v. Reid*, 12 How. 361, 13 L. ed. 1023; *Logan v. U. S.*, 144 U. S. 263, 36 L. ed. 429; *U. S. v. Hall*, 53 Fed. 352; s. c., C. C. A.; s. c., U. S. App.

⁹ *Re Hoffman*, 199 Fed. 448. The former statute did not allow a wife to testify in behalf of, or against, her husband, unless the laws of the State permit her so to do. For her incompetency by the common law was due not to interest, but to grounds of public policy. *Lucas v. Brooks*, 18 Wall. 436, 21 L. ed. 779. It has been held that letters from a husband to his wife, whether competent evidence or not, must, if called for by subpoena, be produced and made a part of the record in equity for use in case of a review by appeal on the ruling as to their admissibility. *Lloyd v. Pennie*, 50 Fed. 4, 11. See *infra*, § 352.

¹⁰ *Butler v. Fayerweather*, C. C. A., 91 Fed. 458; *Re Ruos*, 159 Fed. 252. Under the former statute it was held that a state statute permitting confidential communications to an attorney to be put in evidence would not be followed at common law in a Federal court; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Liggett v. Glenn*, C. C. A., 51 Fed. 381. And that a contract between an attorney and his client is privileged and cannot be

put in evidence, although on file in a court of probate. *Liggett v. Glenn*, C. C. A., 51 Fed. 381. *Cf. Mutual L. Ins. Co. v. Selby*, C. C. A., 72 Fed. 980; *Edison El. L. Co. v. U. S. El. L. Co.*, 44 Fed. 294, 297, 299.

¹¹ *Conn. Mut. L. Ins. Co. v. Union Tr. Co.*, 112 U. S. 250, 28 L. ed. 708; *Mutual Ben. Life Ins. Co. v. Robinson*, 22 L.R.A. 325, 58 Fed. 723; *Union Pac. R. Co. v. Thomas*, C. C. A., 152 Fed. 365.

¹² *Rowlan v. Biesecker*, C. C. A., 185 Fed. 515; affirming 181 Fed. 128. But see *Updike v. Mace*, 194 Fed. 1001. The former statute permitted persons interested to testify on their own behalf to transactions with decedent in all cases not excepted by the Federal Statute, although the state Statutes included such evidence. *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. ed. 111; *Goodwin v. Fox*, 129 U. S. 601, 631, 32 L. ed. 805, 816; *Snyder v. Fiedler*, 139 U. S. 478, 35 L. ed. 218; *White v. Wansey*, C. C. A., 116 Fed. 345; *Smith v. Township of Au Gres, Michigan*, C. C. A., 9 L.R.A. (N.S.) 876, 150 Fed. 257; *Huntington Nat. Bank v. Huntington Distilling Co.*, 152 Fed. 240; *Miller v. Steele*, C. C. A., 153 Fed. 714. It permitted a party or interested person to testify concerning a transaction with a decedent, in an action by or against the latter's legatee; *Miller v. Steele*, C. C. A., 153 Fed. 714; devisee, *Harman v. Harmon*, C. C. A., 70 Fed. 894; donee or grantee, under a deed of gift, *Fitzpatrick v. Graham*, C. C. A., 122 Fed. 401; or trustee in

utes.¹³ The State law is now followed in determining the disqualification of a witness because of his conviction of a crime,¹⁴ except in the case of perjury.¹⁵ The Michigan statute as to statements to tax assessors¹⁶ makes them inadmissible in evidence in the Federal courts.¹⁷ When a State statute authorized the admissibility in evidence of a notarial certificate of a form inadmissible at common law,¹⁸ or of the indorsement of negotiable paper without proof of handwriting,¹⁹ or of experts who based their opinion upon a comparison of writing in

bankruptcy, *Smith v. Township of Au Gres, Michigan*, C. C. A., 9 L.R.A. (N.S.) 876, 180 Fed. 257. Where an administratrix had commenced a suit and subsequently resigned, and the suit was continued by her successor, it was held that she who began the suit was a competent witness as to transactions with the testator. *Lucas v. Brooks*, 18 Wall. 436, 21 L. ed. 779; *Bassett v. U. S.*, 137 U. S. 496, 505, 34 L. ed. 762. She could not testify in the District of Columbia. *Hopkins v. Grimshaw*, 165 U. S. 342, 349, 41 L. ed. 739. If there are several defendants, one of whom has a similar interest in the result to that of the complainant, such defendant cannot, by requiring the complainant to testify, obviate the effect of the proviso in this statute. *Eslava v. Mazange*, 1 Woods, 623.

¹³ *Nashua Sav. Bank v. Anglo-American Land, Mtge. & Agency Co.*, 189 U. S. 221, 228, 47 L. ed. 782, 785; *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254; *Calderon v. O'Donohue*, U. S. C. C., S. D. N. Y., per Wheeler, D. J., June, 1891; in which latter case the writer was counsel. The evidence of an attorney of a foreign country, when accompanied by a book which he states is an official copy of the statute, is sufficient to prove the same. *Nashua*

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Sav. Bank v. Anglo-American Land, Mtge. & Agency Co., 189 U. S. 221, 227, 47 L. ed. 782, 785. It is the better practice to have the attorney also testify to the construction of the statute. *The Asiatic Prince*, C. C. A., 108 Fed. 287, 289; *Badische Anilin & Soda Fabrik v. Klipstein & Co.*, 125 Fed. 543; where German lawyers testified that certain acts under the German law made the parties a corporation. The testimony of an attorney, who does not produce the statute upon the subject may also be sufficient. *Re International Mahogany Co.*, C. C. A., 147 Fed. 147. *The Asiatic Prince*, C. C. A., 108 Fed. 287, 289; where the attorney testified that by the law of Brazil, the delivery of dutiable goods must be made to the custom authorities, upon whom devolved the allowance of entry and the responsibility for a delivery of the goods to the proper persons on payment of the duties.

¹⁴ *Wise v. Williams*, 162 Fed. 161.

¹⁵ U. S. R. S., § 5392; Comp. St. 1901, p. 3653; quoted *infra*.

¹⁶ Compiled Laws 1897, § 3846.

¹⁷ *Re Reid*, 155 Fed. 933.

¹⁸ *Sims v. Hundley*, 6 How. 1, 12 L. ed. 319.

¹⁹ *M'Niel v. Holbrook*, 12 Pet. 84, 9 L. ed. 1009.

question with other writings treated as genuine by the adverse party,²⁰ the Federal court there held followed the same. It has been said that it relates only to the competency of witnesses and not to the admissibility of evidence,²¹ such as conversations to contradict a written instrument.²² In the Federal courts, no matter what the decisions of the State courts may be, a verbal collateral agreement cannot be proven to vary, qualify, contradict, add to or subtract from the absolute terms of a written instrument, in the absence of fraud, accident, or mistake;²³ nor to show by parol that payment was to be made in some other way than that specified in the written instrument.²⁴ Statements made by a party through an interpreter upon an examination by an administrative officer, are admissible when the interpreter testifies that they are correct translations of the answers then given, although the questions were not recorded.²⁵ At least in the absence of a State law to the contrary, in the courts of the United States a party may be examined *de bene esse* by his adversary in cases where a stranger could be so examined,²⁶ and he may testify in his own behalf, as well

²⁰ *Green v. Terwilliger*, 56 Fed. 384, 393. In the absence of a statute, as a general rule, the genuineness of handwriting cannot be determined by comparing it with any other handwriting of the party except other papers admitted to be in his handwriting, which are in evidence for some other purpose. *Hickory v. U. S.*, 151 U. S. 303, 38 L. ed. 170. See *Moore v. U. S.*, 91 U. S. 271, 23 L. ed. 346; *Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417.

²¹ *Downs v. Wall*, C. C. A., 176 Fed. 657; *Union Pac. Ry. Co. v. Yates*, C. C. A., 40 L.R.A. 553, 79 Fed. 584. But see *Hinds v. Keith*, C. C. A., 57 Fed. 10; *Baltimore & O. R. Co. v. Rambo*, C. C. A., 59 Fed. 75; *Stewart v. Morris*, C. C. A., 88 Fed. 461.

²² *Ibid.*

²³ *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508; *Am. El. C. Co. v. Consumers' Gas Co.*, 47 Fed. 43, 46.

²⁴ *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145; *Bast v. First Nat. Bank*, 101 U. S. 93, 25 L. ed. 794.

²⁵ *Toy Dip v. U. S.*, C. C. A., 198 Fed. 603. In *Guan Lee v. U. S.*, C. C. A., 198 Fed. 596, 601, the answers were admissible, although they were written down at the time by a different person than the interpreter and the writer did not testify that he could not recollect what was said without referring to the paper.

²⁶ *Lowrey v. Kusworm*, 66 Fed. 539. A deposition as to transactions with one, taken while the latter was alive, was admitted in evidence, although the latter died without giving his deposition, and the suit was revived in the name of the executors. *McMullen v. Ritchie*, 64 Fed. 253; *Steiner v. Eppinger*, C. C. A., 61 Fed. 253.

as when called upon by the others.²⁷ Upon the second trial of an action in a Federal court, a party can prove the testimony given at the former trial by a witness, who has since died²⁸ but when such testimony does not materially differ from that given by the same witness in a deposition read in the second case, it is not error to exclude the same.²⁹ It is insufficient proof of the same merely to produce a witness, who testifies to the correctness of the printed transcript of such testimony in the record in the former suit, and then to offer in evidence such parts of the printed testimony as counsel deems material or important to his case.³⁰ It has been held that the testimony of a living witness, given upon a former trial of the same case, cannot be read in evidence, although he is beyond the district and more than one hundred miles from the place of trial.³¹ The testimony of a party that he does not know the whereabouts of a witness, without proof of any effort to ascertain the same,³² or that the witness promised, but failed, to be present, is insufficient as a basis for the introduction of the testimony of the witness in a former case as secondary evidence.³³ It has been said that, where a transcript of such testimony is admissible by the State practice, it may be admitted in the Federal Court in an action at common law,³⁴ but not where material exhibits, to which he referred when examined, are not offered in evidence.³⁵ It has been held, that parol evidence of a judge to show the grounds of an order made by him is incompetent.³⁶ It seems that the admissions of a party are competent evidence against him, even though, upon his cross-

²⁷ *Stevens v. Bernays*, 42 Fed. 488; *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. ed. 111.

²⁸ *Green v. Terwilliger*, 56 Fed. 384; 393.

²⁹ *Brown v. Spofford*, 95 U. S. 474; *Am. El. C. Co. v. Consumers' Gas Co.*, 47 Fed. 43, 46.

³⁰ *Rumford Chemical Works v. Hygienic Chemical Co.*, 148 Fed. 862.

³¹ *Diamond Coal & Coke Co. v. Allen*, C. C. A., 137 Fed. 705.

³² *Dover v. Greenwood*, 177 Fed. 946.

³³ *Chicago, M. & St. P. Ry. Co. v. Newsome*, C. C. A., 174 Fed. 394.

³⁴ *Chicago, St. P., M. & O. Ry. Co. v. Myers*, C. C. A., 80 Fed. 361, 365, 25 C. C. A., 486. *Contra*, dicta in *Diamond Coal & Coke Co. v. Allen*, 137 Fed. 705.

³⁵ *Chicago, St. P., M. & O. Ry. Co. v. Myers*, C. C. A., 80 Fed. 361, 365, 25 C. C. A., 486.

³⁶ *Blue M. I. & S. Co. v. Portner*, C. C. A., 131 Fed. 57, 60.

examination, when testifying in his own behalf, he was not asked if he made them.³⁷

The rules for the collection of internal revenue forbid the collectors to produce the records, or copies thereof, in a State court.³⁸ They are also directed to decline to testify as to facts contained in the records, or coming to their knowledge in their

³⁷ The Stranger, 1 Brown's Adm. 281.

³⁸ "All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby prohibited from giving out any special tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a State court, whether in answer to subpoenas *duces tecum* or otherwise. Whenever such subpoenas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof for use against the special tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to

public policy and not to be permitted. As to any other records than those relating to special tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely: (In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of the court upon the Secretary of the Treasury requesting the same). Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such a copy."

official capacity; and this prohibition is extended to include, also internal revenue storekeepers and gaugers, and agents. This rule was authorized by the general authority conferred upon the Secretary of the Treasury by the Revised Statutes of the United States;³⁹ and a revenue officer, who has been punished by a State court for contempt in refusing to produce copies of reports made to him by distillers, or of other records, will be released upon a writ of habeas corpus by the Federal courts.⁴⁰ The Revised Statutes provide that every person who has been convicted of perjury, under the laws of the United States, shall thereafter be incapable of giving any testimony in any court of the United States until the judgment against him is reversed.⁴¹ The disqualification does not exist before a conviction,⁴² of perjury as defined in that section.⁴³ A conviction of embezzlement,⁴⁴ or of forgery,⁴⁵ or of making false reports under them to the Comptroller of the Currency,⁴⁶ does not disqualify a witness, unless the laws of the State so provide. By statute, on the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness.⁴⁷

The Fifth Amendment ordains that no person "shall be

³⁹ U. S. R. S., § 161.

⁴⁰ *Boske v. Comingore*, 177 U. S. 459, 460, 461, 44 L. ed. 846, 847; s. c., *Re Comingore*, 96 Fed. 552; *Stegall v. Thurman*, 175 Fed. 813. See *Re Lamberton*, 124 Fed. 446.

⁴¹ U. S. R. S., § 5392.

⁴² *O'Leary v. U. S.*, C. C. A., 158 Fed. 796.

⁴³ *Ibid.*

⁴⁴ *U. S. v. Sims*, 161 Fed. 1008; *Kelher v. U. S.*, C. C. A., 193 Fed. 8; both under U. S. R. S., § 5209, Comp. St. 1901, p. 3497.

⁴⁵ *O'Leary v. U. S.*, C. C. A., 158

Fed. 796; under U. S. R. S., § 5425, Comp. St. 1901, p. 3669.

⁴⁶ *Wise v. Williams*, 162 Fed. 161; under 12 St. at L. Ch. 189, p. 588.

⁴⁷ 20 St. at L. 30; *Allison v. U. S.*, 160 U. S. 203, 40 L. ed. 395; *Wolfson v. U. S.*, C. C. A., 101 Fed. 430; s. c., 102 Fed. 134. It has been held that this does not render competent a defendant who, by a previous conviction of an infamous crime, had lost the privilege of testifying. *U. S. v. Hollis*, 43 Fed. 248.

compelled in any criminal case to be a witness against himself.⁴⁸ An involuntary confession cannot be put in evidence, even to impeach an accused, who has testified in his own behalf.⁴⁹ This does not permit a corporation,⁵⁰ or officer,⁵¹ or em-

⁴⁸ For the prerevolutionary history of this constitutional provision, see Harv. L. Rev., XV., 610. It was held that a witness compelled to testify before a pension examiner without notice or knowledge of his constitutional privilege cannot be indicted for perjury thereupon. *U. S. v. Bell*, 81 Fed. 830. A witness, at least if not a party to the suit, may be compelled to testify as to an infringement of a patent by himself, when relevant, and is not shielded by the Constitution because he may thereby prove his own liability to treble damages. *Massey v. Johnston*, 59 Fed. 613. A defendant when called by the complainant as a witness may be compelled to state whether he has in his possession a machine claimed to be an infringement of the plaintiff's patent, although the plaintiff has not previously made out a *prima facie* case of infringement. *Delamater v. Reinhardt*, 43 Fed. 76, S. D. N. Y. *Contra*, *Celluloid Co. v. Crane Co.*, 3d Circuit. A party may be compelled to produce an application for a patent which has not been issued and correspondence with the Patent Office upon the subject, although he claims that the result will be to disclose confidential communications with his attorneys. *Edison El. L. Co. v. U. S. El. L. Co.*, 45 Fed. 55; and s. c., 44 Fed. 294. But see Rule 15 of Patent Office; *U. S. R. S.*, § 4902.

This does not prevent the denial of an application for a discharge in bankruptcy because of the refusal of

the bankrupt to answer questions upon his examination in the proceeding although his answer may tend to criminate him. *Re Dresser*, C. C. A., 146 Fed. 383. But it has been held that a petitioner in admiralty for limitation of liability may refuse upon this ground to answer an interrogatory annexed to the answer. *La Bourgogne*, 104 Fed. 823.

⁴⁹ *Harrold v. Oklahoma*, C. C. A., 169 Fed. 47. The retention, however, by the prosecuting authorities, of a statement made by the accused, is not the ground of an exception if they do not use it upon the trial. *Pendleton v. U. S.* 216 U. S. 305, 54 L. ed. 491. Under *U. S. R. S.*, § 860, which has been repealed, it was held that a party who had testified voluntarily did not waive his right to object to the subsequent use of such testimony. *Hammond Lumber Co. v. Sailors' Union of the Pacific*, 167 Fed. 809.

⁵⁰ *Wilson v. U. S.*, 221 U. S. 361, 55 L. ed. 771; *Re Bornn Hat Co.*, 184 Fed. 506; *U. S. v. Armour & Co.*, 142 Fed. 808. It is no excuse for a failure to produce the books, that the tribunal intends to extend its examination to matters over which it has no jurisdiction, when that matter subpoenaed is relevant to a proceeding legitimately before it. *U. S. v. Calhoun*, 184 Fed. 499.

⁵¹ *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652; *Dreier v. U. S.*, 221 U. S. 394, 55 L. ed. 784; *Wilson v. U. S.* 221 U. S. 361, 55 L. ed. 771; *Wheeler v. U. S.*, 226 U. S. 478, 57 L. ed. —; *Grant v. U. S.*, 227

ployee⁵² thereof, to refuse to produce its books because it might tend to criminate the company or the individual subpoenaed. The dissolution of the corporation does not relieve its officer or employee from such production of any books or papers in his possession.⁵³ It is the safer practice, when books are needed for this purpose, to serve a *subpoena duces tecum* without an *ad testificandum* clause and to address the same to the corporation, not to the individual having the custody of the books.⁵⁴ It does not permit a bankrupt to refuse to deposit his books with his receiver in bankruptcy, because he claims that they would tend to criminate him.⁵⁵ An attorney may be compelled to produce books and papers, belonging to his client, of a corporation, in which his client is the sole stockholder, when they tend to incriminate the latter; provided that they were given to him not for the purposes of advice, but in order to keep them from the prosecuting officers, and he may be compelled to open the package containing them in order to ascertain their contents.⁵⁶ This Ordinance applies to criminal contempt proceedings.⁵⁷ The privilege cannot be claimed until the person affected has been sworn as a witness,⁵⁸ and he must satisfy the court, by something more than his mere assertion, that there is reasonable ground for the objection.⁵⁹ It was held that

U. S. 74, 80, 57 L. ed. —; *Re Bornn Hat. Co.*, 184 Fed. 506; *Contra*, *Re Chapman*, 153 Fed. 371.

⁵² *Grant v. U. S.*, 227 U. S. 74, 57 L. ed. —, affirming 198 Fed. 708.

⁵³ *Wheeler v. U. S.*, 226 U. S. 478.

⁵⁴ L. ed. —; *Grant v. U. S.*, 227 U. S. 74, affirming 198 Fed. 708.

⁵⁵ *Wilson v. U. S.*, 221 U. S. 361,

55 L. ed. 771; *Wheeler v. U. S.*, 226 U. S. 478.

⁵⁶ *Matter of Harris*, 221 U. S. 274, 55 L. ed. 732.

⁵⁷ *Grant v. U. S.*, 227 U. S. 74, 57 L. ed. —, affirming 198 Fed. 708.

⁵⁸ *Hammond Lumber Co. v. Sailors' Union of the Pacific*, 167 Fed. 809. It has been held that this does not excuse a witness from giving testimony that might subject him to a civil but not a criminal

contempt. *Russie Cement Co. v. Woolworth & Co.*, 68 Misc. (N. Y.)

454. See *Merchants' Stock & Grain Co. v. Board of Trade of Chicago*, C. C. A., 201 Fed. 20; *infra*, § 431.

⁵⁹ *U. S. v. Collins*, 145 Fed. 709; *Marshall, C. J. in Burr's Trial*, *Robertson's Rep.*, I, 243; *Wigmore on Evidence*, § 2271.

⁵⁹ *U. S. v. Collins*, 145 Fed. 709; *Barr v. People*, 30 Colo. 522, 71 Pac. 392; *Bolen v. People*, 184 Ill. 338, 56 N. E. 408; *New York Life Ins. Co. v. People*, 195 Ill. 430, 63 N. E. 264; *South Bend v. Hardy*, 98 Ind. 577, 583; *Clifton v. Granger*, 86 Ia. 573, 575, 53 N. W. 316; *Foster v. People*, 18 Mich. 266, 271; *White v. State*, 52 Miss. 216, 225; *Fries v. Brugler*, 12 N. J. Law, 79; *Southard v. Rexford*, 6 Cow. (N.

a denial, by a witness, that he had a cash book containing certain entries, did not debar him from refusing to produce the book on the ground that it would tend to criminate him.⁶⁰ The objection to the question must be made by the witness himself, not by a party,⁶¹ and must expressly invoke the constitutional privilege.⁶² A witness, who has testified without objection, cannot object to the subsequent admission of his testimony against himself, on the ground that he could not have been compelled to give the same.⁶³ It has been held that the testimony, before a grand jury, of a person subpoenaed to attend before it, does not invalidate his indictment by such grand jury,⁶⁴ and that a proceeding to punish a defendant, for the violation of an injunction, will not be quashed because the petition shows that certain of the facts therein set forth were obtained from testimony given by defendant as a witness in another case, it not appearing that such facts may not be proved by other testimony.⁶⁵

The Fourth Amendment ordains: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It has been held that this does not forbid the seizure of all the books of a corporation without a search warrant when its organization and entire business were part of a scheme of fraud,⁶⁶ nor apply to Chinese Exclusion Cases.⁶⁷ But a statute which compelled

Y.) 254, 259; *Cloyes v. Thayer*, 3 Hill (N. Y.), 564, 566; *Ward v. People*, 6 Hill (N. Y.), 144, 146; *People v. Bodine*, 1 Denio (N. Y.), 281, 314; *Ingersol v. McWillie*, 87 Tex. 647, 30 S. W. 869; *State v. Olin*, 23 Wis. 309, 319.

⁶⁰ *Ballmann v. Fagin*, 200 U. S. 186, 50 L. ed. 433.

⁶¹ *Southard v. Rexford*, 6 Cowen (N. Y.) 254, 259; *Ward v. People*, 6 Hill (N. Y.) 144, 146; *Wigmore*, § 2270.

⁶² *Re Knickerbocker Steamboat Co.*, 139 Fed. 713.

⁶³ *Burrell v. Montana*, 194 U. S. 572, 48 L. ed. 1122. But see *People v. Sharp*, 107 N. Y. 427.

⁶⁴ *U. S. v. Kimball*, 117 Fed. 156. See *Re Hale*, 139 Fed. 496, *aff'd* as *Hale v. Henkel*, 201 U. S. 43; *U. S. v. Swift*, 186 Fed. 1002.

⁶⁵ *Hammond Lumber Co. v. Sailors' Union of the Pacific*, 149 Fed. 577.

⁶⁶ *U. S. v. Rice*, S. D. N. Y., October, 1911.

⁶⁷ *Re Chin Wah*, 182 Fed. 256.

the owner of property, in proceedings for its forfeiture, to produce upon the trial his books and papers for the inspection of the United States attorney, and provided that, in case of his refusal, the allegations on the part of the government should be taken as confessed,⁶⁸ was held to be unconstitutional.⁶⁹ It has been held that papers, which have been unlawfully seized, cannot be put in evidence against the person to whom they belong;⁷⁰ and that the court should direct their return by the District Attorney,⁷¹ but that this rule does not apply where the search was not seriously resisted;⁷² and the admission of such papers in a State court is not a violation of the Fourteenth Amendment.⁷³

The Revised Statutes further provide; "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."⁷⁴ "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."⁷⁵ The Interstate Commerce law provides: "That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the

⁶⁸ Act of June 22, 1874, § 12, 18 St. at L. 186.

⁶⁹ *Boyd v. U. S.*, 116 U. S. 616; 29 L. ed. 746, *supra*, § 332.

⁷⁰ *U. S. v. Wong Quong Wong*, 94 Fed. 832; criticised in *N. Y. L. J.* September 22, 1899. *Contra*, opinion in *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575; *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 Fed. 353. See *May v. U. S.*, C. C. A., 199 Fed. 53.

⁷¹ *U. S. v. Mills*, 185 Fed. 318.

But see *U. S. v. Rice*, S. D. N. Y. October, 1911. See *Wise v. Mills*, 220 U. S. 549, 55 L. ed. 579; *Wise v. Henkel*, 220 U. S. 556, 55 L. ed. 581; *Wise v. Mills*, C. C. A., 189 Fed. 583.

⁷² *Lum Yan v. U. S.*, C. C. A., 193 Fed. 970.

⁷³ *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575.

⁷⁴ U. S. R. S., § 859.

⁷⁵ U. S. R. S., § 103. *Supra*, § 332.

subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."⁷⁶ This has been held to be constitutional; since the statute protects the witness from prosecution in the State as well as in the Federal courts; and the possibility that, by his disclosure, he may be subjected to the criminal laws of some other sovereignty, is too remote a possibility.⁷⁷

The Act of February 19, 1903, "to further regulate commerce with foreign nations and among the States," provides: "In proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such

⁷⁶ Amendment of February 11, 1893, 27 St. at L. 443; U. S. R. S., § 863, has been repealed 36 St. at L. p. 352.

⁷⁷ *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860. But see *Counsellman v. Hitchcock*, 142 U. S. 547,

35 L. ed. 1110; *U. S. v. James*, 60 Fed. 257; *Foot v. Buchanan*, 113 Fed. 156; *Re Carter*, 166 Mo. 604, 57 L.R.A. 654; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74; *Ex parte Irvine*, 74 Fed. 954; *U. S. v. Price*, 96 Fed. 960; *U. S. v. Kimball*, 117 Fed. 156.

person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise in such proceeding."⁷⁸ The Act creating the Department of Commerce and Labor contains similar provisions concerning investigations by the Commissioner of Corporations.⁷⁹ Similar provisions prevail concerning investigations under the Anti-Monopoly Law,⁸⁰ and the Customs Act of June 10, 1890.⁸¹ But the immunity under all these statutes has been limited as follows: "Immunity shall extend only to a natural person, who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." This does not give immunity to persons because they have filed answers, as pleadings, under oath in such proceedings,⁸² or have produced documentary evidence as officers or employees of corporations,⁸³ including schedules and abstracts prepared from the books by other employees of the company;⁸⁴ nor does it apply to future offenses.⁸⁵ It was formerly held that immunity was given to a witness who testified voluntarily without the compulsion of a subpoena.⁸⁶ The statute does not prevent an indictment for perjury because of false testimony in such a proceeding.⁸⁷ It authorizes compulsory testimony concerning a crime for which the witness has been already indicted, although it is a defense to such an indictment.⁸⁸

⁷⁸ 32 St. at L. 847, § 3, 10 Fed. St. Ann. 170; Comp. St. Supp. 599, Pierce Fed. Code, § 6453.

⁷⁹ Act of February 14, 1903, 32 St. at L. 827; U. S. v. Armour, 142 Fed. 808; Santa Fe Pac. R. Co. v. Davidson, 149 Fed. 603.

⁸⁰ Act of July 2, 1890, Ch. 647, 26 St. at L. 209, Comp. St. 1901, p. 3200; Act of June 30, 1906, 34 St. at L. 798, Comp. St. Supp. 1909, p. 1168.

⁸¹ Ch. 407, 26 St. at L. 131, Comp. St. 1901, p. 1886.

⁸² U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 229.

⁸³ Heike v. U. S., 217 U. S. 423, 30 Sup. Ct. 439, 54 L. ed. 821; s. c., 227 U. S. 131; affirming C. C. A., 192 Fed. 83; affirming U. S. v. Heike, 175 Fed. 852.

⁸⁴ Ibid.

⁸⁵ U. S. v. Swift, 186 Fed. 1002.

⁸⁶ U. S. v. Armour & Co., 142 Fed. 808. See Hammond Lumber Co. v. Sailors' Union of the Pacific, 167 Fed. 809.

⁸⁷ Glickstein v. U. S., 222 U. S. 139, 56 L. ed. 128; Cameron v. U. S., C. C. A., 192 Fed. 548.

⁸⁸ Re Kittle, 180 Fed. 946.

§ 340. *Subpœnas ad testificandum.* The attendance of a witness is usually compelled in equity as in law by the service of a subpœna *ad testificandum*, and the payment of his fees and mileage.¹ A subpœna *ad testificandum* is substantially in the same form in equity as in law. When issued from a court of the United States, it must be under the seal of the court, and signed by the clerk; and is usually also signed by the solicitors of the party at whose request it issues. Those issued from the Supreme Court must bear *teste* from the day of such issue of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence.² Those issued from a District Court, must bear *teste* of the judge, or, when that office is vacant, of the clerk thereof.³ The subpœna must show the action or proceeding in which the testimony of the witness is required.⁴ By the common law, the names of but four witnesses could be included in one subpœna.⁵ The Revised Statutes, however, provide that, "to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a case in such a subpœna as convenience in serving the same will permit."⁶ The Equity Rules of 1912, provide that the subpœna, in the usual form, may be issued by the clerk in blank and filled up by the party drawing the same or issued by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified.⁷ In actions at common law, it would seem that the common-law practice must prevail, according thereto. If the witness can be served within the jurisdiction of the court where the suit is pending, or within a hundred miles of the place of holding that court, the subpœna may be issued from its clerk's

§ 340. ¹ For the amount of his fees and mileage, see § 333.

² U. S. R. S., §§ 911, 912.

³ U. S. R. S., §§ 911, 912.

⁴ *Re Shaw*, 172 Fed. 520, holding that a subpœna to testify before a grand jury must disclose the names of the persons against whom the in-

quiry is instituted or the subject of the investigation.

⁵ *Erwin v. U. S.*, 37 Fed. 470, 490.

⁶ U. S. R. S., § 829; *Erwin v. U. S.*, 37 Fed. 470, 490; *Re Shaw*, 172 Fed. 520.

⁷ Eq. Rule 52.

office.⁸ If he cannot, and it is desired to take his testimony in a civil cause⁹ *de bene esse* under the Revised Statutes, application for the issue of the subpoena must be made to the court of the district where the examination is to be made, or to the clerk of such court.¹⁰ It has been held that, where the State laws authorize a committing magistrate to issue subpoenas, the same power is vested in a United States commissioner; and that a subpoena signed and sealed by him, and countersigned by an attorney for a party, are valid process, although not issued nor countersigned by a judge or clerk, of a United States court.¹¹ General court-martials of the United States army are authorized by statute to issue subpoenas to witnesses, within the judicial districts where they are held.¹² It has been held that Congress has no power to authorize or compel the courts of the United States to issue subpoenas or punish for contempt witnesses before a Congressional Commission, such as the Pacific Railway Commission,¹³ or the Interstate Commerce Commission,¹⁴ or an executive officer.¹⁵ Special statutes have been passed providing for the punishment of recalcitrant witnesses in such cases under the criminal laws.¹⁶ "Witnesses who are required to attend any term of a District Court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under

⁸ U. S. R. S., § 876. Under the former practice it was held, that a person who did not reside within the district where he was served with a subpoena could not be compelled to attend before an examiner in a suit in equity, unless the proceedings were instituted for taking his deposition *de bene esse* in accordance with the Revised Statutes. *Tomlinson v. Moore*, 189 Fed. 845. And that a witness who lives outside the district cannot be compelled to attend before a United States Commissioner who sits within one hundred miles of his residence. *U. S. v. Stern*, 177 Fed. 479. As to naturalization cases, see U.

S. v. Ojala, C. C. A., 182 Fed. 51.

⁹ See *infra*, §§ 354, 355.

¹⁰ U. S. R. S., § 863; *U. S. v. Tilden*, 25 Int. Rev. R. 352; *Ex parte Humphrey*, 2 Blatchf. 228; *Henry v. Ricketts*, 1 Cranch, C. C. 580; *Ex parte Peck*, 3 Blatchf. 113. See *infra*, § 342.

¹¹ *U. S. v. Beavers*, 125 Fed. 778. See U. S. R. S., § 1014.

¹² 31 St. at L. 950.

¹³ *Re Pac. Ry. Com.*, 32 Fed. 241.

¹⁴ *Re Interstate Commerce Commission*, 53 Fed. 476.

¹⁵ *Re McLean*, 37 Fed. 648. *Of. U. S. R. S.*, § 4906; *Ex parte Moses*, 53 Fed. 316.

¹⁶ *Infra*, § 343.

such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney."¹⁷

§ 341. *Subpoenas duces tecum.* A subpoena *duces tecum* is the ordinary process to compel the production of a book, document or paper.¹ A subpoena *duces tecum* may be issued against a party to the action.² It may be issued against a corporation.³ It is not defective because it contains no *ad testificandum* clause or direction that the witness testify.⁴ It is not necessary to have the person producing the papers sworn as a witness. After their production by him, they may be proved by others.⁵ The production of drawings may be thus compelled.⁶ The production of other articles, such as patterns,⁷ or models cannot.⁸ It has been held that an attorney cannot

¹⁷ U. S. R. S., § 877. It has been said that extreme poverty is an excuse for the failure of the witness to attend when the Government has not furnished him money for his traveling expenses. U. S. v. Durling, 4 Biss. 509. See Greenleaf on Evidence, (16th ed.) § 311.

§ 341. ¹ Johnson Steel S. R. Co. v. N. B. S. Co., 48 Fed. 191; Diamond Match Co. v. Oshkosh M. Works, 63 Fed. 984. An indorsement by the marshal upon such a subpoena stating that he is unable to find the witness therein named, does not show that the subpoena was returned upon the date mentioned in the indorsement, nor that it has become *functus officio*. Heinze v. U. S., C. C. A., 181 Fed. 322. When the production of books before a grand jury is thus directed, "Obedience to the subpoena will be complete when the books called for are presented to the grand jury in an actual session, and are taken away again by the messenger of the corporation as soon as the particular session adjourns; while the session lasts they must remain with the

grand jury. *Re Am. Sugar Refining Co.*, 178 Fed. 109, 111.

² *Am. Lithographic Co. v. Werckmeister*, 221 U. S. 603, 55 L. ed. 873.

³ *Re Am. Sugar Refining Co.*, 178 Fed. 109; *Re Bornn Hat Co.*, 184 Fed. 506. See § 339, *supra*.

⁴ *Wilson v. U. S.*, 221 U. S. 361, 55 L. ed. 771; *Wheeler v. U. S.*, 226 U. S. 478, 57 L. ed. —. See § 339, *supra*.

⁵ *Wilson v. U. S.*, 221 U. S. 361, 55 L. ed. 771, 776.

⁶ *Johnson Steel S. R. Co. v. N. B. S. Co.*, 48 Fed. 191; *Diamond Match Co. v. Oshkosh M. Works*, 63 Fed. 984.

⁷ *Re Shephard*, 3 Fed. 12. It has been held that, in an action for the infringement of a patent, the court may impound articles that are made in violation of the patent which are found in the defendant's possession or under his control. *Re Steiner*, 195 Fed. 299.

⁸ *Johnson Steel S. R. Co. v. N. B. S. Co.*, 48 Fed. 191; *Diamond Match Co. v. Oshkosh M. Works*, 63 Fed. 984.

be compelled, by a subpoena *duces tecum*, to produce a document, upon which he has a lien.⁹ It has been held: that the inspection of a mine may be allowed and compelled, in a proceeding to remove a receiver;¹⁰ that a State statute empowering the courts to compel the inspection and survey of a mine is constitutional;¹¹ and that a court of equity has power, in aid of the defense of an action at law upon a life insurance policy, to order the body of the insured to be exhumed for examination.¹² Under the former practice it was held, that an order requiring the defendant in a suit for the infringement of a patent to permit the complainant to inspect his machines should not, except in extraordinary cases, be granted upon affidavits before taking testimony.¹³ Under the former practice, it was held that a subpoena *duces tecum* could only be obtained by application to the court.¹⁴ This should be by petition setting forth facts, which tend to show that the books or papers required are in the possession of the witness, and that they are *prima facie*, material or relevant to the petitioner's case.¹⁵ It is insufficient merely to allege that the books or papers required are material or relevant to the issues; but the facts, which enabled the court to determine whether they are *prima facie*, material or relevant, have to be set forth.¹⁶ Allegations solely upon information and belief, without stating the sources

⁹ Davis v. Davis, 90 Fed. 791.

¹⁰ Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. 778.

¹¹ Montana Co. v. St. Louis Min. & Mfg. Co., 152 U. S. 160, 38 L. ed. 398.

¹² Mutual Life Ins. Co. v. Griesa, 156 Fed. 398.

¹³ Eibel Process Co. v. Remington-Martin Co., 197 Fed. 760.

¹⁴ U. S. v. Hunter, 15 Fed. 712; Bischoffsheim v. Brown, 29 Fed. 341; Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753; U. S. v. Terminal R. Ass'n, 154 Fed. 268. In the Second Circuit it has been held: that the same rule applies when the testimony is to be taken for use in another district (Vacuum

Cleaner Co. v. Platt, C. C. A., 196 Fed. 398); that it is a proper exercise of discretion for the court to refuse thus to compel the production of a document which is not shown to have any possible relevancy to the issue (Ibid.); and that the remedy for refusing to issue such a subpoena is not by the writ of *madamus*, but by appeal (Ibid.)

¹⁵ Ibid.

¹⁶ Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753; U. S. v. Terminal R. Ass'n, 154 Fed. 268. *Contra*, U. S. v. Terminal R. Ass'n, 148 Fed. 486; U. S. v. Babcock, 3 Dillon, 566, Fed. Cas. No. 14,484.

of the information and the grounds of the belief concerning the contents of the documents desired, were ordinarily insufficient.¹⁷ When a large number of books and papers are required, it is the safer practice for the applicant to apply for separate subpoenas *duces tecum*.¹⁸ Whether the new Equity Rules authorizing subpoenas to be issued by the clerk, commissioner, master or examiner, applies to subpoenas *duces tecum*,¹⁹ has not yet been decided. A subpoena *duces tecum* must be reasonable in its terms. If too broad, it may constitute an unreasonable search and seizure, such as is forbidden by the Fourth Amendment.²⁰ In a case where a blanket subpoena of that character was obtained, the court refused to punish the witness for contempt in disobedience

¹⁷ West Pub. Co. v. Edward Thompson Co., 151 Fed. 138.

¹⁸ Miller v. Mutual Reserve Fund Life Ann's, 139 Fed. 864.

¹⁹ Eq. Rule 52.

²⁰ Hale v. Henkel, 201 U. S. 43, 76, 77, 50 L. ed. 652, 666, 667. See Hoppe v. N. B. Ostrander Co., 183 Fed. 786. A subpoena is too broad, which requires the production of all understandings, contracts, or correspondence between one corporation and six other companies, together with all reports made and accounts rendered by such companies to the former corporation, from the date of its organization, when the companies are situated in several States of the Union. Hale v. Henkel, 201 U. S. 43, 76, 77, 50 L. ed. 652, 666, 667. It has been held that a corporation may be required to produce all its minute books "from the time of its incorporation to the present day," a period of about three years, and its copy letter books, for a period of less than four months. U. S. v. American Tobacco Co., 146 Fed. 557. A subpoena commanding an employee of a

telegraph company to produce all messages between certain persons, within a reasonably short time, is not too broad. U. S. v. Hunter, 15 Fed. 712; U. S. v. Babcock, 3 Dillon, 566, Fed. Cas. No. 14,484. Re Stororr, 63 Fed. 564; where the period appears to have been less than a month. *Contra*, *Ex parte* Taynes, 70 Cal. 638, 12 Pac. 117. A subpoena directing an officer of a railway company to bring with him "certain tissue impression copy books, containing copies of vouchers made by you or by the office in which you are employed during the years 1904, 1905, and until August 1st, 1906, in payment of each, every and all of the claims made upon and against said railway company for refund of any ever paid," together with all letters, papers, memoranda and documents relating to certain claims specified by their numbers, and all correspondence and memoranda relating to a certain claim specified by its number; was held to be not too broad. Santa Fe Pac. R. Co. v. Davidson, 149 Fed. 603.

to the same.²¹ Where an assistant United States attorney had obtained by service of a subpoena *duces tecum* from a Federal Court, directed to a County Judge, the production of the records of the County Court; it was held that the County Court had no power to punish him for contempt in refusing to return those records which had been given to the Federal Grand Jury, and that he might be discharged by habeas corpus, from a commitment for such an alleged contempt.²² When a party needs to use, in a State court, papers on file in the clerk's office of a court of the United States, the safer practice is to apply to the Federal court for permission to serve a subpoena *duces tecum* upon its clerk.²³

§ 342. Service of a subpoena ad testificandum. A subpoena to appear and testify may be served by the marshal of the court, or by any other person acting as the agent of the party calling the witness.¹ Subpoenas on behalf of the United States in a criminal prosecution may be served in any part of the United States.² In the Southern District of New York subpoenas issued by a United States commissioner, on behalf of a defendant, cannot be served outside of the county where he holds the hearing; unless a United States judge, upon an affidavit of the prosecutor or district attorney or of the defendant or his counsel, stating that he believes that the evidence of the witness is material and his attendance at the trial of examination necessary, endorses on the subpoena an order for the attendance of the witness.³ The Revised Statutes provide that "subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."⁴ The attendance of a witness in a civil cause, at a court

²¹ *Miller v. Mutual Reserve Fund & P. Co.*, 6 Blatchf. 509; *Miller v. Life Ass'n.*, 139 Fed. 864. *Scott*, 6 Phila. (Pa.) 484; *Power*

²² *Re Leaken*, 137 Fed. 680.

v. Semmes, 1 Cranch, C. C. 247.

²³ *Harkrader v. Wadley*, 172 U.

² U. S. R. S., § 876.

S. 148, 153, 43 L. ed. 399, 400; *s. c.*

³ U. S. v. *Beavers*, 125 Fed. 778.

Wadley v. Blount, 65 Fed. 667.

⁴ U. S. R. S., § 876; *Ex parte Beebee*, 2 Wall. Jr. 127; *Henry v.*

§ 342. ¹ *Schwabacker v. Reilly*, 2 Dill. 127; *Cummings v. Akron C.*

Ricketts, 1 Cranch, C. C. 580; *U. S. v. Williams*, 4 Cranch, C. C. 372.

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more than one hundred miles from the place where he lives cannot be compelled by the service of a subpoena upon him within the district, when he has been enticed there by false pretenses;⁵ or while there to attend either as a party, a witness, an attorney, or a counsel during a suit or other judicial proceeding in a State⁶ or Federal court;⁷ or, while traveling upon his way to or from Congress, if he is a member thereof;⁸ or if there in the course of the performance of any public duty.⁹ It has been held that the attendance of an officer of a corporation cannot be compelled by the service, upon another officer, of a subpoena or order addressed to the company;¹⁰ and that where the secretary proves that certain of its books have never been in his possession or control, and that he cannot obtain them, except surreptitiously or by a breach of the peace, he cannot be punished for contempt in failing to produce them in obedience to a subpoena *duces tecum* served upon him, the proper practice being to address the writ to the corporation and make due service upon it.¹¹ Under ordinary circumstances, a member of a firm may be compelled to produce its books, although they are not in his custody.¹² A variance between the original subpoena and the copy served, as regards the hour of the time of appearance, does not make the service void when the witness does not appear at either time.¹³ A witness who accepts without protest insufficient fees, cannot object to the sufficiency of the service upon that ground.¹⁴

"When a commission has been issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States

⁵ Union S. R. Co. v. Mathiesson, 2 Cliff. 304; Steiger v. Bonn, 4 Fed. 17.

⁶ Juneau Bank v. M'Spedan, 5 Biss. 64; Matthews v. Tufts, 87 N. Y. 568. But see Blight v. Fisher, Pet. C. C. 41.

⁷ Parker v. Hotchkiss, 1 Wall. Jr. 269; Matthews v. Tufts, 87 N. Y. 568. *Contra*, Blight v. Fisher, Pet. C. C. 41.

⁸ Const. art. I, § 6; Miner v. Markham, 28 Fed. 387.

⁹ See § 98.

¹⁰ Central Grain & Stock Exch. v. Board of Trade, C. C. A., 125 Fed. 463, 468.

¹¹ U. S. v. Am. Tobacco Co., 146 Fed. 557.

¹² U. S. v. Collins, 145 Fed. 709.

¹³ Leber v. U. S., C. C. A., 170 Fed. 881.

¹⁴ Leber v. U. S., C. C. A., 170 Fed. 881.

for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at any time and place stated in the subpœna; and if any witness, after being duly served with subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court.”¹⁵ “When either party in such suit applies to any judge of a United States court in such district or Territory for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied, by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner at the time and place stated in the subpœna, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna, or punish the disobedience, in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such com-

¹⁵ U. S. R. S., § 1868.

missioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.”¹⁶ “No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day’s attendance at the place of examination are paid or tendered to him at the time of the service of the subpoena.”¹⁷ The fee of the witness is

¹⁶ U. S. R. S., § 869.

¹⁷ U. S. R. S., § 870. U. S. R. S., § 871. “When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or Territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the Supreme Court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners, named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified.” U. S. R. S., § 872. “When it satisfactorily appears by affidavit to any justice of the Supreme Court of the District of Columbia, or to any commissioner for taking depositions appointed by said court: first, that any person within said District is a material witness for either party in a suit pending in any State or Territorial or foreign court; sec-

ond, that no commission nor notice to take the testimony of such witness has been issued or given; and, third, that, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof,—such officer shall issue his summons, requiring the witness to appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit.” U. S. R. S., § 873. “Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit.” U. S. R. S., § 874. “Every witness appearing and testifying under the said provisions relating to the Dis-

one dollar and fifty cents a day, and mileage at five cents a mile for going and returning.¹⁸ A witness in a criminal case on the part of the United States is usually required to attend upon service of a subpoena without the prepayment of his fees or mileage, which, however, he can subsequently collect.¹⁹ The courts of the United States have no power to compel the attendance of persons to an examination in a foreign country. Such testimony, therefore, can only be taken against the will of a witness by the aid of, and by means of the remedies administered by, a foreign court.²⁰

§ 343. Compelling a witness to testify. When a witness, who has been properly served with a subpoena, refuses to attend, or when upon his examination he refuses to answer a relevant and proper question, against answering which he is not protected by his privilege, by the old rules he was liable "to be proceeded against in three ways: first, by attachment for contempt of the process of the court; secondly, by a special action on the case for damages at common law; and thirdly, by action on the statute 5 Eliz., c. 9 § 12, for the further recompense given by that statute, if it has been previously assessed by the court out of which the process issued."¹ In the Federal courts, a witness, if contumacious, may be punished for contempt,² and is also probably liable to an action for the damages sustained by his refusal. Special statutes provided for the punishment, under the criminal laws, of witnesses who refuse to appear or testify before Congressional Committees,³ court-martials,⁴ and certain commissions and commissioners.⁵ It has been held that a witness, who, under the advice of counsel, refuses to answer before a court-martial, a question which might subject him to a prosecution for libel, cannot be pun-

trict of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance."

¹⁸ U. S. R. S., § 848; *infra*, § 419.

¹⁹ U. S. v. Durling, 4 Biss. 409; *infra*, § 419.

²⁰ *Infra*, § 358.

§ 343. ¹ Tidd's Pr. 738.

² U. S. R. S., § 725; *infra*, §§ 428-438.

³ U. S. R. S., § 116; *Re Chapman*, 166 U. S. 661; *Macartney v. U. S.*, 5 App. D. C. 122; *U. S. v. Searles*, 25 Wash. L. and Rep. 384.

⁴ 31 St. at L. 950.

⁵ Such as the Interstate Commerce Commission, 27 St. at L. 423, and the Commissioner of Corporations, 32 St. at L. 827. See §§ 5, 339, *supra*.

ished.⁶ A case, which has been severely criticised, holds that a witness, who has attended before a Congressional Committee without a subpoena, cannot be punished for refusing to answer a question.⁷ Upon an application to punish a witness for refusing to answer a question, the power of the officer before whom he is examined, and the materiality of the question, may both be considered;⁸ but he will rarely be relieved from answering because of an objection to the relevancy or materiality of the question.⁹ Care will be taken not to compel a witness needlessly to disclose his business secrets¹⁰ and private papers.¹¹ A court of equity will not, except possibly in an extraordinary case, require a party to repeat in public certain experiments.¹² Ordinarily, a corporation, even if it is a party to the suit,¹³ will not be required to permit a general inspection of its books

⁶U. S. v. Praeger, 149 Fed. 474.

⁷U. S. v. Searles, 25 Wash. Law Rep. 384.

⁸*Ex parte* Peck, 3 Blatchf. 113, *Ex parte* Judson, 3 Blatchf. 89.

⁹New England Phonograph Co. v. National Phonograph Co. et al., 148 Fed. 324. See *infra*, § 352.

¹⁰Robinson v. Phila., etc., R. Co., 28 Fed. 340, 342. It has been held that the defendant cannot be compelled to disclose the names of confidential customers to whom he has furnished articles covered by the patent, at least before an accounting has been ordered. Roberts v. Walley, 14 Fed. 167. But in an action of replevin to recover property, on the ground that it was bought with the intention of breaking a contract between the plaintiff and the buyer by selling it to the defendant; it was held that an officer of the defendants could be required to testify whether they had ever bought any of the same or had any interest therein, and to their custom of scratching off serial numbers on the wrappers and labels before they shipped them, and to produce correspondence relating to the sale; although it was contended

that the questions were irrelevant and tended to disclose trade secrets, consisting of the names of the persons through whom the defendants obtained the goods. *Re Park*, 138 Fed. 421; and a complainant in a suit in equity against a railway company may require a witness to disclose the extent of his interest in another corporation, which owns a majority of the stock of the defendant. *Teller v. Tonopah & G. R. Co.*, 151 Fed. 607. A party may be compelled to produce an application for a patent which has not been issued and correspondence with the Patent Office upon the subject, although he claims that the result will be to disclose confidential communications with his attorneys. *Edison El. L. Co. v. U. S. El. L. Co.*, 45 Fed. 55; and *s. c.*, 44 Fed. 294. But see Rule 15 of Patent Office; U. S. R. S., § 4902. See *supra*, §§ 332, 339, note 45.

¹¹*Henry v. Travelers' Ins. Co.*, 35 Fed. 15. But see *Lloyd v. Pennie*, 50 Fed. 4, 11.

¹²*Simonds R. M. Co. v. Hathorn Mfg. Co.*, 83 Fed. 490.

¹³See *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652. *Supra*, § 341.

and papers; but only those can be examined which are shown to be relevant to the issues.¹⁴ The privileges of the witness will be protected.¹⁵ A witness, who attends without service of a subpoena, may be punished for refusing to answer a proper question.¹⁶ But where the oral testimony of a witness had been concluded, and he had refused to produce a paper voluntarily; it was held that he could not be punished for contempt in failing to appear at an adjourned hearing, when he was not tendered his fee for such attendance, nor served with a subpoena *duces tecum*.¹⁷ Where a party to an interference proceeding testified on his own behalf, and then permitted adjournments by consent, until it was too late to enforce by subpoena his attendance for cross-examination within the time allowed by the Commissioner of Patents; it was held that his appearance might be ordered by the court.¹⁸ The application to punish a witness for his refusal to attend must be made to the court which issued the subpoena.¹⁹ Upon an application to punish a witness for contempt for failure to produce a paper in obedience to a subpoena *duces tecum*; it has been said, that the materiality of the paper will not be determined until it is produced;²⁰ and, if there is color for the claim that the paper is material, its production will be compelled, and the decision, as to its admission in evidence will be postponed to the final hearing.²¹ The rules concerning the privileges of witnesses, and the materiality and relevance of evidence, are substantially the same in equity as to common law.²² Orders punishing for contempt witnesses, who, in order to raise jurisdictional objections, have refused to be sworn or to answer certain questions, have been stayed pending their review by the Circuit Courts of Appeals.²³

¹⁴ *Southern Ry. Co. v. North Carolina Corp. Com'rs*, 104 Fed. 700. *Contra*, *Wertheim v. Continental Ry. & Tr. Co.*, 15 Fed. 716; *U. S. v. Babcock*, Fed. Cas. No. 14,484. *Cf.* *Russell v. McLennan*, Fed. Cas. No. 12,158; *Re Hirsch*, 74 Fed. 928; *McMullen v. Ritchie*, 57 Fed. 104. As to the right of a stockholder to inspect the books of the corporation, see *Ranger v. Champion C. P. Co.*, 51 Fed. 61.

¹⁵ *Butler v. Fayerweather, C. C. A.*, 91 Fed. 458.

¹⁶ *U. S. v. Armour & Co.*, 142 Fed. 808, 824.

¹⁷ *Re Johnson & Knox Lumber Co.*, C. C. A., 151 Fed. 207.

¹⁸ *Lobel v. Cossey*, C. C. A., 157 Fed. 664.

¹⁹ *Re Allis*, 44 Fed. 216.

²⁰ *Edison El. L. Co. v. U. S. El. L. Co.*, 44 Fed. 294.

²¹ *Edison El. L. Co. v. U. S. El. L. Co.*, 45 Fed. 55, 59.

²² *Stevens v. Cooper*, 1 J. Ch. (N. Y.) 425, 7 Am. Dec. 499.

²³ *Re Spofford*, 62 Fed. 434; *But-*

§ 344. Testimony taken in equity which may be used in other courts. Testimony may be taken in a court of equity for use in other courts, as well as for its own use, by bills to perpetuate testimony¹ and bills to take testimony *de bene esse*;² and formerly, at least testimony could be taken in a court of equity for use in another court by a bill of discovery.³

§ 345. Bills to perpetuate testimony. "In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any "District Court, upon applications to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States."¹ In order to obtain such a direction, the party wishing the testimony taken should file a bill to perpetuate testimony.² A bill to perpetuate testimony must contain all the facts necessary to give the court jurisdiction. It must state with reasonable certainty the subject-matter touching which the plaintiff is desirous of taking testimony,³ and show that it is a matter which may be cognizable in a court of the United States.⁴ It should also show that the plaintiff has some interest in the subject-matter, which may be endangered if the testimony in support of it is lost. A mere expectancy, however strong and well-founded, is not sufficient. It has been said, "Put the case as high as possible; that the party seeking to perpetuate the testimony is the next of kin of a lunatic; that the lunatic is intestate; that he is in the most helpless state, a moral and physical impossibility (though the law would not so regard) that he should ever recover; even if he were *in articulo mortis*, and the bill was filed at that instant; still, the plaintiff could not qualify himself to

ler v. Fayerweather, C. C. A., 91 Fed. 458.

§ 344. 1 § 345.

2 § 346.

3 § 347.

§ 345. 1 U. S. R. S., § 866. Testimony may thus be taken before a Circuit Court while a case is pending in the Supreme Court or Circuit Court of Appeals on appeal

from a decree sustaining a demurrer. Richter v. Union T. Co., 115 U. S. 55.

2 N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578.

3 Story's Eq. Pl., §§ 300, 305.

4 U. S. R. S., § 868; N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578. But see Morris v. Morris, 2 Phill. 205, 208.

mainain it, as having any interest in the subject of the suit.”⁵ If, moreover, the interest be such a one as may be immediately barred by the party against whom the bill is brought, it has been said that the court will withhold its assistance, for it would be a fruitless exercise of power.⁶ Such a bill must also show that the defendant has, or claims to have, a title or interest in opposition to that of the plaintiff in the subject-matter of the proposed testimony,⁷ as, for example, that the defendant claims an exclusive right to the use of a process which the plaintiff is using, and rests his claim upon letters-patent which the proposed testimony will show to be invalid;⁸ and some ground of necessity, for perpetuating the evidence; as that the facts, to which the testimony of the witness proposed to be examined relate, cannot be immediately investigated in a court of law or equity, —or, if they can be immediately investigated, that the right to commence such a suit or action belongs exclusively to the defendants or that the defendant has interposed some impediment, such as an injunction, to an immediate trial of the matter in a court of law; or that, before the investigation can take place, the evidence of a material witness is likely to be lost by his threatened death, illness, or departure from the jurisdiction of the court,⁹ but the fact that, in the case recently cited, the Attorney-General might institute a proceeding to annul a patent, did not prevent the granting of the prayer of the bill.¹⁰ The prayer should be for leave to examine the witnesses touch-

⁵ Dursley v. Fitzhardinge, 6 Ves. 260.

⁶ Dursley v. Fitzhardinge, 6 Ves. 261-263.

⁷ Story's Eq. Pl., § 302.

⁸ N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578; Westinghouse Mach. Co. v. El. Storage Battery Co., C. C. A., 25 L.R.A. (N.S.) 673, 170 Fed. 430; reversing 165 Fed. 992; where it was held to be sufficient to allege: that defendant charged that an article manufactured and sold by complainant infringed a patent owned by defendant and threatened suits against complainant and its customers, but

refused to bring the same; and that complainant could prove that defendant's patent was void by the testimony of certain designated witnesses and not otherwise, although there was no allegation that the witnesses were about to depart from the jurisdiction or were infirm or old.

⁹ Angell v. Angell, 1 Sim. & S. 83; N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578; Story's Eq. Pl., § 303; Daniell's Ch. Pr. 1572, 1573.

¹⁰ N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578.

ing the matter stated to the end that their testimony may be preserved and perpetuated, and for the proper process of subpoena.¹¹ It has been held that if it adds thereto a prayer for other, or for general relief, it will be demurrable for that reason,¹² although the court may allow an amendment omitting that part of the prayer.¹³ An affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost, must be filed with the bill.¹⁴ Otherwise, the bill should confirm substantially to the requirements of original bills praying relief. Such a bill, it has been held, cannot by amendment be converted into a bill of discovery.¹⁵ It is of itself a bill of discovery only to the extent of enabling the plaintiff to obtain the relief prayed for in it, and he can, therefore, only require an answer from the defendant as to the facts alleged in the bill as entitling him to examine the witnesses.¹⁶ An omission of any of the foregoing statements in, or requirements of, the bill will make it demurrable; and if any of the necessary allegations are false, or there is another objection not apparent upon the face of the bill, that may be taken by plea or answer.¹⁷ If the defendant answer denying the plaintiff's case, witnesses may be examined as to the point in issue by either party.¹⁸ Otherwise, such a bill should not be brought to a hearing; and if the plaintiff do so, it will be dismissed with costs, but without prejudice to the use of the testimony taken in pursuance of its prayer.¹⁹ It is said that "if the plaintiff neglects to proceed with the suit, the defendant cannot

¹¹ Story's Eq. Pl., § 306.

¹² *Rose v. Gannel*, 3 Atk. 439; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316; *Ætna Life Ins. Co. v. Smith*, 73 Fed. 318; *Dalton v. Thompson*, 1 Dickens, 97. But see *Equity Rule 21*; *Cleland v. Casgrain*, 92 Mich. 139; s. c., 52 N. W. 460.

¹³ *Vaughan v. Fitzgerald*, 1 S. & L. 316.

¹⁴ *Earl of Suffolk v. Green*, 1 Atk. 450; *Philips v. Carew*, 1 P. Wms. 117; *Shirley v. Earl Ferrers*, 3 P. Wms. 77.

¹⁵ *Ellice v. Roupell*, 32 Beav. 299; s. c., 9 Jur. (N. S.) 530.

¹⁶ *Ellice v. Roupell*, 32 Beav. 308; s. c., 9 Jur. (N. S.) 533.

¹⁷ Story's Eq. Pl., § 306a.

¹⁸ *Brigstocke v. Roch*, 7 Jur. (N. S.) 63. The failure of the defendant to call witnesses to deny the facts to which the complainant's witnesses testified, does not prevent his contradicting such testimony when the depositions then taken are offered in evidence in a subsequent suit or proceeding. *Ex parte Wing You*, C. C. A., 190 Fed. 294.

¹⁹ *Hall v. Hoddlesdon*, 2 P. Wms. 162; *Anon.*, Amb. 237; s. c., 2 Ves. Sen. 497; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316; *Morrison v. Ar-*

move to dismiss for want of prosecution; but may move that the plaintiff be ordered to take the next step, within a limited time, or to pay him the costs of the suit. If the defendant neglects to take the steps proper to be taken by him within the prescribed time, the court will, it seems, order the examination of the witnesses to proceed."²⁰ If no valid objection is made, the court will order the testimony to be taken. Both parties may examine witnesses under the order,²¹ and either party must be allowed to cross-examine those whom his opponent examines in chief.²² After the witnesses have been examined, the cause is at an end,²³ and if the defendant have examined no witnesses in chief he will be entitled to his costs; but by receiving costs he waives any objection he might otherwise be entitled to make on the ground that he has had no sufficient opportunity of cross-examination.²⁴ The testimony thus taken is filed in the clerk's office, and can be used in a subsequent case at law or in equity in the same court, under an order, which must be obtained by motion upon notice, and supported by proof of the witness's death, or that he cannot be then compelled to attend and testify.²⁵

§ 346. Bills to take testimony de bene esse. Bills to take testimony *de bene esse* were formerly filed after a suit or action had been begun, in order to take the testimony of such witnesses as, on account of their age, infirmity, or intention to depart from the jurisdiction of the court, it was feared could not be taken in its regular method of proceeding.¹ Such bills must substantially comply with the rules regulating bills to perpetuate testimony, with which, indeed, they have been often confounded.² Now that the same relief can be afforded under the statutes both

nold, 19 Ves. 670; *Ellice v. Roupell*, 32 Beav. 308.

²⁰ *Daniell's Ch. Pr.* (5th Am. ed.) 1573; *Wright v. Tatham*, 2 Sim. 459; *Beavan v. Carpenter*, 11 Sim. 22; *Coveny v. Athill*, 1 Dick. 355; *Lancaster v. Lancaster*, 6 Sim. 439. ²¹ *Sheward v. Sheward*, 2 V. & B. 116; *Earl of Abergavenny v. Powell*, 1 Meriv. 434; *Skrine v. Powell*, 15 Sim. 81; s. c., 9 Jur. 1054.

²² *Daniell's Ch. Pr.* (5th Am. ed.) 1573, 1574.

²³ *Morrison v. Arnold*, 19 Ves. 670; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316.

²⁴ *Watkins v. Atchison*, 10 Hare, Ap. xlv.

²⁵ *Daniell's Ch. Pr.* (5th Am. ed.) 1574, 1575.

§ 346. ¹ *Story's Eq. Pl.*, § 307.

² *Story's Eq. Pl.*, § 307.

of most of the individual States and of the United States,³ it is rarely, if ever, that an occasion for their use arises.

§ 347. **Bills of discovery.** By the former practice, every bill might seek discovery, but the kind of bill called a bill of discovery is a bill filed for the sole purpose of obtaining a discovery of facts resting in the defendant's knowledge, or of deeds, writings, or other things in his custody or power; and seeking no relief in consequence of the discovery, except possibly a stay of proceedings till the discovery is made.¹ A bill of discovery is usually filed in aid of the jurisdiction of another court.² In England, actions purely for discovery can still be sustained in certain cases; for example, to procure the names of consignors and the particulars of a shipment,³ in aid of arbitration,⁴ in aid of proceedings to recover land in India;⁵ but not, it was held, in aid of proceedings in a foreign court.⁶ Before the Equity Rules of 1912, it was held: that a bill of discovery could not be maintained in a court of the United States held within a State under whose statutes a party could be compelled to testify,⁷ but the preponderance of authority was otherwise.⁸ A bill of dis-

³ U. S. R. S., §§ 863-865; Equity Rule 70; *supra*, §§ 347, 348.

§ 347. ¹ Daniell's Ch. Pr. (5th Am. ed.) 1556.

² Daniell's Ch. Pr. (5th Am. ed.) 1556.

³ Orr v. Diaper, 4 Ch. D. 92.

⁴ Ainsworth v. Starkee, (W. N. 1876) P. 8.

⁵ Reiner v. Salisbury, 2 Ch. D. 378.

⁶ Dreyfus v. Peruvian Co., 41 Ch. D. 151.

⁷ Rindskopf v. Plato (D. Wis.), 20 Fed. 130; Paton v. Majors (D. La.), 46 Fed. 210; Preston v. Smith, (D. Mo.), 26 Fed. 884, 889; Safford v. Ensign Mfg. Co., C. C. A., 120 Fed. 480; U. S. v. Bitter Root Dev. Co., C. C. A., 133 Fed. 274; Brown v. McDonald, 130 Fed. 964; Miller v. Moise, 168 Fed. 940. See also Heath v. Erie R. Co., 9 Blatchf. 316; Brown v. Swann, 10

Pet. 497, 9 L. ed. 508; Manchester F. A. Co. v. Stockton C. H. & A. Works, 38 Fed. 378; Southern Pac. R. R. Co. v. U. S., 200 U. S. 341, 351, 50 L. ed. 507, 511; Carpenter v. Winn, 221 U. S. 533, 540, 55 L. ed. 842, 845.

⁸ Continental Nat. Bank v. Heilman, 66 Fed. 184; Kelly v. Boettcher, 85 Fed. 55, 66; National H. B. Co. v. Interchangeable B. B. Co., C. C. A., 83 Fed. 26, 30; Bryant v. Leyland, 6 Fed. 125; Indianapolis Gas Co. v. Indianapolis, 90 Fed. 196; Colgate v. Compagnie Francaise, 23 Fed. 82; McMullen Lumber Co. v. Strother, C. C. A., Circuit, 138 Fed. 295; Brown v. Magee, 146 Fed. 765; Brown v. Palmer, 157 Fed. 797. See also, Paine v. Warren, 33 Fed. 357. The court sustained a bill of discovery in aid of an action at law upon an insurance policy, to compel the ex-

covery might be maintained in support of a suit in another State or in a foreign country.⁹ It will not be allowed, if it seek a discovery of matters concerning which a party, if called as a witness, would be excused from testifying;¹⁰ nor, it has been said, if the discovery is sought in aid of an action for a mere personal tort.¹¹ A bill of discovery can only be filed in aid of a judicial proceeding already commenced or immediately contemplated.¹² If filed in aid of proceedings already begun, no person may be made a party to it who is not a party to such proceedings,¹³ except possibly the officer of a corporation.¹⁴ A bill of discovery must state the matter touching which discovery is sought, show that both the plaintiff and the defendant have or claim an interest therein, state the facts and circumstances upon which the plaintiff's right to compel discovery from the defendant is founded, and pray that the defendant may make a full discovery of the matters therein stated.¹⁵ A bill of discovery may also pray any equitable assistance of the court which is merely consequential upon the prayer for discovery;¹⁶ but if it should pray any other or general relief, it will thereby become a bill for relief.¹⁷ It has been said that a bill of discovery may be sustained although it waives an answer under oath.¹⁸ It seems that a bill of discovery need not allege that the facts of which a discovery is sought are within the exclusive knowledge of the de-

humation of the body of the insured and its examination in aid of the defense. *Mutual Life Ins. Co. v. Griesa*, 156 Fed. 398; *aff'd. Griesa v. Mutual Life Ins. Co., C. C. A.*, 169 Fed. 509, where it was said that the question would not be reviewed after the disinterment and autopsy had taken place and that the widow, who owned the cemetery lot where the corpse was buried, was a proper party defendant.

⁹ *Crow v. Del Ris & Vallego*, Ch. 1769; *Mitchell v. Smith*, 1 Paige (N. Y.), 287.

¹⁰ *Glynn v. Houston*, 1 Keen, 329; *Langdell's Eq. Pl.*, § 69; *Wigram on Discovery*, §§ 130-138; *Daniell's Ch. Pr.* (2d Am. ed.) 563-569.

¹¹ *Glynn v. Houston*, 1 Keen, 329. For discovery of an unlawful combination, see *Evans v. Lancaster City St. Ry. Co.*, 64 Fed. 626.

¹² *Mayor of London v. Levy*, 8 Ves. 398; *United N. J. R. & C. Co. v. Hoppock*, 1 Stew. Eq. (N. J.) 261; *Daniell's Ch. Pr.* 1558.

¹³ *Queen of Portugal v. Glyn*, 7 Cl. & F. 466; *Daniell's Ch. Pr.* (5th Am. ed.) 1558.

¹⁴ See § 43.

¹⁵ *Daniell's Ch. Pr.* (5th Am. ed.) 1557.

¹⁶ *Mitford's Eq. Pl.*, ch. i, § 2; *Loker v. Roll*, 3 Ves. 4.

¹⁷ *Angell v. Westcombe*, 6 Sim. 30.

¹⁸ *Hudson v. Wood*, 119 Fed. 764, 776.

fendant;¹⁹ but they must be matters essential to a plaintiff's cause of action, or if he be defendant in another suit or action, to his affirmative defense, and the bill must not seek discovery of the evidence of a part of what belongs solely to the defendant's case.²⁰ The defendant may oppose a bill of discovery by a motion to dismiss,²¹ or in his answer, in the same manner as he might oppose a bill for relief. The English rule as finally established, was that, if a demurrer were interposed to a bill praying both discovery and relief, and the bill were held not to show a proper case for relief, it could not be maintained for discovery merely.²² This seems to be the rule in the Federal courts.²³ By the former practice a defense founded upon the statute of limitations or laches could be interposed to a bill of discovery by plea,²⁴ or, if it appeared upon the face of the bill, by demurrer.²⁵ A material amendment of a bill of discovery will very rarely be allowed.²⁶ A bill of discovery was never brought to a hearing; but, after the defendant had put in a full answer thereto, he was entitled to costs of the suit,²⁷ less any costs allowed the plaintiff upon exceptions to a previous answer as insufficient.²⁸

§ 348. *Discovery in equity.* Under the former practice, discovery and inspection could only be obtained in the answer

¹⁹ *Metler v. Metler*, 4 C. E. Green (19 N. J. Eq.), 457. But see *Bell v. Pomeroy*, 41 McLean, 57.

²⁰ *Carpenter v. Winn*, 221 U. S. 533, 540; *Wigram on Discovery*, § 372; *Langdell's Eq. Pl.*, § 172; *Ingilby v. Shafto*, 33 Beav. 31.

²¹ *Evans v. Lancaster City St. Ry. Co.*, 64 Fed. 626; *Eq. Rule* 29.

²² *Fry v. Penn.*, 2 Bro. C. C. 280; *Loker v. Rolle*, 3 Ves. 4; *Langdell's Eq. Pl.*, § 152.

²³ *Markey v. Mut. Ben. L. Ins. Co.*, 6 Ins. L. J. 537; *Cecil Nat. Bank v. Thurber*, C. C. A., 59 Fed. 913; *Preston v. Smith*, 26 Fed. 884; *Safford v. Ensign Mfg. Co.*, C. C. A., 120 Fed. 480; *Grieb v. Equitable Life Assurance Society*, 189 Fed. 498. But see *Livingston v. Story*, 9 Pet. 632, 9 L. ed. 255; *Wright v. Dame*, 1 Met. (Mass.) 237; *Higgin-*

botham v. Burnet, 5 J. Ch. (N. Y.) 184; *Story's Eq. Pl.*, § 412.

²⁴ *Beames on Pleas*, 275; *Gait v. Osbaldeston*, 1 Russ. 158.

²⁵ *Wooster v. Sidenbergh*, S. D. N. Y., Nov. 6, 1889.

²⁶ *Marquis Cholmondeley v. Lord Clinton*, Meriv. 71.

²⁷ *Atty. Gen. v. Burch*, 4 Madd. 178.

²⁸ *Hughes v. Clerk*, 6 Hare, 195. See also *Bryant v. Leland*, 6 Fed. 125, U. S. C. C., D. Mass.; *Easton v. Hodges*, 7 Bissell, 324, U. S. C. C., D. Illinois; *Paton v. Majors*, 46 Fed. 210, U. S. C. C., E. D. La.; *Billings, J.*; *Washburn & M. Mfg. Co. v. Freeman Wire Co.*, 41 Fed. 410, U. S. C. C., E. D. Mo.; *Thayer, J.*; *Washburn & M. Mfg. Co. v. Cincinnati B. W. F. Co.*, 42 Fed. 675, U. S. C. C., S. D. Ohio.

of the defendant, made either to a bill seeking relief and discovery of matters thereto incidental or by answer to a bill filed solely for discovery. The new Equity Rules, however, provide: "The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge. If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit. Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor. Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required. The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or re-

fusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.¹ By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable." This is derived from Order XXXI. of the Supreme Court of England. The English cases under that order and the former cases upon discovery in Chancery will be useful in the interpretation of the new rule.² Under the Chancery practice, the complainant was obliged to answer specifically and categorically, distinguishing between matters within his personal knowledge and those within his information and belief.³ He had then to answer not only as to all facts within his knowledge, but as to all which he could ascertain from an inspection of books and papers in his possession or under his control.⁴ He was also required to give

§ 348. ¹Eq. Rule 58.

²Lord Chancellor Loreburn (Harv. Law Rev., xxvi, p. 106): "Either party to the suit can obtain an order for discovery of documents relevant to the case of the adversary, but a fishing discovery—that is to say, discovery in order to enable the applicant to fish for a cause of action when he has no materials of his own—is disallowed. It must always be a matter for decision upon the circumstances in each case whether it is a fishing application or not. There are numerous decisions illustrating the way in which this rule works. Normally each party must disclose the documents relevant to his opponent's case which are or have been in his custody or control, and make

an affidavit that there are no others. He may put in a separate schedule to the affidavit, such of them as he claims to be privileged from inspection. Then his adversary can obtain inspection of such as the judge thinks are not privileged."

³Brooks v. Byam, 1 Story, 296; Kittredge v. Claremont Bank, 3 Story, 590; s. c., 1 W. & M. 244; Victor G. Bloede Co. v. Carter, 148 Fed. 127. It has been said that the defendant must answer not only as to all facts within his knowledge, but to all which he can ascertain from an inspection of books and papers in his possession or under his control. Davis v. Mapes, 2 Paige (N. Y.) 105.

⁴Davis v. Mapes, 2 Paige (N. Y.) 105.

a full answer concerning any information that he could obtain upon the subject from persons in his employ.⁵ If the employees were no longer in the party's employ, he was not bound to procure information from them in order to answer,⁶ and it has been said that a full answer which would involve an unreasonable expense may be excused.⁷ If he asserted ignorance as to any matter, he was required to aver that he was ignorant both of his own knowledge and as to information and belief;⁸ but if he denied knowledge and information, he was not required to state his belief.⁹ He could not deny that he had no knowledge as to a subject, which the bill charged as a personal transaction in which he had taken part.¹⁰ This last rule, it has been said, applies to officers of corporations.¹¹ If new officers have succeeded those in office at the time when the matters charged are said to have occurred, it is their duty, when called upon for discovery, to ascertain the facts by searching the records of the corporation and by inquiry of their predecessors.¹² Where it was shown that a party charged with infringement made a device substantially similar to that produced by the complainant's patented machine, and the former refused to permit an inspection thereof or to disclose the contents of an application that he had made for a patent in relation to the same; an order compelling such disclosure or permission to make such an inspection was granted.¹³ Objections to the interrogatories may be made upon

⁵ In England, if a party "is interrogated about acts which are done in the presence of persons employed by him their knowledge is his knowledge, and he is bound to answer in respect of that." *Rasbotham v. Shropshire Union Ry. & Canal Co.*, 24 Ch. D. 110, 113; *Odger's Pleading*, 4th ed., p. 271.

⁶ *Phillips v. Routh*, (L. R.) 7 C. P. 287.

⁷ *Bolekow, Vaughan & Co. v. Fisher*, 10 Q. B. D. 161. *Cf. Miller v. Chicago & A. R. Co.*, 176 Fed. 379, 381. But see *Hall v. L. & N. W. Ry. Co.*, 35 L. T. 848.

⁸ *Brooks v. Byam*, 1 Story, 296; *Kittredge v. Claremont Bank*, 1 W. & M. 244.

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⁹ *Victor G. Bloede Co. v. Carter*, 148 Fed. 127.

¹⁰ *Burpee v. First Nat. Bank*, 5 Biss. 405. It has been held that it is insufficient to deny fraud charged to have been committed by an agent upon the information of the agent and the belief of the principal. *Mason v. Jones*, 1 Hayw. & H. 329; s. c., Fed. Cas. No. 9,240.

¹¹ *Burpee v. First Nat. Bank*, 5 Biss. 405; *Kittredge v. Claremont Bank*, 1 W. & M. 244.

¹² *Kittredge v. Claremont Bank*, 1 W. & M. 244.

¹³ *Rowell v. William Koehl Co.*, 194 Fed. 446.

the same grounds as, under the former practice, to a demurrer to the discovery. A demurrer to the discovery claimed that, for some reason apparent upon the face of the bill, the defendant should not be obliged to answer so much thereof as his demurrer cover. Professor Langdell says: "A demurrer to discovery indeed is not in its nature a demurrer at all, but a mere statement in writing that the defendant refuses to answer certain allegations in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out."¹⁴ A defendant might thus demur because (1) his answer might subject him to a pain, penalty, or forfeiture;¹⁵ (2) that it was immaterial to the purposes of the

¹⁴ Langdell's Eq. Pl., § 97. The object of interrogating is twofold: first, to obtain admissions to prove the case of the interrogator; secondly, to ascertain the case of the interrogated. Great care is necessary in their preparation, for, if the question is too general or assumes the existence of several facts, an error in one of them may justify a denial. For example: if the interrogator has heard that the plaintiff gave evidence upon an examination before Commissioner Shields, that a certain check was in the handwriting of James Brown, it may be of no use to put the interrogatory, "Did you not state, on oath, upon an examination before Commissioner Shields, that the said check was in the handwriting of Mr. Brown?" To discover precisely what the plaintiff denies, the question should be split substantially thus: "Were you not examined as a witness before Commissioner John A. Shields on October 25th, 1912? Was not a check then and there produced to you? Was not the check then and there produced before you? Was not the said check the one men-

tioned in the third paragraph of the bill of complaint herein? If you answer "No" to the last question, describe the check that was then produced. Did you not say that said check was in the handwriting of James Brown? Did you not say so on oath? Did you not say so in the presence of said Commissioner Shields? If you answer "No" to any of the last three questions, in whose handwriting did you say the said check was?" Under the Chancery practice, it was the custom to close a leading interrogatory with the words, "or how otherwise?"

¹⁵ *Stewart v. Drasha*, 4 M'Lean, 563; *Atwill v. Farrett*, 2 Blatchf. 39; *U. S. v. White*, 17 Fed. 561, 565; *Snow v. Mast*, 63 Fed. 623; *Paxton v. Douglas*, 19 Ves. 225; *Story's Eq. Pl.*, §§ 575-599. Perhaps, also, if it might disgrace him. *Franco v. Bolton*, 3 Ves. 368; *Finch v. Finch*, 2 Ves. Jr. 491, 493; *Brownsword v. Edwards*, 2 Ves. Jr. 243, 245; *Northrop v. Hatch*, 6 Conn. 361, 363. In England also, relevant questions which tend to criminate may be asked, although the party interrogated is not bound

suit;¹⁶ (3) that it would involve a breach of some confidence which it is the policy of the law to preserve inviolate,¹⁷ as a professional confidence,¹⁸ or one obtained in the course of a public office;¹⁹ (4) that the matters of which a discovery was sought pertained exclusively to the defendant's case;²⁰ (5) because the defendant had, "in conscience, a right equal to that claimed by a person filing a bill against him though not clothed with a perfect legal title,"²¹ as, if he were a purchaser in good faith, and for a valuable consideration, without any notice of the plaintiff's claim.²² Where the complainant was the only person who could insist upon the penalty or forfeiture, and he waives it in his bill, he might compel a discovery.²³ In certain cases, a defendant might be obliged to answer to a charge of a fraud which might subject him to criminal prosecution.²⁴ An English case held that a discovery could be compelled although a defendant might thereby admit his guilt of an offense against the criminal laws of a foreign country.²⁵ It was said: that a defendant could not demur to the discovery because the bill waived an answer under oath.²⁶ A demurrer to an interrogatory that has been already answered cannot raise the question

to answer the same; *Alabaster v. Harness*, 70 L. T. 375; *McCorquodale v. Bell*, (1876) W. N. 39; Odgers, "Principles of Pleading," 4th ed., p. 268.

¹⁶ *Harvey v. Morris*, Rep. temp. Finch, 214; *Daniell's Ch. Pr.* (2d Am. ed.) 636, 637. But see *Pac. R. of Mo. v. Mo. Pac. Ry. Co.*, 111 U. S. 505, 522, 28 L. ed. 498, 504.

¹⁷ *Story's Eq. Pl.*, § 547; *Gormully & Jeffery Mfg. Co. v. Bretz*, 64 Fed. 612.

¹⁸ *Greenough v. Gaskell*, 1 Myl. & K. 100; *Story's Eq. Pl.*, § 547; and cases cited.

¹⁹ *Smith v. East India Co.*, 1 Phillips, 50; *Atty.-Gen. v. London*, 12 Beav. 8; *Worthington v. Scribner*, 109 Mass. 487, 493; 12 Am. Rep. 736.

²⁰ *Bolton v. Liverpool*, 1 Myl. &

K. 88; *Daniell's Ch. Pr.* (2d Am. ed.) 645-648.

²¹ *Daniell's Ch. Pr.* (2d Am. ed.) 635, 636.

²² *Jarrard v. Saunders*, 2 Ves. Jr. 454; *Glegg v. Legh*, 4 Madd. 193; *Langdell's Eq. Pl.*, § 188.

²³ *Mason v. Lake*, 2 Brown, P. C. 495; *Lord Uxbridge v. Staveland*, 1 Ves. Sen. 56; *Atwill v. Ferrett*, 3 Blatchf. 39.

²⁴ *Dummer v. Chippenham*, 14 Ves. 245, 251; *Story's Eq. Pl.*, § 578; *Daniell's Ch. Pr.* (2d Am. ed.) 631, 632.

²⁵ *King of Two Sicilies v. Wilcox*, 1 Simons (N. S.), 301. See also *U. S. v. McRae*, L. R. 4 Eq. 327; s. c., L. R. 3 Ch. App. 79.

²⁶ *Hudson v. Wood*, 119 Fed. 764, 776. Cf. *Johnston v. Forsyth Merc.*,

whether the answer to it is sufficient.²⁷ The criterion of the materiality of an interrogatory is not whether an affirmative answer will prove the bill, but whether it will tend to prove the bill.²⁸ Interrogatories must be relevant to the issue.²⁹ An interrogatory will not be allowed if its sole object is to establish certain facts, which, if proved, would not be relevant evidence in support of the plaintiff's claim³⁰ or would be no defense in law to the action;³¹ but interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely. They may be directed to the evidence by which it is desired to establish such facts at the trial,³² and an interrogatory is proper when relevant to any link in the chain of evidence necessary to substantiate the case of the interrogator.³³ A party may file interrogatories as to anything which can be fairly said to be material, to enable him either to maintain his own case or to destroy the case of his adversary;³⁴ but the English rule is that he is not entitled to obtain more than an outline of his opponent's case. He can there compel his adversary to disclose the facts on which the latter intends to rely, but not the evidence

Co., 127 Fed. 845, 848. But see § 148.

²⁷ Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18.

²⁸ Uhlmann v. Arnholt & S. B. Co., 41 Fed. 369. See *supra*, § 174.

²⁹ Rogers & Co. v. Lambert & Co., 24 Q. B. D. 573.

³⁰ Kennedy v. Dodson, (1895) 1 Ch. 334. In England, a defendant cannot be asked, "If you did not print the libel, did McCarthy & Company or some other and what firm printed it?" Pankhurst v. Wighton & Co., 2 Times L. R. 745.

³¹ Rogers & Co. v. Lambert & Co., 24 Q. B. D. 573.

³² Attorney General v. Gaskill, 20 Ch. D. 519, 528. To obtain names of witnesses for the interrogator, Hall v. Lycordet, W. N. (1883) 175; names of persons such as incumbrancers in order to make them

parties, Union Bank v. Manby, 13 Ch. D. 239. The security held by prior incumbrances. West of England Bank v. Nicholls, 6 Ch. D. 613. Profits on a business where it is admitted that trust funds were employed in the same. Elkins v. Clarke, 21 W. R. 447; Schreiber v. Heymann, 63 L. J. Q. B. 749. But, see, Hemery v. Worwsom, 26 Solic. J. 26.

³³ Jones v. Richards, 15 Q. B. D. 439, holding that, when defendant has denied that he wrote a material document, he may be asked whether other documents produced are not in his handwriting, although the latter documents have no relevancy except for use in a comparison of handwriting.

³⁴ Hennessy v. Wright, No. 2, 24 Q. B. D. 447n, per Lord Esher, M. R.

by which his adversary proposes to prove those facts.³⁵ "Even in interrogating as to your own case the questions asked must not be 'fishing'; that is they must refer to some definite and existing state of circumstances, not be put merely in the hopes of discovering something which may help the party interrogating to make out some case. They must be confined to matters which there is good ground for believing to have occurred."³⁶ In England, questions "to credit" or interrogatories put solely to test the credibility of a party, are not allowed before trial, although they then may be asked upon cross-examination.³⁷ In the Queens Bench Division of England, interrogatories are not allowed as to the contents of written documents, unless it is admitted that the documents have been lost or destroyed.³⁸ Interrogatories will not there be allowed when their object is to contradict a written document;³⁹ but the interrogated party may be asked what has become of a particular document and the interrogatory continued, "If you state that such document is lost or destroyed, set out the contents of the same to the best of your recollection and belief. If you have a copy, make it an exhibit to your answer."⁴⁰ In England, it has been said that there are seven grounds upon which production of documents may be lawfully refused: First, documents of title need not be produced when they relate solely to a party's own title to real property, corporeal or incorporeal, and contain nothing which tends to establish the title of his opponent.⁴¹ Where, however, the documents are material to his opponent's title, they must be produced, although the party against whom the order is made is a purchaser for value without notice.⁴² Second, communications

³⁵ Odgers "Principles of Pleading," 4th ed. pp. 265, 266; citing *Eade v. Jacobs*, 3 Ex. D. 335; *Johns v. James*, 13 Ch. D. 370.

³⁶ Odgers "Principles of Pleading," 4th ed., p. 267; citing *Gourley v. Plimsoll*, L. R. H. C. P. 362; *Hennessy v. Wright*, No. 2, 24 Q. B. D. 448.

³⁷ *Labouchere v. Shaw*, 41 J. P. 788, per Cockburn, C. J.; *Allhusen v. Labouchere*, 3 Q. B. D. 654.

³⁸ Odgers "Principles of Pleading," 4th ed., p. 267; citing *Stein*

v. Tabor, 31 L. T. 444; *Fitzgibbon v. Greer Parish* R. 9 C. L. 294.

³⁹ *Moor v. Roberts*, 3 C. B. N. S. 671.

⁴⁰ Odgers "Principles of Pleading," 4th ed., p. 267, 268; citing *Wolverhampton New Water Works Co. v. Hawksford*, 5 C. B. N. S. 703; *Dalrymple v. Leslie*, 8 Q. B. 5.

⁴¹ *Egremont Burial Board v. Egremont Iron Ore Co.*, 14 Ch. D. 158.

⁴² *Ind. Coope & Co. v. Emmerson*, 12 App. Cas. 300.

between solicitor and client.⁴³ Third, documents prepared solely for the purpose of assisting the opponent or his legal advisers in any actual or anticipated litigation.⁴⁴ Fourth, incriminating documents.⁴⁵ But, in England, the objection to such must be made under oath, in clear and express terms, not upon information and belief.⁴⁶ Fifth, documents that tend to prove a forfeiture.⁴⁷ Sixth, documents which are the property of a third person and held by the interrogated as agent or trustee.⁴⁸ But this privilege does not extend to private letters written in confidence by a stranger, who forbids their production.⁴⁹ Seventh, State documents, the production of which is contrary to public policy.⁵⁰ An answer to an interrogatory is insufficient when it is so mixed with matter irrelevant thereto as to prevent the interrogator from using the same apart therefrom.⁵¹

§ 349. **Inspection in equity.** According to the old English practice, the adverse party had no right, in the absence of special circumstances, to compel before the hearing the production of any exhibit, however it had been proved, except, perhaps, when the deposition proving it had set it out *verbatim*; nor even to inspect it, it being considered that a party should not before the hearing see the strength of the cause, or any deed, to pick hole in it.¹ The Equity Rules now provide: that the court or judge may upon reasonable notice make all such orders

⁴³ Lowden v. Blakey, 23 Q. B. D. 332; Minet v. Morgan, L. R. H. Ch. 361; Calcraft v. Guest, (1898) 1 Q. B. 759; Goldstone v. Williams, Deacon & Co., (1899) 1 Ch. 47.

⁴⁴ Walsham v. Stainton, 2 H. & M. 1; 12 W. R. 199; Nicholl v. Jones, 2 H. & M. 588; 13 W. R. 451; M'Corquodale v. Bell, 1 C. P. D. 471; 45 L. J. C. P. 329; Southwark and Vauxhall Water Co. v. Quick, 3 Q. B. D. 315; 47 L. J. Q. B. 258; Friend v. London, Chatham and Dover Ry. Co., 2 Ex. D. 437; 46 L. J. Ex. 696.

⁴⁵ Spokes v. Grosvenor Hotel Co., 2 Q. B. D. 130.

⁴⁶ Roe v. New York Press, 75 L. T. J. 31.

⁴⁷ Earl of Mexborough v. Whitwood, (1897) 2 Q. B. 111. *Contra*, Seaward v. Dennington, 44 W. R. 696.

⁴⁸ Proctor v. Smiles, 2 Times L. R. 474; Ward v. Marshall, 3 Times L. R. 578; Odgers "Principles of Pleading," 4th ed., p. 258.

⁴⁹ Hopkinson v. Lord Burghley, L. R. 2 Ch. 447; Odgers "Principles of Pleading," 4th ed., p. 258. See M'Corquodale v. Bell, 1 C. P. D. 471.

⁵⁰ Beatson v. Skene, 5 H. & N. 838. See § 332, *supra*.

⁵¹ Lyell v. Kennedy, 27 Ch. D. 1, 28.

§ 349. ¹ Davers v. Davers, 2 P. Wms. 410.

as may be appropriate to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary.²

A party is not entitled to a general inspection of books and papers in his adversary's possession. In the case of an inspection of books, the usual practice is to have all except the pages containing the material matter sealed up, and to have the inspection take place under the supervision of a master or commissioner,³ or the clerk,⁴ with the right in the latter case to a summary application to the judge for a review of the clerk's decision after both sides had been afforded a hearing.⁵ Previously to the Equity Rules of 1912, the section of the Revised Statutes⁶ quoted in the following section has been followed in equity.⁷

§ 350. Inspection at common law. The Revised Statutes provide: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue,

²Eq. Rule 58, quoted *supra*, § 348.

³*Robbins v. Denis*, 1 Blatchf. 238, 243.

⁴*Jacques v. Collins*, 2 Blatchf. 23.

⁵*Ibid.*

⁶U. S. R. S., § 724.

⁷*Coit v. N. C. Gold Am. Co.*, 9 Fed. 577. *Of* U. S. R. S., § 724; *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. 46. But see *Guyot v. Hilton*, 32 Fed. 743; *Colgate v. Compagnie Francaise*, 23 Fed. 82; *Ryder v. Bateman*, 93 Fed. 31. Under the former practice it was held: that upon the inspection of books or documents, the order might provide that the originals be filed with the clerk or that copies thereof be served upon the parties seeking them (*Sampson v. Johnson*, 2 Cranch C. C. 107; *Bank of U. S. v. Kurtz*, 2 Cranch C. C. 342); that a special master might be appointed to supervise the inspection

(*Motley, Green & Co. v. Detroit Steel & Spring Co.*, 174 Fed. 734); or that the clerk might supervise the inspection, with the right of both parties to a summary application to the judge, at chambers, for a review of his decision after a hearing (*Jacques v. Collins*, 2 Blatchf. 23); that, in the case of books, only the entries which were relevant (*Jacques v. Collins*, 2 Blatchf. 23; *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 174 Fed. 734); and that photographic copies of letters might be made under proper restrictions (*Newcomb v. Burbank*, 159 Fed. 568). Inspection of entries containing the name of a party's customers will rarely be allowed, unless they are clearly relevant. *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 174 Fed. 734; *Roberts v. Walley*, 14 Fed. 167.

in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.¹ The Supreme Court of the United States, overruling a number of cases in the lower courts to the contrary,² has held that this statute does not authorize compulsion of the production of books and papers before trial,³ the court saying that a bill of discovery is the proper remedy if the parties desire inspection in order to prepare for trial.⁴ It has been held that such an order will not be granted when the production of the papers can be compelled by a subpoena *duces tecum* which has been served.⁵ Where a deposition is properly taken under the Revised Statutes before trial, the production of books, papers and other documents can then undoubtedly be compelled by a subpoena *duces tecum*.⁶ It was previously held that the pendency of a bill of discovery was not a bar to such a motion in an action at common law,⁷ and that the motion must be made before the trial.⁸ The statute has been enforced in an

§ 350. ¹ U. S. R. S., § 724, 3 Fed. St. Ann. 2, Pierce Fed. Code, § 7360.

² Exchange Nat. Bank v. Wichita Cattle Co., 61 Fed. 190; Central Nat. Bank v. Tayloe, 2 Cranch, C. C. 427; Jacques v. Collins, 2 Blatchf. 23; Gregory v. Chicago, M. & St. P. R. Co., 10 Fed. 529; Lucker v. Phenix Assur. Co., 67 Fed. 18; Victor G. Bloede Co. v. Joseph Bancroft & Sons, 98 Fed. 175; Cameron Lumber Co. v. Droney, 132 Fed. 304. *Contra*, Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201; Iasigi v. Brown, 1 Curt. 401; Triplett v. Bank, 3 Cranch, C. C. 646; Cassatt v. Mitchell Coal & Coke Co., C. C. A., 150 Fed. 32; reversed for want of jurisdiction of the writ of error, Webster Coal & Coke Co. v. Cas-

satt, 207 U. S. 181. See *Bas v. Steele*, 3 Wash. C. C. 381, Fed. Cas. No. 1,088; *Dunham v. Riley*, 4 Wash. C. C. 126, Fed. Cas. No. 4,155.

³ *Carpenter v. Winn*, 221 U. S. 533, 55 L. ed. 842; reversing C. C. A., 165 Fed. 636.

⁴ *Ibid.*, 221 U. S. 533, 540, 55 L. ed. 842, 845. See *supra*, § 347.

⁵ *Edison El. L. Co. v. U. S. El. L. Co.*, 44 Fed. 294, 300.

⁶ *Am. Lithographie Co. v. Werckmeister*, C. C. A., Nov. 16, 1908, 165 Fed. 426. See *supra*, § 341.

⁷ *Iasigi v. Brown*, 1 Curt. 401, Fed. Cas. No. 6,993.

⁸ *Geyger v. Geyger*, 2 Dall. 332, 1 L. ed. 403; *Bank of U. S. v. Kurtz*, 2 Cranch, C. C. 342.

action to recover treble damages under the Anti-Trust Act.⁹ In an action to recover a penalty, whether brought by a private individual or by the United States, and in a proceeding to enforce a forfeiture of property, the defendant or owner of the property seized cannot be compelled to produce its books or papers or other articles of personal property for the inspection of the opposite party, and should such an inspection be compelled, the judgment may be reversed upon that round alone.¹⁰ It has been said that, as regards inspection at common law, the State practice may now be followed.¹¹

§ 351. Testimony taken before a cause is at issue. Testimony for use in a court of law or equity of the United States may be taken either before or after it is at issue. Testimony taken before a cause is at issue may be taken either before or after it has begun. "Any court of the United States may, in its discretion, admit in evidence in any clause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending according to the laws thereof."¹ Evidence taken by means of a bill to perpetuate testimony may also be admitted in a subsequent suit in equity.² The Equity Rules authorize depositions to be taken, by leave of the court, "when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit."³ Such testimony is then taken in the same manner as testimony taken after issue has been joined.

⁹ *Am. Banana Co. v. U. S.*, 153 Fed. 943.

¹⁰ *Johnson v. Donaldson*, 18 Blatchf. 287; *Boyd v. U. S.*, 116 U. S. 616; 29 L. ed. 746. See *U. S. v. Denicke*, 35 Fed. 407, 410.

¹¹ *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.*, 98 Fed. 175; *Filscolé v. Lancaster*, 70 Fed. 337; *Gray v. Schneider*, 119 Fed. 474. *Contra*, *Lucker v. Phoenix Assur. Co.*, 67 Fed. 18; *Schatz v. Winton Motor Carriage Co.*, 197 Fed. 777.

§ 351. ¹ *U. S. R. S.*, § 867; *Brown v. Worster*, 113 Fed. 20. For a case where the testimony of a

man injured by an accident was taken for use in a contemplated action on behalf of his family to recover for his death, see *Ohio Copper Min. Co. v. Hutchings*, C. C. A., 172 Fed. 201.

² *N. Y. & B. C. P. Co. v. N. Y. C. P. Co.*, 9 Fed. 578.

³ *Eq. Rule 47*, quoted *infra*, § 352. See *Eq. Rule 70 of 1842*. The action of an examiner in adjourning the hearing after a witness is tendered for cross-examination is final, and if the party who offered the witness refuses to produce him for cross-examination his testimony in

§ 352. Testimony taken within the jurisdiction of the court after a cause is at issue. Testimony taken after a cause is at issue is taken differently when taken within, than when taken without, the jurisdiction of the court. The Equity Rules of 1912 make a radical innovation in the pre-existing practice.

"In all trials in equity the testimony of witness shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require."¹

"The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order

chief will be suppressed. *Shapleigh v. Chester El. L. & P. Co.*, 47 Fed. 848. The court may, after a deposition has been concluded, allow further cross-examination. *La Normandie*, C. C. A., 58 Fed. 427; s. c., 40 Fed. 590. For a case where a deposition was admitted when the witness had died before his cross-examination, which had been adjourned at the request of the cross-examiner, see *Celluloid Mfg. Co. v. Arlington Mfg. Co.*, 47 Fed. 4. For a case where a deposition was taken by consent in the absence of the examiner, and a dispute arose see

Ballard v. McCluskey, 52 Fed. 677. It has been held that when the parties stipulate that testimony may be taken before any officer or magistrate qualified to administer oaths without special appointment by the court as an examiner, the deposition thus taken must be filed on record, as required by Equity Rule 67, in cases where an examiner is regularly appointed; and the party in whose behalf the testimony was taken has no right to suppress it. *T. L. Mott Iron Works v. Standard Mfg. Co.*, C. C. A., 48 Fed. 345.

§ 352. ¹ Eq. Rule 46.

of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires."²

"In a case involving the validity or scope of a patent or trademark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause."³

"All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the

² Eq. Rule 47.

³ Eq. Rule 48. In view of the positive language of the Revised Statutes, there may be some question whether the Court can compel the testimony of expert witnesses who live more than one hundred miles from the place of trial to be thus taken. See U. S. R. S., § 863. *Infra*, § 354. The Equity Rules of S. D. N. Y. "5. In the trial of a patent cause whether in open Court or by deposition, or partly in each way, only one expert witness shall be allowed to each side, unless leave shall previously be obtained from the Court on motion made and cause shown." "In cases where under Supreme Court Rule 48 the direct testimony of experts in Patent causes is taken by affidavit, the wit-

nesses shall not give their opinion as to the meaning of any patent claim or specification, but their testimony shall be strictly confined to an explanation of the operation of relevant arts, processes, machines, manufactures or compositions of matter, and of the meaning of terms of art or science and of diagrams or formulæ. If the affidavit or deposition of any expert witness contain matter forbidden by this Rule, or irrelevant or immaterial matter, it shall not be answered by the opposite party, nor shall it be the basis of any cross-examination at the hearing, and the Court at any stage of the cause may strike from any such affidavit or deposition all such matter."

court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.”⁴

“When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.”⁵

“Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.”⁶

“Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk’s office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the

⁴ Eq. Rule 49.

⁶ Eq. Rule 51.

⁵ Eq. Rule 50.

contempt were for not attending, or for refusing to give testimony in, the court. In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories."⁷

"Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case."⁸

"After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order."⁹

"Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court."¹⁰

"After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be kept except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give."¹¹

Originally, the only manner of examining witnesses within the jurisdiction of a court of chancery was by means of written interrogatories and cross-interrogatories, which were prepared by the solicitors and counsel of the respective parties, or by the court, and then submitted to an examiner or one or more commissioners appointed by the court, who examined the witnesses privately by means of them. The testimony thus obtained was kept secret until all the testimony in the cause had been taken.

⁷ Eq. Rule 52.

⁸ Eq. Rule 53.

⁹ Eq. Rule 54.

¹⁰ Eq. Rule 55.

¹¹ Eq. Rule 56.

The time when it could first be inspected was called the time of publication. This method of taking testimony was, like many other parts of equity practice, borrowed from the canon law; with this difference, however, that whereas by the canon law each party before the examination of witnesses was obliged to furnish his adversary and the court with articles containing a specific statement of the facts which he expected to prove by them; in equity, on the other hand, except in a few rare instances, facts, not evidence, are required to be pleaded. So, originally, each party was before publication very much in the dark as to the facts which his antagonist intended to attempt to establish. "It is not surprising, therefore, that the mode of taking testimony in equity fell into disrepute, and finally broke down."¹² Under the Equity Rules of 1842, as subsequently amended,¹³ testimony within the jurisdiction was usually taken orally before an examiner. It was the duty of the examiner to note all of the objections and of the exceptions to questions and answers and to take the testimony subject to them when deciding on their validity.¹⁴ It was held that the court should not inter-

¹² Langdell's Eq. Pl., § 56. See also Langdell's Eq. Pl., §§ 14-19, 57, 58; *Eillert v. Craps*, 44 Fed. 792; *Wood v. Mann*, 2 Sumn. 316. The argument in favor of this practice is stated by Chancellor Kent in *Remsen v. Remsen*, 2 J. Ch. (N. Y.) 495, 499, 500: "Whether examinations shall be secret, and to what extent they shall be carried, suggests much more important considerations. If examinations are protracted, from day to day, for any length of time, there is very great danger of abuse from public examinations, by which parties are enabled to detect the weak parts of the adversary's case, or of their own, and to hunt up or fabricate testimony to meet the pressure or exigency of the inquiry. It is to guard against this abuse, that examinations in chief are not permitted, after publication, and that

courts of law will not grant new trials merely to enable a party to accumulate testimony on any given point, or to oppose that which was taken on the opposite side. It is also upon the same grounds, that a witness, who has been examined in chief before the hearing, cannot be re-examined before the master, without an order, and, then, not to any matter to which he had before been examined; (*Dickens*, 508.); and that a witness, once examined before the master, cannot be re-examined, without an order. (2 Ves. 270. 2 *Maddock's Ch.* 392, 393.) In trials at common law, the cause is heard, and the verdict taken at one sitting, and all opportunity for getting up supplementary proof is precluded."

¹³ Former Eq. Rule 67.

¹⁴ *Appleton v. Ecaubert*, 45 Fed. 281.

fere to prevent irrelevant questions.¹⁵ The only way to object for irrelevancy was for the witness to refuse to answer and then to waive the objection upon a motion to compel him to answer¹⁶ or upon contempt proceedings.¹⁷ Where the witness or the evidence was privileged,¹⁸ or it clearly and affirmatively appeared that the evidence sought could not possibly be competent, material or relevant, which very rarely happened, such a motion would be denied;¹⁹ but a witness ordinarily was compelled to answer all questions which might possibly be relevant or material, provided that he was not privileged.²⁰ It was held that this rule applied to depositions taken upon a commission of *dedimus protestatem*, issued under section eight hundred and sixty-six of the Revised Statutes of the United States, after a general notice by the plaintiff that he desired the evidence to be taken orally;²¹ unless, for special reasons, the court ordered it to be taken upon written interrogatories.²² This system produced great abuses. Records were swollen with irrelevant matter consisting not only of testimony but of discussions between counsel. Before a case could be heard, the courts required that this all be printed, and fees be paid the clerks of the courts for filing the same. The consequence was that a rich and unscrupulous defendant could make litigation so expensive and delay a case so long that poor men feared to assert their rights on the equity side of the courts of the United States. The evil was especially prominent in litigation concerning patents. The new rules have, it is hoped, abolished it forever. It has been held that the taking of depositions before an

¹⁵ *Blease v. Garlington*, 92 U. S. 1, 4-8; 23 L. ed. 521, 522-524.

¹⁶ *Independent Baking Powder Co. v. Boorman*, 137 Fed. 995. See *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211, where the form of the application was a petition for mandamus.

¹⁷ *Butler v. Fayerweather*, C. C. A., 91 Fed. 458.

¹⁸ *Butler v. Fayerweather*, C. C. A., 91 Fed. 458; *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211.

¹⁹ *Independent Baking Powder Co.*

v. Boorman, 137 Fed. 995; *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211; *supra*, § 343.

²⁰ *Perry v. Rubber Tire Wheel Co.*, 138 Fed. 836; *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211.

²¹ *Bischoffsheim v. Baltzer*, 10 Fed. 1; *Encyclopædia Britannica Co. v. Werner Co.*, 138 Fed. 461; *infra*, § 355.

²² *Bischoffsheim v. Baltzer*, 10 Fed. 1.

examiner in an equity suit is not a judicial trial, nor part of a trial, but merely a proceeding preliminary to a trial, and that neither the public, nor the representatives of the press, have the right to be present against the objection of either party.²³ A recent statute directs that testimony in such proceedings in suits by the United States under the Anti-Monopoly Law shall be public.²⁴

§ 353. **Testimony taken after a cause is at issue and beyond the jurisdiction of the court.** It often happens that a witness, whose testimony is needed by either party to a suit in equity, is beyond the jurisdiction of the court. In such a case, his testimony can be taken in six ways,—by deposition, according to the acts of Congress;¹ by a commission under a *dedimus potestatem*;² by letters rogatory;³ in the method prescribed by the laws of the State where the court is held;⁴ and by a special master or examiner,⁵ or a master⁶ appointed by the court where the suit is pending to take testimony in another district, or even in a foreign country.⁷ In such cases, applications to compel witnesses to answer questions or to punish them for contempt, must be made to the court of the district where the testimony is taken;⁸ and if application to the court for subpoenas is necessary, the court of such district must issue them.⁹ Where a party lives without the district, the court has the power to postpone the trial to enable his deposition to be taken, unless he is present in court and within reach of a subpoena.¹⁰

²³ U. S. v. United Shoe Machinery Co. of New Jersey, 198 Fed. 870. A bill to invoke such proceedings open to the public has been introduced in Congress.

²⁴ Act of March 3d, 1913.

§ 353. ¹ *Infra*, §§ 354, 355.

² *Infra*, §§ 356, 357.

³ *Infra*, § 358.

⁴ 27 St. at L. 17; § 359, *infra*.

⁵ White v. Toledo R. Co., C. C. A., 79 Fed. 133; North Carolina R. Co. v. Drew, 3 Woods, 691; *Re Steward*, 29 Fed. 813; Johnson Steel Street Rail Co. v. North Branch Steel Co., 48 Fed. 191; *Re Allis*, 44 Fed. 217; *Re Spofford*, 62 Fed. 443; *Re Rob-*

ert Gair Co., C. C. A., 196 Fed. 492, 493; U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 232. But see *Arnold v. Chesebrough*, 35 Fed. 16, and *Celluloid Mfg. Co. v. Russell*, 35 Fed. 17.

⁶ Consolidated Fastener Co. v. Columbian B. & T. Co., 85 Fed. 54.

⁷ Bate Refrigerating Co. v. Gill-ette, 28 Fed. 673.

⁸ U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 232.

⁹ U. S. v. Standard Sanitary Mfg. Co., 187 Fed. 232. But see Eq. Rule 52.

¹⁰ Frost v. Barber, 173 Fed. 847.

§ 354. **Depositions de bene esse under the acts of Congress.** The acts of Congress which authorize depositions to be taken *de bene esse*, apply to cases at common law and in equity.¹ They are as follows: "The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a Circuit Court, or any clerk of a District or Circuit Court, or any chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, judge of a County Court or Court of Common Pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness, and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice therein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court."² Every person deposing

§ 354. ¹ *Stegner v. Blake*, 36 Fed. 183; U. S. R. S., § 863, taken before a judge of probate if his court is a court of record, *Merrill v. Dawson*, Hempst. 563; s. c.,

² U. S. R. S., § 863. It has been held that the deposition may be *sub nom.* *Fowler v. Merrill*, 11

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as provided in the preceding section, shall be cautioned and sworn to tell the whole truth, and carefully examined. His testimony shall be reduced to writing, or typewriting, by the officer taking the deposition, or by some other person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent."³

"Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it was taken; or it shall, together with a certificate of the reasons as aforesaid of taking it, and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment he is unable to travel and appear at court, such deposition shall not be used in the cause."⁴ These sections do not apply to the taking of depositions in foreign countries.⁵ A deposition cannot be taken under these statutory provisions after an appeal to the Supreme Court or the Circuit Court of Appeals has been perfected; for the case is then no longer "depending" in a Circuit Court.⁶ This practice has no application to cases pending in the Supreme Court.⁷ Either party to an action at law, or a suit in equity, may be thus examined under oath when the

How. 375, 13 L. ed. 736; or any county judge, *Voce v. Lawrence*, 4 McLean, 203. It has been held that the deposition cannot be taken before a township justice, *Schutte v. Thompson*, 15 Wall. 152, 21 L. ed. 123; or a judge of a county commissioner's court, *Garey v. Union Bank*, 3 Cranch, C. C. 91; or a judge of a city court, *Freeman v. Holmead*, 5 Cranch, C. C. 162.

³ U. S. R. S., § 864, as amended May 13, 1900.

⁴ U. S. R. C., § 865.

⁵ *Cortes Co. v. Tannhauser*, 18 Fed. 667; *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129; *The Alexandra*, 104 Fed. 904; *Compania Azucarera Cubana v. Ingraham*, Maxwell & Beals, 180 Fed. 516. But see *Bischoffsheim v. Baltzer*, 10 Fed. 1.

⁶ *Richter v. Jerome*, 25 Fed. 679, 681; *Slaughter-House Cases*, 10 Wall. 273, 19 L. ed. 915.

⁷ *The Argo*, 2 Wheat. 287, 4 L. ed. 241; *Richter v. Jerome*, 25 Fed. 679, 681.

other statutory conditions exist.⁸ It has been held that a witness or a party, not ancient or infirm, cannot be examined under this statute *de bene esse* before issue joined, although he resides more than one hundred miles from the place of trial.⁹ The magistrate should write down and return to the court any species of evidence offered before him, and cannot exclude evidence on the ground that it is not pertinent. It belongs to the court, on the return of the deposition, to determine whether the evidence is pertinent or not.¹⁰ The relevancy of a question and the right to have the deposition taken will be tested, if the witness refuses to answer, and an application is made to punish him for contempt.¹¹ The statutory provisions, being in derogation of the common law, are strictly construed.¹² Consequently, before depositions thus taken can be read in evidence, the party that

⁸ *Lowrey v. Kusworm*, 66 Fed. 539; *Supra*, § 339.

⁹ *Stevens v. Mo., K. & T. Ry. Co.*, 104 Fed. 934; *Flower v. MacGinniss*, C. C. A., 112 Fed. 377; *Hartman v. Feenaughty*, 139 Fed. 887. *Contra*, *Lowrey v. Kusworm*, 66 Fed. 539.

¹⁰ *Ex parte Judson*, 3 Blatchf. 89; *Adee v. J. L. Mott Iron Works*, 46 Fed. 39. See *Thomson-Houston El. Co. v. Jeffrey Mfg. Co.*, 83 Fed. 614.

¹¹ *Ex parte Peck*, 3 Blatchf. 113; *Ex parte Judson*, 3 Blatchf. 89. Where the witness or the evidence is privileged, *Butler v. Fayerweather*, C. C. A., 91 Fed. 458; *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211; or it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material or relevant, and that it would be an abuse of the process of the court to compel its production, as for example, when it relates to matters alleged in part of a pleading, which has been previously stricken out by the court; *Independent Baking Powder Co. v. Boorman*, 137 Fed. 995. Such a motion was denied: In *dependent Bak-*

ing Powder Co. v. Boorman, 137 Fed. 995; *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211; *supra*, § 343; but a witness may be compelled to answer all questions, which may possibly be relevant or material, provided that he is not privileged; *Perry v. Rubber Tire Wheel Co.*, 138 Fed. 836; *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211. If there is any doubt on the question of its relevancy, the motion to compel an answer will be granted. *Independent Baking Powder Co. v. Boorman*, 137 Fed. 995; *Perry v. Rubber Tire Wheel Co.*, 138 Fed. 836; *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 139 Fed. 843. Where the master certified to the court a question which a witness refused to answer, and the proponent failed to press the motion to compel an answer it was held that he thereby waived his right to the same. *Dr. Peter H. Fahrney & Sons Co. v. Ruminer*, C. C. A., 153 Fed. 735.

¹² *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174.

offers them must prove that compliance was made with all the requirements of the statutes, or else that these requirements were waived by the opposite party.¹³ There is no presumption that a deposition was properly taken.¹⁴ The certificate of the magistrate is *prima facie* evidence of such a compliance.¹⁵ His certificate that the witness lives more than one hundred miles from the place of trial is *prima facie* evidence of that fact,¹⁶ and when that appears by such certificate, or by testimony in the deposition, it will be presumed, without further proof, that the witness is, at the time of trial, more than one hundred miles away.¹⁷ When the distance is great the court may take judicial notice of the fact.¹⁸ A witness lives, within the meaning of the statute, at a place "where he can be found and is sojourning, residing or abiding for any lawful purpose."¹⁹ It has been held that he lives at a place where he has gone for his health to remain for an uncertain time.²⁰ If the witness does not live more than one hundred miles from the place of trial the party who has taken his deposition must prove that his disability to attend still continues, and that due diligence was used in seeking to procure his attendance, before the deposition can be read in evidence.²¹ The previous issue of a subpoena is not essential if proof of the inability of the witness is otherwise given.²² If it appears that

fion was denied; Independent Bak-

¹³ Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Harris v. Wall, 7 How. 693, 12 L. ed. 875.

¹⁴ Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Banks v. Miller, 1 Cranch, C. C. 543.

¹⁵ Harris v. Wall, 7 How. 693, 12 L. ed. 875; Thorpe v. Simmons, 2 Cranch, C. C. 195.

¹⁶ Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. ed. 243; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736; Tooker v. Thompson, 3 McLean, 92.

¹⁷ Texas & P. Ry. Co. v. Reagan, C. C. A., 118 Fed. 815.

¹⁸ Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723.

¹⁹ Ibid.

²⁰ Ibid. The fact that a witness is a seaman on a gunboat stationed in a harbor, but liable to be ordered to some other place, is, it seems, not sufficient to authorize the taking of his testimony *de bene esse* in this manner. The Samuel, 1 Wheat. 9, 4 L. ed. 23.

²¹ Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 612, 8 L. ed. 243, 246; The Samuel, 1 Wheat. 9, 4 L. ed. 23; Weed v. Kellogg, 6 McLean, 44; Jones v. Greenolds, 1 Cranch, C. C. 339; Penn v. Ingraham, 2 Wash. C. C. 487; Baumert v. Day, 3 Wash. C. C. 343; Pettibone v. Derringer, 4 Wash. C. C. 215; Read v. Bertrand, 4 Wash. C. C. 558; Brown v. Galloway, Pet. C. C. 291.

²² Park v. Willis, 1 Cranch, C. C.

at the time when the deposition was taken the witness lived more than one hundred miles from the place of trial, the opposite party, upon whom the burden then rests, may prove that at the time of trial he lives within one hundred miles.²³ Actual residence and not domicile is the test.²⁴ Whether a witness resides more than one hundred miles from the place of trial is to be determined by the actual distance by usual routes.²⁵ It has been held that parol evidence is inadmissible to show a sufficient reason, where the magistrate's certificate gives one that is insufficient.²⁶ No order or rule of the court is necessary in order to take depositions in this manner.²⁷ Although one deposition has been already taken, yet a second deposition of the same witness may be taken without an order of the court.²⁸ Any one, even a party to the suit, may serve the notice.²⁹ If the United States be a party, it seems that service of the notice should be made upon the nearest district attorney.³⁰ It has been held if an attorney has been employed in a case and is still em-

357; *Leatherberry v. Radcliffe*, 5 Cranch, C. C. 550.

²³ *Penn v. Ingraham*, 2 Wash. C. C. 487; *Brown v. Galloway*, Pet. C. C. 291; *Pettibone v. Derringer*, 4 Wash. 215; *Russell v. Ashley*, Hempst. 546, 549; *Weed v. Kellogg*, 6 McLean, 44; *Whitford v. Clark Co.*, 119 U. S. 522, 30 L. ed. 500; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. ed. 243.

²⁴ *Frost v. Barber*, 173 Fed. 848.

²⁵ *Ex parte Beebee*, 2 Wall. Jr. 127.

²⁶ *Wheaton v. Love*, 1 Cranch, C. C. 451. But see *Dunkle v. Worcester*, 5 Biss. 102. It is the proper practice for the magistrate to state in his certificate that he was not of counsel for either party nor interested in the event of the cause, *Gartside Coal Co. v. Maxwell*, 20 Fed. 187; *Donohue v. Roberts*, 19 Fed. 863. But see *Miller v. Young*, 2 Cranch, C. C. 53; *Peyton v. Veitch*, 2 Cranch, C. C. 123; *Stewart v.*

Townsend, 41 Fed. 121. It has been held that the magistrate's certificate need not state the witness was "sworn to testify the whole truth" if it states that the witness was sworn. *Bussard v. Catalino*, 12 Cranch, C. C. 421. But see *Rainer v. Haynes*, Hempst. 689; *Garrett v. Woodward*, 2 Cranch, C. C. 190. Nor, perhaps, that the witness is not a resident of the district where the case is pending. *Sage v. Tauszky*, 6 Cent. L. J. 7.

²⁷ *Pettibone v. Derringer*, 4 Wash. 215; *Buckingham v. Burgess*, 3 McLean, 368. But see *Walker v. Parker*, 5 Cranch, C. C. 639.

²⁸ *Nash, tenant of Connett v. Williams*, 20 Wall. 226, 22 L. ed. 254. See *U. S. v. Tilden*, Fed. Cas. No. 16,522.

²⁹ *Henning v. Boyle*, 112 Fed. 397; *Young v. Davidson*, 5 Cranch, C. C. 515.

³⁰ *The Argo*, 2 Gall. 314.

ployed therein, notice should be given to him, although he has never formally appeared on the record.³¹ The service of the notice, at least when made upon the party, must be personal, unless otherwise expressly authorized as provided for in the statute.³² The notice must be served a reasonable time before the taking of the deposition.³³ The notice must show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives the party serving it a right to have the deposition taken; so that the party upon whom it is served may be able to judge whether it is necessary for him to attend.³⁴ It has been held that the court has no jurisdiction to vacate or

³¹ Allen v. Blunt, 2 M. & W. 121.

³² Carrington v. Stimson, 1 Curt. 437. *Contra*, Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375. 13 L. ed. 736.

³³ Jamieson v. Willis, 1 Cranch, C. C. 566; Renner v. Howland, 2 Cranch, C. C. 441; Barrell v. Simonton, 3 Cranch, C. C. 681; Am. Ex. Nat. Bank v. First Nat. Bank, C. C. A., 82 Fed. 961. An hour's notice has been held to be reasonable. Leiper v. Bickley, 1 Cranch, C. C. 29; Bowie v. Talbot, 1 Cranch, C. C. 247; Atkinson v. Glenn, 4 Cranch, C. C. 134. But see Renner v. Howland, 2 Cranch, C. C. 441; Irving v. Sutton, 1 Cranch, C. C. 567. It seems that it is not proper to serve a notice for the taking of a deposition during a term at which the cause could be tried, Allen v. Blunt, 2 W. & M. 121; Bell v. Nimmon, 4 McLean, 539; *Contra*, Union Pac. Ry. Co. v. Reese, C. C. A., 56 Fed. 288; or so short a time before as not to allow an attorney, if he attend, to reach the court before the commencement of that term. Bell v. Nimmon, 4 McLean, 539. Where the parties and their attorneys lived in the place where the deposition was taken, a

notice that the deposition would be taken "before William G. Peckham, Esq., Notary Public, or some other officer authorized by law to take depositions," etc., was held sufficient when the deposition was taken before another notary. Gormley v. Bunyan, 138 U. S. 623, 632, 34 L. ed. 1086, 1089.

³⁴ Aldrich v. Nye, U. S. C. C., S. D. N. Y., Lacombe, J., Oct. 31, 1891; Harris v. Hall, 7 How. 693, 12 L. ed. 875. *Contra*, Debutts v. McCulloch, 1 Cranch, C. C. 28; Sage v. Tauszky, 6 Cent. L. J. 7. If the witnesses' Christian names are unknown, the inclusion of their surnames in the notice will be sufficient. Claxton v. Adams, 1 MacAr. (D. C.) 496. See Carrington v. Stimson, 1 Curt. 437. If the notice state that the taking of depositions will be adjourned from day to day, it seems that depositions taken upon an adjourned day will be received. Knode v. Williamson, 17 Wall. 586, 21 L. ed. 670; Sage v. Tauszky, 6 Cent. L. J. 7. But see Kirkpatrick v. B. & O. R. Co., 24 Pittsb. L. J. 51. A notice that a party will on the same day take depositions of witnesses in different cities is unreasonable; and such deposition will be suppressed; even,

extend the notice.³⁵ Under the former practice, it was customary to file in the clerk's office, the notice, or a copy thereof, with an affidavit showing proof of service thereof and proof of the pendency of the suit, and the clerk then issued a subpoena.³⁶ Whether this has been denied by the new Equity Rules has not yet been decided.³⁷ It seems insufficient to swear the witness to tell the whole truth concerning such interrogatories as may be put to him. He should be sworn or should affirm to tell the whole truth as far as he knows concerning the matter in controversy between the parties.³⁸ It seems that if the witness is properly sworn, it is necessary that he be also cautioned to testify the whole truth;³⁹ and that the oath may be administered after the deposition has been reduced to writing, as well as before.⁴⁰ If the witness has conscientious scruples about taking an oath, he may affirm.⁴¹ The certificate of the magistrate that the witness has such conscientious scruples is sufficient evidence thereof.⁴²

It has been held that a witness may be compelled to attend for the purpose of having his deposition taken *de bene esse*, either by a subpoena *duces tecum*, or the writ of *habeas corpus ad testificandum*, but that a commissioner cannot issue a writ of *habeas corpus* to take a person from a jail for the purpose of giving his deposition before such a commissioner.⁴³ A subpoena *duces tecum* may be issued by the court to compel the production

it has been held, if the opposite party appeared at each by counsel and cross-examined, provided that before the direct examination the objection was specifically stated, and although such party had served similar notices of the taking of depositions at other times and places on his own behalf. *Uhle v. Burnham*, 44 Fed. 729.

³⁵ *Kline Bros. & Co. v. Liverpool & London & Globe Ins. Co.*, 184 Fed. 969.

³⁶ *Davis v. Davis*, 90 Fed. 791; *Ex parte Judson*, 3 Blatchf. 89.

³⁷ See Eq. Rules 52, 54.

³⁸ *Shutte v. Thompson*, 15 Wall.

152; *Pendleton v. Forbes*, 1 Cranch, 507; *Garrett v. Woodward*, 2 Cranch 190; *Rainer v. Haynes*, Hempst. 689; *Wilson S. M. A. v. Jackson*, 1 Hughes, 295; *U. S. v. Smith*, 4 Day, 121.

³⁹ *Doe d. Moore v. Nelson*, 3 McLean, 383; *Brown v. Piatt*, 2 Cranch, 253. *Contra*, *Luther v. The Merritt Hunt*, 1 Newb. Adm. 4.

⁴⁰ *Toker v. Thompson*, 3 McLean, 92.

⁴¹ U. S. R. S., § 1.

⁴² *Elliot v. Hayman*, 2 Cranch, 678.

⁴³ *Ex parte Peck*, 3 Blatchf. 113; *U. S. v. Tilden*, 10 Ben. 566.

of books and papers in connection with such deposition.⁴⁴ Under the former practice, a subpoena *duces tecum* could only be issued by an order of the court.⁴⁵ Whether the new Equity Rules permit such a subpoena now to be issued by the officer taking the deposition has not yet been decided.⁴⁶ A party cannot be compelled by a subpoena to produce papers, books &c., which would not be material or competent as evidence, merely for the purpose of refreshing his memory,⁴⁷ but the production of papers which are material may be thus compelled,⁴⁸ not, however, it has been held, by the client from an attorney, who has a lien upon the same.⁴⁹

The rules concerning the exclusion of evidence claimed to be incompetent, irrelevant, or immaterial, are the same as those in depositions taken within the original jurisdiction.⁵⁰ A witness will be compelled to answer any question that may possibly be material, subject to his right to be protected in his constitutional privilege.⁵¹ It has been held that after a party has examined a witness in chief under the statutory provisions and demanded an adjournment, he has no right to withdraw the proceedings, and that any party in interest may compel such witness to appear and submit to cross-examination.⁵² Either party may obtain an order compelling the return of a deposition thus taken.⁵³ After a deposition has been taken, the court may allow its return for cross-examination, where the counsel for the party thereto entitled has not attended because of a reasonable excuse,⁵⁴ or it may allow a further cross-examination on newly-discovered facts.⁵⁵ The court has the power to compel the opening of such a deposition before the trial upon the motion of either party against the objection of the other.⁵⁶ It is the safer practice to

⁴⁴ U. S. v. Tilden, Fed. Cas. No. 16,522; Davis v. Davis, 90 Fed. 791.

⁴⁵ Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753; *supra*, § 341.

⁴⁶ See Eq. Rule 52.

⁴⁷ *Ex parte* Peck, 3 Blatchf. 113; U. S. v. Tilden, 10 Ben. 566.

⁴⁸ Davis v. Davis, 90 Fed. 791.

⁴⁹ *Ibid*.

⁵⁰ *Supra*, §§ 339, 343.

⁵¹ Perry v. Rubber Tire Wheel

Co., 138 Fed. 836; Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co., 139 Fed. 843.

⁵² *Ex parte* Barnes, 1 Sprague, 133; *Re* Rindskopf, 24 Fed. 542.

⁵³ First Nat. Bank v. Forest, 44 Fed. 246.

⁵⁴ Pennsylvania Sugar Refining Co. v. Am. Sugar Refining Co., 171 Fed. 579.

⁵⁵ The Normandie, 40 Fed. 596.

⁵⁶ U. S. v. Tilden, 10 Ben. 170.

have the witness sign his deposition.⁵⁷ No notice of filing a deposition need be given to a party who knows it has been taken.⁵⁸ A State statute requiring depositions to be filed a certain number of days before trial was not followed by the Federal court.⁵⁹ An objection to the admissibility of such a deposition, upon the ground that it is not shown that the witness is beyond the reach of a subpoena at the time of the trial, must be made when it is offered in evidence, and will not be considered when interposed for the first time in the court of review.⁶⁰ An objection to an entire deposition is untenable if any part thereof is admitted in evidence.⁶¹ It has been held that a deposition should not be suppressed because the witness refused to answer competent questions, but that the proper remedy is an order compelling the witness to answer the same.⁶² Where such witness is a defendant, his answer cannot be stricken out because of such refusal.⁶³ Either party may offer part of the deposition, provided that it is not a fragment which cannot be understood without reference to what is omitted;⁶⁴ but, in such a case, the other party may offer what was omitted.⁶⁵ Where the taker of the deposition fails to offer the same in evidence, the opposing party may offer all or a part thereof and the taker may then put in evidence the rest.⁶⁶ Where the witness is present upon the trial, and is tendered in open court by one party to the other, the latter cannot read his deposition, except to impeach testimony then given by the witness orally.⁶⁷

§ 355. Form of deposition under acts of Congress.

The deposition should state, either in its body or in its caption, the name of the court where the cause is pending,¹ the title of

⁵⁷ Thorpe v. Simmons, 2 Cranch, 195.

⁵⁸ Nelson v. Woodruff, 1 Black, 156; Leatherberry v. Radcliffe, 5 Cranch, 550. For practice when a deposition is destroyed, see Stebbins v. Duncan, 108 U. S. 32.

⁵⁹ Walker v. Collins, 59 Fed. 70.

⁶⁰ Columbus Ry. Co. v. Patterson, C. C. A., 143 Fed. 245.

⁶¹ Ritterbusch v. Atchison, T. & S. F. Ry. Co., 198 Fed. 46.

⁶² H. Scherer & Co. v. Everest, C. C. A., 168 Fed. 822.

⁶³ Barnes v. Trees, 194 Fed. 230.

⁶⁴ Crotty v. Chicago Great Western Ry. Co., C. C. A., 169 Fed. 593.

⁶⁵ Ibid.

⁶⁶ H. Scherer & Co. v. Everest, C. C. A., 168 Fed. 822.

⁶⁷ Texas & P. Ry. Co. v. Wilder, C. C. A., 92 Fed. 953; Texas & P. Ry. Co. v. Watson, C. C. A., 112 Fed. 402.

§ 355. ¹ Van Ness v. Heineke, 2 Cranch, C. C. 259.

the cause,² and the place where the deposition is taken.³ If the deponent reduces the deposition to writing, the magistrate must certify that it was reduced to writing by the deponent in his presence.⁴ Consent may waive objection to the person who takes down the deposition.⁵ Consent may waive an omission by the witness to sign the testimony, which was taken down in short-

² *Peyton v. Veitch*, 2 Cranch, C. C. 123; *Smith v. Coleman*, 2 Cranch, C. C. 237; *Centre v. Keene*, 2 Cranch, C. C. 198; *Waskern v. Diamond*, Hempst. 701; *Allen v. Blunt*, 2 W. & M. 421. But see *Voce v. Lawrence*, 4 McLean, 203; *Buckingham v. Burgess*, 3 McLean, 368; *Pannill v. Eliason*, 3 Cranch, C. C. 358; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736.

³ *Pendleton v. Forbes*, 1 Cranch, C. C. 507; *Tooker v. Thompson*, 3 McLean, 92. A slight error in the caption, such as a mistake in spelling the name of a party, *Van Ness v. Heineke*, 2 Cranch, C. C. 259; or the omission from the title of the cause of the name of one of several plaintiffs or defendants, is not a ground of suppressing the deposition. *Pamill v. Eliason*, 3 Cranch, C. C. 358; *Egbert v. Citizens' Ins. Co.*, 7 Fed. 47; *Merritt v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375. See also *Voce v. Lawrence*, 4 McLean, 203. The heading of the notice: "United States of America, State of Illinois, County of Cook, ss. In the Circuit Court of the United States," was held not sufficiently irregular to avoid the deposition. *Gormley v. Bunyan*, 138 U. S. 623, 634, 34 L. ed. 1086, 1090. The omission of the name of the county from the caption is not a

fatal defect. *Van Ness v. Heineke*, 2 Cranch, C. C. 259.

⁴ *Edmonson v. Barrel*, 2 Cranch, C. C. 228; *Rainer v. Haynes*, Hempst. 689; *Pettibone v. Derringer*, 4 Wash. 215. Before the amendment of May 13, 1900, it was held that the certificate should show that the magistrate reduced the testimony in writing himself, or that it was done by the witness in his presence. *Cook v. Burnley*, 11 Wall. 659, 20 L. ed. 29; *U. S. v. Smith*, 4 Day (Conn.) 121; *Bell v. Morrison*, 1 Pet. 351, 355, 7 L. ed. 174, 176; *Bussard v. Catalino*, 2 Cranch, C. C. 421; *Donohue v. Roberts*, 19 Fed. 863. *Contra*, *Vasse v. Smith*, 2 Cranch, C. C. 31; *Van Ness v. Heineke*, 2 Cranch, C. C. 259; *Centre v. Keen*, 2 Cranch, C. C. 198; *Elliott v. Piersol*, 1 Pet. 328, 335, 7 L. ed. 164, 168; *Cook v. Burnley*, 11 Wall. 659, 20 L. ed. 29. But see *Vasse v. Smith*, 2 Cranch, C. C. 31; *U. S. v. Smith*, 4 Day (Conn.), 121; *Marstin v. McRae*, Hempst. 688; *Rainer v. Haynes*, Hempst. 689. In one case, a deposition was rejected because the magistrate certified that "the form," an evident slip of the pen for "the same," which were the words of the statute then in force, "was reduced to writing." *Voce v. Lawrence*, 4 McLean, 203; *Burton v. Simmons*, 2 Cranch, C. C. 195.

⁵ *Stewart v. Townsend*, 41 Fed. 121.

hand.⁶ It has been said that a witness, upon a second examination, may read over and subscribe as his second deposition, a copy of one formerly made by him in his case.⁷ The objection that the magistrate does not certify that the deposition was signed by the witness in his presence, is not fatal.⁸ A mistake in the name of witness in the notarial certificate will not make the deposition inadmissible, when the name is correctly stated in the caption.⁹ The certificate should state whether the parties were or were not present or represented,¹⁰ and show the reasons for which the deposition was taken.¹¹ The notice need not be attached to the deposition.¹² Except under extraordinary circumstances, copies instead of the originals of exhibits or so much thereof as is required by either party, must be annexed to the deposition.¹³ If the deposition is sent by mail, the magistrate should certify that it was retained by him until sealed up and directed to the court.¹⁴ The certificate need not state that the deposition has been sealed, provided that it appears by the

⁶ *Columbus Ry. Co. v. Patterson*, C. C. A., 143 Fed. 245.

⁷ *Samuel Bros. & Co. v. Hostetter*, C. C. A., 118 Fed. 257, 258, 259.

⁸ *Van Ness v. Heineke*, 2 Cranch, C. C. 259; *Centre v. Keen*, 2 Cranch, C. C. 198. If the deposition bears the witness' signature and appears to have been reduced to writing by the magistrate, it is sufficient, although the certificate does not say that it was signed by the witness. *Bussard v. Catalino*, 2 Cranch, C. C. 421. But see *Cook v. Burnley*, 11 Wall. 659, 20 L. ed. 29; *Donahue v. Roberts*, 19 Fed. 863.

⁹ *Columbus Ry. Co. v. Patterson*, C. C. A., 143 Fed. 245.

¹⁰ *Curtis v. Railway Co.*, 6 McLean, 401.

¹¹ *Shutte v. Thompson*, 15 Wall. 152, 21 L. ed. 123; *Sage v. Tauszky*, 6 Cent. L. J., 7; *Harris v. Wall*, 7 How. 693, 12 L. ed. 875; *Woodward v. Hall*, 2 Cranch, C. C. 235; *Wheaton v. Love*, 1 Cranch, C. C. 451;

Jones v. Knowles, 1 Cranch, C. C. 523. See *supra*, § 355. It has been held that a certificate sufficiently shows the reason for making depositions, if the caption of the deposition states when the depositions were taken, without giving the distance from the place of taking to the place of trial, where the distance is in fact, and is well known by all parties to be more than one hundred miles from the place of trial. *Egbert v. Citizens' Ins. Co. of Mo.*, 7 Fed. 47.

¹² *Stewart v. Townsend*, 41 Fed. 121.

¹³ *Dancel v. Goodyear Shoe-Machinery Co.*, U. S. C. C., D. Mass., 1905. See *Illinois Car & Eq. Co. v. Linstroth Wagon Co.*, C. C. A., 112 Fed. 737; U. S. R. S., § 869.

¹⁴ *Shankwiker v. Reading*, 4 McLean, 240; *Jones v. Neale*, 1 Hughes, 268. But see *Stewart v. Townsend*, 41 Fed. 121.

envelope that the deposition was sealed.¹⁵ If the magistrate have an official seal under which he usually certifies his acts, it seems that this certificate should be under that seal.¹⁶ It seems that it will be presumed that he occupies the official position which he assumes in his certificate;¹⁷ certainly so if he be a notary public and certifies under his notarial seal;¹⁸ and this may always be proved by oral testimony like any other material fact.¹⁹ The deposition may be directed to either the judge or the clerk of the court.²⁰ It cannot be read in evidence if intentionally opened anywhere but in court,²¹ except by consent, which it will be well to have appear by writing duly signed and filed with or indorsed on the deposition.²² Where the certificate fails to state certain material facts, by leave of the court the deposition may be withdrawn from the clerk's office, the certificate amended, and the deposition then refiled.²³ If an attorney appear and cross-examine a witness without objection, he thereby waives any lack of notice, or irregularity in the notice,²⁴ or in the form and manner of the proceedings,²⁵ or, it seems an incompetency in the witness then known to him,²⁶ or

¹⁵ *Egbert v. Citizens' Ins. Co. of Mo.*, 7 Fed. 47, 50. If the deposition is sealed up with the seal of a corporation, across which are written the name or the names of the person or persons who took the deposition, it is sufficient. *Re Thomas*, 35 Fed. 337.

¹⁶ *Paul v. Lowry*, 2 Cranch, C. C. 628. But see *Price v. Morris*, 5 McLean, 4.

¹⁷ *Ruggles v. Bucknor*, 1 Paine, 358; *Price v. Morris*, 5 McLean, 4; *Vasse v. Smith*, 2 Cranch, C. C. 31; *Whitney v. Hunt*, 5 Cranch, C. C. 120. But see *Tooker v. Thompson*, 3 McLean, 92.

¹⁸ *Dinsmore v. Maroney*, 4 Blatchf. 416.

¹⁹ *Paul v. Lowry*, 2 Cranch, C. C. 628; *Dunlop v. Munroe*, 1 Cranch, C. C. 536.

²⁰ *Thorpe v. Orr*, 2 Cranch, C. C.

335; *Whitney v. Hunt*, 5 Cranch, C. C. 120.

²¹ *Béale v. Thompson*, 8 Cranch, 70; *The Roscius*, 1 Brown, Adm. 442; *Re Thomas*, 35 Fed. 337. The accidental opening in the mail of an envelope containing a deposition taken by a commission under Rule 67 does not authorize the suppression of the deposition. *Eilert v. Craps*, 44 Fed. 164.

²² *The Roscius*, 1 Brown, Adm. 442.

²³ *Gartside Coal Co. v. Maxwell*, 20 Fed. 187; *Donahue v. Roberts*, 19 Fed. 863; *Leatherberry v. Radcliffe*, 5 Cranch, C. C. 550.

²⁴ *Dinsmore v. Maroney*, 4 Blatchf. 416.

²⁵ *Shutte v. Thompson*, 15 Wall. 152, 21 L. ed. 123; *Re Thomas*, 35 Fed. 822.

²⁶ *U. S. v. One Case*, 1 Paine, 400.

any other formal defect. His presence, however, if he declines to take any part in the proceedings, does not.²⁷ It is the safer and the usual practice for the counsel present to note on the record all objections to the form of questions; and to the admission of an exhibit; and a failure to note such an objection might be held to be a waiver by a party who was present or represented at the examination.²⁸ The matter objected to should be specifically pointed out, and the grounds of the objection stated.²⁹ Irregularities are waived by consent to open depositions "without prejudice to any objections to the inclosed deposition other than relating to publication and opening, which is hereby waived."³⁰ An objection to the failure of a witness to produce a paper to which he referred, or which was called for, can only be made by a motion to suppress the deposition.³¹ In general, all defects in form³² or to the competency or relevancy of evidence³³ can only be raised by a motion to suppress the deposition, which is seasonably made before the case is called for trial,³⁴ and the court may, and usually will, when such a motion is granted, allow an adjournment of the hearing in order that the testimony may be taken again, provided that the objection can then be obviated.³⁵ The denial of such a motion is no ground for the reversal of a judgment at common law, unless

²⁷ *Harris v. Wall*, 7 How. 693, 12 L. ed. 875.

²⁸ *Cf.* Equity Rule 67; S. C. Rule 13, *Illinois Car. & Eq. Co. v. Linstroth Wagon Co.*, C. C. A., 112 Fed. 737; *Persons v. Beling*, 116 Fed. 877.

²⁹ *Persons v. Beling*, 116 Fed. 877.

³⁰ *Stewart v. Townsend*, 41 Fed. 121.

³¹ *Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186; *Winans v. N. Y. & E. R. Co.*, 21 How. 88, 16 L. ed. 68. As to the transmission and identification of exhibits, see *Giles v. Paxson*, 36 Fed. 882; *Bird v. Halsy*, 87 Fed. 671; *U. S. v. Fifty Boxes*, 92 Fed. 601.

³² *Claxton v. Adams*, 1 MacA. (D. C.) 496; *Bank of Danville v. Trav-ers*, 4 Biss. 507; *Brooks v. Jenkins*, 3 McLean 432; *Uhle v. Burnham*, 44 Fed. 729, 730; *Howard v. Stillwell*, B. M. Co., 139 U. S. 199, 35 L. ed. 147; *Bibb v. Allen*, 149 U. S. 481, 488, 37 L. ed. 819, 822; *Samuel Bros. & Co. v. Hostetter*, C. C. A., 118 Fed. 257. See *Dickerson v. Matheson*, 50 Fed. 73, 75.

³³ *Ward v. Cochran*, C. C. A., 71 Fed. 127.

³⁴ *Bibb v. Allen*, 149 U. S. 481, 488, 37 L. ed. 819, 822.

³⁵ *Luther v. The Merritt Hunt*, 1 Newb. Adm. 4; *Doe d. Moore v. Nelson*, 3 McLean 383.

upon the trial an objection is duly made to the admission of the evidence and an exception taken.³⁶

§ 356. Commissions issued under a *dedimus potestatem*. The Revised Statutes provide that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage." "And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five shall not apply to any depositions to be taken under the authority of this section."¹ This statute applies to criminal prosecutions,² informations for forfeitures,³ actions at law,⁴ and cases in equity.⁵ The words "common usage," when applied to a suit in equity, signify the ordinary practice of courts of equity.⁶ It has been held that the usage referred to is the common usage at the time of the revision of the Statutes of the United States in 1874;⁷ that it does not direct the Federal courts to adopt all subsequent laws of the States wherein they sit;⁸ and where, prior to 1874, the Federal courts within a district had adopted a practice of their own, such practice may be continued;⁹ that accordingly in the Southern District of New York, those courts, even when sitting at common law, are not bound by the sections of the State Code of Civil Procedure regulating the execution of commissions to take testimony in foreign countries, but may take them in accordance with the old practice in the district upon written direct and cross-interrogatories; and when the answers of the witnesses are in a foreign language, they may be translated by the commissioner or under his direction, and only the answer, as thus interpreted, be returned;¹⁰ but that in dis-

³⁶ *Union Pac. Ry. Co. v. Reese*, C. C. A. 56 Fed. 288. Cf. *Zych v. Am. Car & Foundry Co.*, 127 Fed. 723.

§ 356. ¹ U. S. R. S., § 866; *Jones v. Oregon C. R. Co.*, 3 Sawyer, 523; *North American Transportation & Tr. Co. v. Howells*, C. C. A., 121 Fed. 694.

² *U. S. v. Fifty Boxes and Packages of Lace*, 92 Fed. 601.

³ *U. S. v. Cameron*, 15 Fed. 794; *U. S. v. Wilder*, 14 Fed. 393.

⁴ *Peters v. Provost*, 1 Paine, 64.

⁵ *Bischoffsheim v. Baltzer*, 10 Fed. 1.

⁶ *U. S. v. Parrott*, 1 McAll. 447.

⁷ *U. S. v. Fifty Boxes and Packages of Lace*, 92 Fed. 601.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

tricts where there is no settled practice the State practice should be followed.¹¹ In a case of doubtful authority, the condition that a safe conduct be furnished to the plaintiff was inserted in an order for a commission to examine witnesses on the part of the defendant in a foreign country,¹² but a commission to prove documents was allowed without such a condition.¹³ Depositions may be taken under this section of the Revised Statutes, even though the witness live within one hundred miles of the court where the cause is pending;¹⁴ or in a country with which the United States are at war.¹⁵ Such a commission is not granted as of course, but only upon good cause shown.¹⁶ The application will ordinarily be denied when the testimony can be taken *de bene esse*, under Section 863 of the Revised Statutes.¹⁷ The appli-

¹¹ *Ibid.*; *Buddicum v. Kirk*, 3 Cranch, 293, 2 L. ed. 444; *Jones v. Railroad Co.*, 3 Sawyer, 523; s. c., Fed. Cas. No. 7,486.

¹² *Hollander v. Baiz*, 40 Fed. 659. For a case where a commission was issued to examine an expert in a foreign country, see *Holliday v. Schultzeberge*, 57 Fed. 660.

¹³ *Hollander v. Baiz*, 43 Fed. 35.

¹⁴ *Wellford v. Miller*, 1 Cranch, C. C. 489; *Russell v. McLellan*, 3 W. & M. 157.

¹⁵ *Peters v. Provost*, 1 Paine, 64.

¹⁶ *U. S. v. Parrott*, 1 McAll. 447; *Magone v. Colorado Smelting & Min. Co.*, 135 Fed. 846. An application for a *dedimus potestatem* to take testimony before trial alleged that the action was to recover damages for the negligent death of plaintiff's father, and that plaintiffs were non-residents and minors; that the negligence alleged consisted in defendant's failure to instruct deceased regarding the dangers of his employment, he being ignorant and illiterate; that the only persons who could give information as to decedent's death, and the rules and regulations under which decedent's bus-

ness was conducted at the time, were persons in defendant's employ, and that the truth of the allegations of plaintiff's complaint must necessarily be established by the testimony of defendant's servants; that defendant had refused to permit plaintiff's representative to enter its works and examine the place of the accident, and that at the inquest over deceased's remains five eyewitnesses testified, two of whom, since the accident, had left the State; that plaintiffs were unable to ascertain their whereabouts or that of another of such eyewitnesses and that plaintiffs verily believe there is danger of losing the testimony of other important witnesses through death, disease, or accident. Held that such allegations were sufficient to entitle plaintiffs to the relief demanded under Rev. St. U. S. § 866 (U. S. Comp. St. 1901, p. 663), authorizing the taking of depositions of witnesses in order to prevent a failure or delay of justice. *Zych v. Am. Foundry Co.*, 127 Fed. 723.

¹⁷ *Henning v. Boyle*, 112 Fed. 397.

cation must be made in open court, and not to a judge at chambers;¹⁸ and must be accompanied by an affidavit showing that the testimony which the party desires to take is material.¹⁹ It seems that the commission need not specify the exact place where the depositions are to be taken; but if it do, the commissioners should conform to it in that respect.²⁰ Whether a party will or will not be required before the commission is issued to name the witnesses to be examined under it, depends upon the discretion of the court, to be exercised under the circumstances of each case.²¹ It has been held that neither party has the right, except under extraordinary circumstances, to have the testimony taken orally;²² unless, for special reasons, the court orders it to be taken upon written interrogatories;²³ that the defendants may be permitted to cross-examine orally, although the complainants have filed interrogatories;²⁴ but, in that case, the complainants will be given leave to withdraw their interrogatories and to examine their witness orally.²⁵ When testimony was taken in a remote jurisdiction—Texas, the suit pending in the Southern District of New York—it was held that the counsel for the other side might interpose their objections to the testimony and prepare their cross-interrogatories, after the direct testimony had been returned; or that, if they then elected to cross-examine orally, the witness must, on reasonable notice, be produced for such cross-examination.²⁶ Before the issue of the commission, the proposed interrogatories should be filed²⁷ and served upon

¹⁸ *Peters v. Provost*, 1 Paine, 64.

¹⁹ *Sutton v. Mandeville*, 1 Cranch, C. C. 115; *U. S. v. Parrott*, 1 McAll. 447.

²⁰ *Rhoades v. Selin*, 4 Wash. 715.

²¹ *Parker v. Nixon*, Baldw. 291.

An order authorizing the examination of witnesses not named in the commission was granted by Mayer, J., in *U. S. D. C., S. D. N. Y.*, February 15, 1913.

²² *Bischoffsheim v. Baltzer*, 10 Fed. 1; *Edison El. Co. v. Westinghouse, Church, Kerr & Co.*, 138 Fed. 460; *Encyclopaedia Britannica Co. v. Werner Co.*, 138 Fed. 461; *Mary-*

land Tr. Co. v. Kirby Lumber Co., 149 Fed. 443.

²³ *Bischoffsheim v. Baltzer*, 10 Fed. 1; *Compania Azucáera Cubana v. Ingraham, Maxwell & Beals*, 180 Fed. 516.

²⁴ *Edison El. Co. v. Westinghouse, Church, Kerr & Co.*, 138 Fed. 460; *Encyclopaedia Britannica Co. v. Werner Co.*, 138 Fed. 461.

²⁵ *Edison El. Co. v. Westinghouse, Church, Kerr & Co.*, 138 Fed. 460.

²⁶ *Maryland Tr. Co. v. Kirby Lumber Co.*, 149 Fed. 443.

²⁷ *Cunningham v. Otis*, 1 Gall. 166.

the opposite party or his attorney;²⁸ and the latter given a reasonable time, usually fixed by the court, within which to object to them and to file cross-interrogatories.²⁹ If he omit to do so, the commission may be issued without further notice.³⁰ The interrogatories are drawn up substantially as those for the examination of witnesses within the jurisdiction of the court.³¹ Objections to interrogatories or cross-interrogatories should be in the form of exceptions to them, and must be filed before the commission issues; or otherwise will be held waived.³² If the parties cannot agree as to their form or substance, a reference may be ordered to a master, whose report will be reviewed by the court.³³ If there be any doubt as to the relevancy or propriety of an interrogatory, the ultimate decision thereon will be reserved until the hearing, and it will be allowed to stand and be answered. If there be no doubt as to its irrelevancy or impropriety, it will be stricken out before the commission issues.³⁴ A commission must also name or designate the commissioner or commissioners.³⁵ A woman may be a commissioner, even though she be the wife of the witness to be examined.³⁶ The court may grant an order that exhibits annexed to a deposition already taken may be removed from the file and attached to a commission, provided that copies of them are left in their place.³⁷

²⁸ Rhoades v. Selin, 4 Wash. 715; Merrill v. Dawson, Hempst. 563; *see c. sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

²⁹ Frevall v. Bache, 5 Cranch, C. C. 463; The Norway, 1 Ben. 493. Leave to cross-examine orally will rarely be given. Coates v. Merrick, 11 C. 41 Fed. 73.

³⁰ Cocker v. F. H. & B. Co., 1 Story, 169.

³¹ Rhoades v. Selin, 4 Wash. 715.

³² Cocker v. F. H. & B. Co., 1 Story, 169.

³³ Cocker v. F. H. & B. Co., 1 Story, 169; Bondereau v. Montgomery, 4 Wash. 186.

³⁴ Cocker v. F. H. & B. Co., 1 Story, 169.

³⁵ Vanstophorst v. Maryland, 2 Dall. 1401, 1 L. ed. 433. A slight error in spelling the commissioner's name will not vitiate proceedings under the commission provided it clearly appears that the adverse party was not misled thereby. Bibb v. Allen, 149 U. S. 481, 488, 37 L. ed. 819, 822; Keene v. Meade, 3 Peters, 1, 6, 7 L. ed. 581, 583.

³⁶ The Norway, 2 Ben. 121.

³⁷ Daly v. Maguire, 6 Blatchf. 137.

§ 357. Proceedings under a *dedimus potestatem*. If the application does not state when and where the commission is to be executed, the party at whose instance, or the commissioner to whom it is issued, should notify the adverse party or his solicitor before the depositions are taken.¹ The notice should name the year as well as the day.² When, however, a party, after notice of an opportunity to do so, has neglected to file cross-interrogatories, no further notice to him is necessary.³ The notice should be served personally, or else left at the house of the person upon whom it is made with a member of his family of sufficient intelligence.⁴ The person with whom it is left, however, need not be informed of its purport.⁵ Service by mail, unless actually received in time, is insufficient.⁶ An hour's notice of the time of taking a deposition in the place where the attorney to whom it is given dwells, has been held sufficient.⁷ The regulation of the proceedings under a commission is a matter in the discretion of the court issuing it.⁸ A commissioner is appointed by and represents the court; and is no more the representative of the party nominating him, than is an arbitrator.⁹ The authority given to a commissioner is special, and must be strictly construed.¹⁰ A commission issued to more than one commissioner must be executed and returned by all of them,¹¹ unless it is otherwise so provided in it;¹² and if any one else,

§ 357. ¹ *Rhoades v. Selin*, 4 Wash. 715; *Knode v. Williamson*, 17 Wall. 586; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736; *Dunlop v. Monroe*, 1 Cranch, C. C. 536.

² *Knode v. Williamson*, 17 Wall. 586, 13 L. ed. 736.

³ *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736.

⁴ *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736.

⁵ *M'Call v. Towers*, 1 Cranch, C. C. 41.

⁶ *Walker v. Parker*, 5 Cranch, C. C. 639.

⁷ *Nicholls v. White*, 1 Cranch, C. C. 59.

⁸ *Cunningham v. Otis*, 1 Gall. 166.

⁹ *Jones v. Oregon C. R. Co.*, 3 Saw. 523; *Gilpins v. Consequa*, Pet. C. C. 85; *Guppy v. Brown*, 4 Dall. 410, 1 L. ed. 887.

¹⁰ *Guppy v. Brown*, 4 Dall. 410, 1 L. ed. 887; *Armstrong v. Brown*, 1 Wash. 43; *Boudereau v. Montgomery*, 4 Wash. 186.

¹¹ *Guppy v. Brown*, 4 Dall. 410, 1 L. ed. 887; *Armstrong v. Brown*, 1 Wash. 43; *Munns v. Dupont*, 3 Wash. C. C. 31.

¹² *The Griffin*, 4 Blatchf. 203; *Lonsdale v. Brown*, 3 Wash. 404.

except a judge in a foreign country whose laws do not permit a private individual to take testimony alone,¹³ join in its execution or return, the testimony taken under it will also be suppressed.¹⁴ A commission must be executed at the time and place named in it, or in the notice.¹⁵ It has been held that the witnesses under such a commission should be examined alone; and the parties are not allowed to be present either in person or by attorney, unless the court otherwise directs.¹⁶ The interrogatories may be shown the witness before he is called upon to give his testimony.¹⁷ He must be examined as to such interrogatory and cross-interrogatory; and if he improperly omits to answer any one of them; or if any one of them, an answer to which would be legal evidence, is not put to him, his whole deposition may be suppressed at the instance of the party who might be thereby injured.¹⁸ If, however, the depositions have been issued *ex parte*, the adverse party having omitted to file cross-interrogatories after an opportunity to do so has been given him, it has been said that as many, or as few, of these interrogatories as the party who filed them thinks proper may be put, provided that the general interrogatory is not omitted.¹⁹ If the cross-interrogatories are put, it makes no difference how soon after the direct interrogatories have been answered the witness is called upon to answer them.²⁰ No additional interrogatories, however, can be filed with or put by, or before, the commissioner.²¹ Under extraordinary circumstances the ex-

¹³ Winthrop v. Union Ins. Co., 2 Wash. 7.

¹⁴ Willings v. Consequa, Pet. C. C. 301; Barnet v. Day, 3 Wash. 243.

¹⁵ Rhoades v. Selin, 4 Wash. 715; Boudereau v. Montgomery, 4 Wash. 186; Knode v. Williamson, 17 Wall. 586, 21 L. ed. 670; Buddicum v. Kirk, 3 Cranch, 293, 2 L. ed. 444. As to waiver, see Gartside Coal Co. v. Maxwell, 20 Fed. 187.

¹⁶ Cunningham v. Otis, 1 Gall. 166. But see Knode v. Williamson, 17 Wall. 586, 21 L. ed. 670; Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

¹⁷ North Carolina R. Co. v. Drew, 3 Woods, 691.

¹⁸ Ketland v. Bissett, 1 Wash. 144; Nelson v. U. S., Pet. C. C. 235; Winthrop v. Union Ins. Co., 2 Wash. 7; Bell v. Davidson, 3 Wash. C. C. 328; Richardson v. Golden, 3 Wash. C. C. 109; Dodge v. Israel, 4 Wash. 323; Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184. But see Gass v. Stinson, 3 Sumn. 98.

¹⁹ Merrill v. Dawson, Hempst. 563, s. c. *sub nom.* Fowler v. Merrill, 11 How. 375, 13 L. ed. 736.

²⁰ Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184.

²¹ Cunningham v. Otis, 1 Gall.

amination of a witness not named in the commission might be permitted.²² The deposition may be taken down in writing either by the magistrate or by the deponent in the presence of the magistrate;²³ but not by the counsel for either of the parties.²⁴ If exhibits are referred to by the witness, they should be annexed to the deposition or identified by marks or reference.²⁵ A paper referred to by a witness, but which is neither in his own power nor in that of the party making the objection, need not, however, be included in the deposition or thus identified.²⁶ The better practice ordinarily seems to be to annex copies of the exhibits to the deposition.²⁷ It has been held that the deposition need not be signed by the witness.²⁸ A deposition prepared and signed some time before the oath is administered is improper and will be suppressed.²⁹ The depositions should be attached to the commission, and, with them, a certificate by all the commissioners that they have complied with the statutory requirements above described. The commission should then be sent or delivered to the clerk's office of the court unopened, and must there remain so till publication is allowed by order or consent.³⁰ The fact that it was forwarded through the embassy mail-bag first to Washington, and thence to the clerk, does not invalidate the proceedings.³¹ The return, or certificate, of the commissioners should state that they were sworn, unless that ceremony has been waived, or they are officers qualified to administer an oath.³² The return should also state

166; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736.

²² *The Infanta*, *Abbott's Adm.* 263. See § 356, note 2, *supra*.

²³ *Stockwell v. U. S.*, 3 Cliff. 284; *Keene v. Meade*, 3 Pet. 1, 7 L. ed. 581; s. c. *sub nom.* *Meade v. Keane*, 3 Cranch, C. C. 51.

²⁴ *U. S. v. Pings*, 4 Fed. 714. But see *Nicholls v. White*, 1 Cranch, C. C. 59; *Atkinson v. Glenn*, 4 Cranch, C. C. 134.

²⁵ *Dodge v. Israel*, 4 Wash. 323.

²⁶ *Winans v. New York & Erie R. Co.*, 21 How. 88, 13 L. ed. 68.

²⁷ *U. S. R. S.*, § 869; quoted *supra*, § 342.

²⁸ *Ketland v. Bissett*, 1 Wash. 144.

²⁹ *Dodge v. Israel*, 4 Wash. 323; *North Carolina R. Co. v. Drew*, 3 Woods, 691.

³⁰ *Boudéreau v. Montgomery*, 4 Wash. 186; *Frevall v. Bach*, 5 Cranch, C. C. 463; *U. S. v. Price*, 2 Wash. 356.

³¹ *U. S. v. Fifty Boxes and Packages of Lace*, 92 Fed. 601.

³² *Frevall v. Bach*, 5 Cranch, C. C. 463; *Hoyt v. Hammekin*, 14 How. 346, 14 L. ed. 449. But see *Gilpins*

the time and place of taking the depositions;³³ that each witness was sworn or affirmed, but not that he was cautioned; nor need it state the form of the oath.³⁴ The return need not state in whose handwriting the depositions were taken down;³⁵ nor, if the witness was an alien, whether or not he was examined by means of an interpreter;³⁶ nor that it was subscribed by a sworn interpreter, when it states that the interpreter was sworn and every page is subscribed by a signature purporting to be that of the interpreter;³⁷ nor, it has been held, need the answers, when an interpreter was used, be transmitted in the foreign language of the witness as well as in the translation.³⁸ The certificate will be presumptive evidence of the facts therein stated in relation to the execution of the commission.³⁹ Subpœnas for the witnesses are issued by the clerk of a court of the United States in the district where the commission is executed.⁴⁰ Subpœnas *duces tecum* can only be issued by the order of a judge of such a court.⁴¹ Otherwise, proceedings under these commissions should conform substantially to those under commissions to examine witnesses within the jurisdiction of the court.⁴² Any objection to the form or manner of the proceedings can only be raised by a motion to suppress the deposition,⁴³ which should be seasonably made before the case is

v. Consequa, Pet. C. C. 85; s. c., 4 Wash. 184.

³³ Rhoades v. Selin, 4 Wash. 715; Boudereau v. Montgomery, 4 Wash. 186.

³⁴ Jones v. Oregon C. R. Co., 3 Saw. 523; Keene v. Meade, 3 Pet. 1, 7 L. ed. 581; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51.

³⁵ Keene v. Meade, 3 Pet. 1, 7 L. ed. 581; s. c. *sub nom.* Meade v. Keane, 3 Cranch, C. C. 51; Jones v. Oregon C. R. Co., 3 Saw. 523.

³⁶ Gilpins v. Consequa, Pet. C. C. 85; s. c., 3 Wash. 184.

³⁷ U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. 601, 603, 604.

³⁸ *Ibid.*

³⁹ Merrill v. Dawson, Hempst. 563; s. c. *sub nom.* Fowler v. Mer-

rill, 11 How. 375, 13 L. ed. 736; Boudereau v. Montgomery, 4 Wash. 186; Winter v. Simonton, 3 Cranch, C. C. 104.

⁴⁰ U. S. R. S., § 868, quoted *supra*, § 342.

⁴¹ U. S. R. S., § 868, quoted *supra*, § 342. See Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753.

⁴² Jones v. Oregon C. R. Co., 3 Saw. 523; U. S. v. Parrott, 1 McAll. 447. See § 352.

⁴³ Blackburn v. Crawfords, 3 Wall. 175; Winans v. New York & Erie R. Co., 21 How. 88, 16 L. ed. 68; Doane v. Glenn, 21 Wall. 33, 22 L. ed. 476; York Co. v. Central R. Co., 3 Wall. 107, 18 L. ed. 170; Walker v. Parker, 5 Cranch, C. C. 639.

called for trial;⁴⁴ provided that sufficient time within which to make such a motion remains between the return of the commission and the hearing.⁴⁵ Should a foreign plaintiff refuse to testify before a commission when required so to do, the court may deny him relief in the suit.⁴⁶

§ 358. Letters rogatory. When the witnesses whose testimony is desired are in a country whose laws do not permit of the execution of a commission issued from a foreign court, their testimony can only be taken by means of letters rogatory. "This method of obtaining testimony from witnesses in a foreign country has always been familiar in the Courts of Admiralty; but it is also deemed to be within the inherent powers of all courts of justice. For, by the law of Nations, courts of Justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the Court before which the action is pending, may send to the Court within whose jurisdiction the witness resides, a writ, either patent or close, usually called a letter rogatory, or a commission *sub mutuae vicissitudinis obtentu, ac in juris subsidium*, from those words contained in it. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause the depositions to be taken, in due course of law, for the furtherance of justice; with an offer, on the part of the tribunal making the request, to do the like for the other in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties, on each side, to which the answers of the witnesses are desired. The commission is executed by the judge who receives it, either by calling the witness before himself, or by the intervention of a commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent, and properly authenticated," or duly authenticated copies of the same, "are returned with the commission to the Court

⁴⁴ *Bibb v. Allen*, 149 U. S. 481, 488, 37 L. ed. 819, 822. See *Dickerson v. Matheson*, 50 Fed. 73, 75; *supra*, § 355.

⁴⁵ *Sergeant v. Biddle*, 4 Wheat. 508, 4 L. ed. 627; *Mechanics' Bank*

v. Seton, 1 Pet. 299, 7 L. ed. 152; *Buddicum v. Kirk*, 3 Cranch, 293, 2 L. ed. 444; *Alsop v. Com. Ins. Co.*, 1 Sumn. 451.

⁴⁶ *Heath v. Erie R. Co.*, 9 Blatchf. 316. *Of. infra*, § 358, note 2.

from which it issued. The Court of Chancery has always freely exercised this power, by a commission, either directed to foreign magistrates, by their official designation, or more usually, to individuals by name; which latter course, the peculiar nature of its jurisdiction and proceedings enables it to induce the parties to adopt by consent, where any doubt exists as to its inherent authority."¹ A special application for an order for letters rogatory may be made to the court, and will be granted in the first instance without issuing a commission, upon satisfactory proof that the authorities abroad will not allow the testimony to be taken in any other manner.² "When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have any interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission so executed and certified by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same."³ The statutes further provide for the taking of testimony under a commission or in pursuance of letters rogatory issued from a court in a foreign country, with which the United States are at peace, to take the testimony of a wit-

§ 358. ¹Greenleaf's Ev., § 320. See for a good form, Nelson v. U. S., 1 Pet. C. C. 236, note. See also Cunningham v. Otis, 1 Gall. 166; Hall's Adm. Pr., part 2, tit. 19, vol. 1, *cum add.*; and tit. 27, *cum add.*, pp. 37, 38, 55, 60; Clerke's Praxis, tit. 27; 1 Roll. Abr. 530, pl. 15; Oughton's Ordo Judiciorum, vol. 1, pp. 150, 152, tit. 95, 96;

Wharton's Int. Law Dig., vol. III, § 413.

²Hoffman's Ch. Pr. 482; Daniell's Ch. Pr. (3d Am. ed. by Judge Perkins), vol. II, p. 953; Gason v. Wordsworth, 2 Ves. Sen. 336; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Gross v. Palmer, 105 Fed. 833.

³U. S. R. S., § 875.

ness residing within the United States, in any suit for the recovery of money or property depending in such foreign court in which the government of such foreign country is a party or has an interest, as follows:—

“The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided*, That when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letters rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons.”⁴ It has been held that criminal proceedings,⁵ and “proceedings relating to the investigation as to the smuggling of some cases of cotton,”⁶ do not come within this statute.

“No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discov-

⁴ U. S. R. S., § 4071.

⁶ *Re Letters Rogatory*, 36 Fed.

⁵ *Matter of the Spanish Consul*, 306.

¹ Ben. 225.

ery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign State."⁷

"If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued in accordance with section forty hundred and seventy-one, or, if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the District Court of the United States."⁸

"Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the District Courts of the United States."⁹

"When letters rogatory are addressed from any court of a foreign country to any Circuit Court of the United States, a commissioner of such Circuit Court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts."¹⁰

§ 359. Testimony taken in the manner prescribed by the State law. The act of March 9, 1892, provides "that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held."¹ Before this statute it was held that no form of examination or deposition unknown to the common law and not authorized by a Federal statute, even though—as the examination of a party before trial,² or the filing of interrogatories with a complaint³—authorized by a statute of the State where the court is held,⁴ would

⁷ U. S. R. S., § 4072.

⁸ U. S. R. S., § 4073.

⁹ U. S. R. S., § 4074.

¹⁰ U. S. R. S., § 875, as amended by 19 St. at L. 241 (U. S. R. S., 1 Supp. 266).

¹ § 359. 127 St. at L. 7.

² *Ex parte* Fisk, 113 U. S. 713,

28 L. ed. 1117. But see *Bryant v. Leyland*, 6 Fed. 125; *Lowrey v. Kusworm*, 66 Fed. 539.

³ *Tabor v. Indianapolis Journal Newspaper Co.*, 66 Fed. 423.

⁴ *U. S. v. Fifty Boxes and Packages of Lace*, 92 Fed. 601.

be followed by a Federal court in either an action at common law or a suit in equity;⁵ and that an order of a State court directing such an examination was avoided by the removal of the case.⁶ In the Second Circuit it was held that an order could be granted for the examination of a party to an action at common law, in accordance with the State statute, to enable the opposite party to frame his pleading.⁷ In the Eighth Circuit it was held that the defendant could not be compelled to answer interrogatories attached to the plaintiff's common-law petition in accordance with the State practice.⁸ It has been said that the statute merely provides an additional method of taking testimony, and does not confer any additional rights.⁹ The statute relates only to the manner of taking depositions, and it does not authorize them to be taken in any cases not specified in the Revised Statutes of the United States.¹⁰ It does not authorize an examination before trial at common law under the State practice either orally,¹¹ or upon written interrogatories,¹² or before issue joined.¹³ It does not prevent the taking of depositions for use upon motions, when that practice is authorized by a rule of the Federal court.¹⁴ Under this statute, a *dedimus potestatem* to take testimony in Cuba, by oral examination, was granted in accordance with the statutes of Connecticut.¹⁵ In the absence of a statute, a court of the United States

⁵ *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117.

⁶ *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117.

⁷ *Anderson v. Mackay*, 46 Fed. 105. But see *Marvin v. C. Aultman & Co.*, 46 Fed. 338.

⁸ *Pierce v. Union Pac. Ry. Co.*, 47 Fed. 709.

⁹ *Nat. Cash Reg. Co. v. Leland*, C. C. A., 94 Fed. 502; s. c., 77 Fed. 242.

¹⁰ *Hanks Dental Ass'n v. International Tooth-Crown Co.*, 194 U. S. 303, 308, 48 L. ed. 989, 991.

¹¹ *Hanks Dental Ass'n v. International Tooth-Crown Co.*, 194 U. S. 303, 308, 48 L. ed. 989, 991; *Nat. Cash-Register Co. v. Leland*, C. C.

A., 94 Fed. 502; s. c., 77 Fed. 242. Cf. *Calivada Colonization Co. v. Hayes*, 119 Fed. 202.

¹² *Hanks Dental Ass'n v. International Tooth-Crown Co.*, 194 U. S. 303, 48 L. ed. 989; *Smith v. International Mercantile Co.*, 154 Fed. 786.

¹³ *Shellebarger v. Oliver*, 64 Fed. 306; *Texas & Pac. Ry. Co. v. Wilder*, C. C. A., 92 Fed. 953; *Despeaux v. Pennsylvania R. Co.*, 81 Fed. 897. But see *Anderson v. MacKay*, 46 Fed. 105.

¹⁴ *Importers' & Traders' Nat. Bank v. Lyons*, 134 Fed. 510.

¹⁵ *Compania Azucarera Cubana v. Ingraham, Maxwell & Beals*, 180 Fed. 516.

has no power to order a plaintiff in an action for personal injuries to submit to a physical examination in advance of the trial,¹⁶ but a State statute authorizing such an examination is constitutional and will be followed.¹⁷ It has been held that the State practice as to the inspection of documents will not be followed.¹⁸

¹⁶ Union Pac. Ry. Co v. Botsford, 141 U. S. 250, 35 L. ed. 734.

¹⁷ Camden & S. Ry. Co. v. Stetson, 177 U. S. 172, 44 L. ed. 721. Cf. Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, 38 L. ed. 398; Lyon v. Manhattan Ry. Co., 142 N. Y. 298, 25 L.R.A. 402; McGovern v. Hope, 63 N. J. Law, 76, 42 Atl. 830.

¹⁸ Lucker v. Phoenix Assur. Co., 67 Fed. 18; Schatz v. Winton Motor Carriage Co., 197 Fed. 777. *Contra*, Victor G. Bloede Co. v. Joseph Bancroft & Sons Co., 98 Fed. 175; Filscole v. Lancaster, 70 Fed. 337; Gray v. Schneider, 119 Fed. 474.

CHAPTER XXII.

DISMISSAL OF BILLS BEFORE A HEARING.

§ 360. Dismissal of bills before a hearing. In general. Bills may be dismissed before a hearing upon a motion of the plaintiff, when he wishes to abandon the suit; upon the motion of the defendant for want of prosecution, for failure to perfect or revive the suit, for want of jurisdiction over the person of the defendant, for want of jurisdiction of the Federal court, and for failure to show a ground for relief in equity or at common law.

§ 361. Dismissal of bills by the plaintiff. The plaintiff may dismiss his bill without costs at any time before the defendant's appearance.¹ He may obtain the order for the dismissal as of course upon motion or petition, usually by the latter;² but if the dismissal is a violation of an agreement between him and the defendant, the order granting it may be subsequently vacated.³ After appearance and before a decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared;⁴ but not, if they or any of them would be injured thereby.⁵ Leave

§ 361. ¹Quoted with approval by Newman, J., *Re Wellhouse*, 113 Fed. 962; *Thompson v. Thompson*, 7 Beav. 350.

² Daniell's Ch. Pr. (5th Am. ed.) 790, 791.

³ *Betts v. Barton*, 3 Jur. (N. S.) 154.

⁴ *Chicago & A. R. Co. v. Union R. M. Co.*, 109 U. S. 702, 27 L. ed. 1081; *Conn. & P. R. Co. v. Hendee*, 27 Fed. 678; *Penn Phonograph Co. v. Columbia Phonograph Co.*, C. C. A., 132 Fed. 808; *Morton Tr. Co. v. Keith*, 150 Fed. 606; *Thomson-Houston El. Co. v. Holland*, 160 Fed.

768; *Tower v. Stimpson*, 175 Fed. 130.

⁵ This whole sentence was quoted with approval by Newman, J., *Re Wellhouse*, 113 Fed. 962, and the text was quoted with approval by Hanford, J., in *Hershberger v. Blewett*, 55 Fed. 170; *Cooper v. Lewis*, 2 Phil. 178; *Ainslie v. Sims*, 17 Beav. 174; *Booth v. Leycester*, 1 Keen, 247; *Bank of S. C. v. Rose*, 1 Rich. Eq. (S. C.) 292; *Stevens v. The Railroads*, 4 Fed. 97. See *W. U. Tel. Co. v. Am. Bell Tel. Co.*, 50 Fed. 662.

to dismiss may be refused where the defendant claims affirmative relief by cross-bill,⁶ or by counter-claim, or otherwise.⁷ For example, where the bill was filed to enforce a false claim to property or an instrument, which the evidence showed had been obtained by fraud; in which case the defendant without filing a cross-bill would be entitled if successful to a decree declaring the plaintiff's claim unfounded, and enjoining him from again settling it up;⁸ or where the bill was filed to set aside a patent on the ground of interference, when the defendant may obtain affirmative relief by answer.⁹ The court will take notice of fractions of a day in determining whether a cross-bill was filed before the filing of a motion to dismiss the original bill.¹⁰ Leave has been refused when the defendant by the dismissal would have lost the benefit of an adjudication made in the previous proceedings in the suit,¹¹ or of a verdict or finding,¹² made in the previous proceedings in the suit, or of a failure of the complaint to take testimony, after a replication, within the time required by the former rules which were then in force.¹³ In a patent case, the court refused to permit the plaintiff to dismiss his bill without prejudice, after the proofs had been taken and a preliminary injunction obtained.¹⁴ Leave may be granted upon terms, as for example, that the complainant stipulate to allow defendant's evidence to be used in any subsequent suit.¹⁵

⁶ *Electrical Acc. Co. v. Brush El. Co.*, 44 Fed. 602; *C. & A. R. Co. v. Rolling M. Co.*, 109 U. S. 702, 27 L. ed. 1081; *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. 569. Where a cross-bill prayed discovery only and not affirmative relief, it did not prevent the dismissal. *Houghton v. Whitin Mach. Works*, 160 Fed. 227. The same rule was applied when the cross-bill sought affirmative relief against a co-defendant and not against the complainants. *Gilmore v. Bort*, 134 Fed. 658. Leave to dismiss an original bill was granted without prejudice to reliev under the cross-bill. *Harding v. Corn Products Refining Co.*, C. C. A., 168 Fed. 658.

⁷ *Stevens v. The Railroads*, 4 Fed.

97; *Hat Sweat Mfg. Co. v. Waring*, 46 Fed. 87.

⁸ *Stevens v. The Railroads*, 4 Fed. 97; *Hat S. Mfg. Co. v. Waring*, 46 Fed. 87; *supra*, § 197.

⁹ *Electrical Acc. Co. v. Brush El. Co.*, 44 Fed. 602; *supra*, § 197.

¹⁰ *Tower v. Stimpson*, 175 Fed. 130.

¹¹ *Hershberger v. Blewett*, 55 Fed. 170, 172; *Daniell's Ch. Pr.* (5th ed.) 793. But see *W. U. Tel. Co. v. Am. Bell T. Co.*, 50 Fed. 662.

¹² *Ebner v. Zimmerly*, C. C. A., 118 Fed. 818.

¹³ *Schmeiser Mfg. Co. v. Blanchard*, 192 Fed. 362.

¹⁴ *Georgia Pine Turpentine Co. v. Bilfinger*, 129 Fed. 131.

¹⁵ *Am. Z. Co. v. Celluloid Mfg.*

An executor or other person, who has filed a bill in a representative capacity in good faith with reasonable grounds for so doing, may be excused payment of costs.¹⁶ The motion for such an order should be upon notice.¹⁷ The same practice is followed when a plaintiff sues in behalf of himself and others, provided that no one has previously joined with him as co-plaintiff,¹⁸ unless, perhaps, others have contributed to the expenses of the suit and wish it continued.¹⁹ He does not lose his right because his motion was made after the removal of his suit from a State to a Federal court and another stockholder has since then instituted, in the former jurisdiction, a suit which is not removable.²⁰ After other members of the class have joined as co-plaintiffs in the suit, the plaintiff cannot dismiss the bill without their consent.²¹ A stockholder of a corporation, who has intervened in a creditors' suit, cannot, however, make such an objection.²² The majority of the stockholders in a corporation cannot always have a suit discontinued against the wishes of its directors.²³ After a decree or decretal order, whether parol or interlocutory, the plaintiff may not discontinue without the consent of all parties who have acquired rights by the decree, including creditors who have filed their claims pursuant to a direction in the same,²⁴ and bondholders represented by the plaintiff as trustee.²⁵ The usual course pursued by one in whose name without his consent a bill has been filed, is to move, on notice to the solicitor who appeared for him and to any other parties who have appeared, to have

Co., 32 Fed. 809; *Am. Steel & Wire Co. v. Mayer & Englund Co.*, 123 Fed. 204.

¹⁶ *Arnoux v. Steinbrenner*, 1 Paige (N. Y.), 82.

¹⁷ *Am. Z. Co. v. Celluloid Mfg. Co.*, 32 Fed. 809; *Gregory v. Pike*, C. C. A., 67 Fed. 837; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166.

¹⁸ *Hanford v. Storie*, 2 Sim. & S. 196; *Armstrong v. Storer*, 9 Beav. 277.

¹⁹ *Ex parte Railroad Co.*, 95 U. S. 221, 24 L. ed. 355; *Miller v. Liggett & M. T. Co.*, 7 Fed. 91.

²⁰ *Harding v. Corn Products Refining Co.*, C. C. A., 168 Fed. 658.

²¹ *Belmont N. Co. v. Columbia I. & S. Co.*, 46 Fed. 336.

²² *Shaffer v. McCulloch*, C. C. A., 192 Fed. 801.

²³ *Railway Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438.

²⁴ *Guilbert v. Hawles*, 1 Ch. Cas. 40; *Carrington v. Holly*, 1 Dick. 280; *Hershberger v. Blewett*, 55 Fed. 170; *Gregory v. Pike*, C. C. A., 67 Fed. 837; *Garner v. Second Nat. Bank*, 67 Fed. 833.

²⁵ *Johnson v. Miller*, 96 Fed. 271.

it taken off the file.²⁶ Upon this being done, he may recover from the solicitor who filed the bill, his costs,²⁷ as well as any costs he may have been compelled to pay a defendant.²⁸ Where the plaintiff had made an agreement of settlement without the consent of his attorneys, who opposed the same, it was held that the suit could not be dismissed until the matter had been set up by a cross-bill.²⁹ It has been held that an agreement to dismiss a suit is waived by answering on the merits an amended bill thereafter filed.³⁰ Plaintiff cannot, it seems, dismiss a part only of his bill. The proper course is for him to amend by omitting it.³¹ When there is more than one plaintiff, one of them may by special leave of the court have the bill dismissed with costs so far as concerns himself, provided that no injury will thereby result to any other party.³² If there are several defendants, a plaintiff may obtain an order dismissing his bill as to some of them, provided that no injury will be thereby done the rest.³³ A dismissal at the plaintiff's request before a hearing is usually without prejudice,³⁴ unless evidence has been taken and the cause set down for a hearing, when it should be granted only by a decree dismissing the bill upon the merits.³⁵ The entry of an order of discontinuance upon consent of both parties amounts in effect to a dismissal of the bill.³⁶ The dismissal of a bill or of part of a bill does not authorize the removal of the paper from the clerk's office unless the order so

²⁶ *Central Tr. Co. v. U. S. Flour Milling Co.*, 113 Fed. 587.

²⁷ *Palmer v. Walesby*, L. R. 3 Ch. App. 732; *Titterwan v. Osborne*, 1 Dick. 350; *Hood v. Phillips*, 6 Beav. 176.

²⁸ *Palmer v. Walesby*, L. R. 3 Ch. App. 732; *Wright v. Castle*, 3 Meriv. 12.

²⁹ *Snyder v. DeForest Wireless Telegraph Co.* (D. Maine), 154 Fed. 142. *Contra*, *Snyder v. DeForest Wireless Telegraph Co.*, E. D. Mo. 1907.

³⁰ *McFadden v. Heisen*, C. C. A., 150 Fed. 568.

³¹ *Camden & Amboy R. Co. v. Stewart*, 4 C. E. Green (N. J.), 69. But see *Lyster v. Stickney*, 12 Fed. 609.

³² *Holkirk v. Holkirk*, 4 Madd. 50; *Winthrop v. Murray*, 7 Hare, 150.

³³ *Baily v. Lambert*, 5 Hare, 178.

³⁴ *Daniell's Ch. Pr.* (5th Am. ed.) 793. But see *Stevens v. The Railroads*, 4 Fed. 97.

³⁵ *Rumbly v. Stainton*, 24 Ala. 712; *Rochester v. Lee*, 1 Macn. & G. 467. See *Stevens v. The Railroads*, 4 Fed. 97.

³⁶ *Pictet A. I. Co. v. N. Y. I. M. Co.*, 12 Fed. 816.

directs; and such a direction will rarely be given.³⁷ Otherwise, the paper remains a part of the record, and may be used as evidence of any admission therein contained.³⁸ An order dismissing a bill may be set aside.³⁹ An order denying a motion to dismiss a bill as to a party was held to be appealable.⁴⁰

§ 362. **Dismissal of bills for want of prosecution or for failure to perfect or revive the suit.** The Equity Rules provide, that if a case is continued by consent beyond the term, it shall be dropped from the trial calendar, subject to reinstatement within one year upon the application to the court by either party. "If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."¹ The refusal of the plaintiff and of the State court to recognize a removal is no defense to such motion to dismiss for want of prosecution in the Federal court,² although the court might, in its discretion, consider this, if made in good faith, as a ground for allowing him further time. A failure to take out subpoenas for two years after a bill was filed has been held to justify a dismissal of the bill.³ A bill may be dismissed for the failure of the complainant, within a reasonable time, to serve indispensable defendants, whom he has named in its introduction or title,⁴ but it is the usual practice to make the order conditional upon his not bringing them in within a number of days therein specified.⁵ By the former practice, when a suit had abated or become otherwise defective before a decree, the party or parties against whom it can be continued might, upon notice served upon the person or persons entitled to revive or supply the defect in the same, move for and obtain an order, directing that these revive or supply the defect, within a certain limited time to be fixed by the court, or that else the bill be dismissed.⁶ If the suit abated

³⁷ *Lyster v. Stickney*, 12 Fed. 609, 610.

³⁸ *Ibid.*

³⁹ *Gregory v. Pike*, C. C. A., 67 Fed. 837.

⁴⁰ *Brush El. Co. v. California El. L. Co.*, C. C. A., 51 Fed. 557; s. c., 52 Fed. 945.

§ 362. ¹ Eq. Rule 57, quoted in full § 369, *infra*.

² *McMullen v. Northern Pac. R. Co.*, 57 Fed. 16.

³ *Houston v. City and County of San Francisco*, 47 Fed. 337; *Bancroft v. Sawin*, 143 Mass. 144.

⁴ *Herndon v. Ridgway*, 17 How. 424, 15 L. ed. 100.

⁵ *Rogers v. Penobscot Min. Co.*, C. C. A., 154 Fed. 606.

⁶ *Adamson v. Hall*, 1 T. & R. 258;

by the death of one of several co-plaintiffs, the order might be obtained against the survivors; and it seems that the objection that there is no personal representative of the deceased plaintiff did not prevent the court from granting such an order.⁷ It is irregular in such cases to move to dismiss a bill for want of prosecution; and an order to that effect, if obtained, would be discharged for irregularity.⁸ A bill might be dismissed at a defendant's motion for the plaintiff's failure to serve with process another defendant named in the bill who was a necessary party to the suit.⁹ Upon the death of a defendant, whom the pleadings showed to be an indispensable party, when it was impossible to bring in his executors, the suit would be dismissed.¹⁰

§ 363. Dismissal for want of jurisdiction. The Judicial Code provides: "If, in any suit commenced in a District Court or removed from a State court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs, or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."¹ The court should do this of its own motion, as soon as it discovers its want of jurisdiction or the improper or collusive joinder.² The Supreme Court has said that such an act is salutary, and that it is the duty of the Courts to exercise

Bolton v. Bolton, 2 S. & S. 371.
See *supra*, §§ 216-221.

⁷ *Hinde v. Morton*, 2 H. & M. 368.

⁸ *Robinson v. Norton*, 10 Beav. 484; *Boddy v. Kent*, 1 Meriv. 361; *Sellers v. Dawson*, 2 Dick. 738; *Dillard's Adm'r v. Central Va. Iron Co.*, 125 Fed. 157, quoting text with approval.

⁹ *Picquet v. Swan*, 5 Mason, 561; Fed. Prac. Vol. II.—74.

Jessup v. Illinois Central R. Co., 56 Fed. 735.

¹⁰ *Lawrence v. Southern Pac. Co.*, 177 Fed. 547.

§ 363. ¹Jud. Code, § 37, 36 St. at L. 1087, re-enacting in substance Act of March 3, 1875, ch. 137, § 5 (18 St. at L. 472).

² *Williams v. Nottawa*, 104 U. S.

their power under it in all proper cases.³ Neither party has the right however, without pleading a denial within the time allowed for that purpose, to introduce evidence to contradict averments of the jurisdictional facts;⁴ but if it appears upon the evidence the objection may be taken at any time.⁵ And if from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.⁶ In such a case the party that sought the jurisdiction of the Federal court should have an opportunity to be heard on the motion, and to meet it by appropriate evidence.⁷ Objection can be raised by motion,⁸ which, where it is charged that there was collusion in the making and alignment of the parties, must specify the parties as to whom the collusion is charged.⁹ Except under extraordinary circumstances, the question should not be tried upon affidavits.¹⁰ A judge cannot thus dismiss or remand a case upon his personal conviction, although it amounts to a moral certainty; the collusion or lack of juris-

209, 26 L. ed. 719; Consolidated Rubber Tire Co. v. Ferguson, C. C. A., 183 Fed. 756; McElDowney v. Card, 193 Fed. 475.

³ Williams v. Nottawa, 104 U. S. 209, 212, 26 L. ed. 719, 720.

⁴ Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725; Davies v. Lathrop, 13 Fed. 565; Cuthbert v. Galloway, 35 Fed. 466; Deputron v. Young, 134 U. S. 241, 33 L. ed. 923. A refusal by the court upon the trial to allow the defendant to file a plea on the question of the plaintiff's citizenship was held not to be reviewable upon a writ of error. Mexican C. Ry. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699.

⁵ Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986.

⁶ Hartog v. Memory, 116 U. S.

588, 29 L. ed. 725; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690; Gribble v. Pioneer Press Co., 15 Fed. 689, 5 McCrary, 73.

⁷ Hartog v. Memory, 116 U. S. 588, 590-592, 29 L. ed. 725, 726, 727; Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729.

⁸ Ladew v. Tennessee Copper Co., 179 Fed. 245; Lewis Blind Stitch Co. v. Abetter Felling Mach. Co., 181 Fed. 974.

⁹ Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77, 79.

¹⁰ Kilgore v. Norman, 119 Fed. 1006. See Put-In-Bay Water Works, &c., Co. v. Ryan, 181 U. S. 409, 415, 45 L. ed. 927, 930; s. c., Industrial, &c., Co. v. El. Supply Co., C. C. A., 58 Fed. 732, 744; s. c., C. C. A., 84 Fed. 740.

diction must be legally proved, and appear upon the record.¹¹ Expressions in the opinion of the District Court of Appeals that the court below had no jurisdiction, do not necessarily make it appear to the satisfaction of the District Court that such was the case, nor compel a dismissal when the mandate does not

¹¹ *Barry v. Edmunds*, 116 U. S. 550, 559, 29 L. ed. 729, 732; *Deputron v. Young*, 134 U. S. 241, 252, 33 L. ed. 923, 929. Where a plaintiff had acquired the causes of action which he sought to enforce, solely for the purpose of collection in the Federal courts under an agreement to pay back a certain proportion of the net proceeds to his assignors, who could not have sued therein, it was held that the suit should be dismissed. *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114; *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719; *Bernards Tp. v. Stebbins*, 109 U. S. 341, 27 L. ed. 956; *New Providence v. Halsey*, 117 U. S. 336, 29 L. ed. 904; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269; *Woodside v. Beckham*, 216 U. S. 117, 54 L. ed. 408; *Norton v. European & N. A. Ry. Co.*, 32 Fed. 865; *Board of Com'rs of Lake County v. Schradsky*, C. C. A., 97 Fed. 1, 38 C. C. A. 17; *Edwards v. Bates County*, 117 Fed. 526; *Turnbull v. Ross*, C. C. A., 141 Fed. 649. But see *Lipsmeier v. Vehslage*, 29 Fed. 175; *Cole v. Phila. & E. Ry. Co.*, 140 Fed. 944; *William H. Perry Co. v. Klosters Aktie Bolag*, C. C. A., 152 Fed. 967. Jurisdiction does not depend upon motive, and when there has been an actual transfer, the jurisdiction is not defeated, although it appears that the property was given to complainant to enable him to sue in the Federal court. *Re Cleland*, 218 U. S. 120, 54 L. ed. 962; *O'Neil v. Wolcott Min. Co.*, C.

C. A., 174 Fed. 527. Where land worth at least \$1,800 was conveyed by a citizen of the State to an alien laborer without means, who agreed to pay \$600 for the same, paid only \$10 in cash, and gave a mortgage for the balance, it was held that the facts did not show a simulated transfer nor justify a dismissal of the bill. *Woodside v. Cigeroni*, C. C. A., 93 Fed. 1. Where persons largely interested in a Pennsylvania corporation, in order to procure the appointment of a receiver by a court of the United States, caused certain bonds and stock of little value to be assigned to a citizen of New Jersey, a stenographer in the office of one of the attorneys for the corporation, for no other consideration than the signature of the bill, it was held that the case should be dismissed as collusive and fraudulent, although the assignment was absolute. *Kreider v. Cole*, C. C. A., 149 Fed. 647. It was held that a suit should be dismissed for collusion when the trustee of a mortgage sued to protect a right asserted by the mortgagor, who was in possession and not in default. *Williams v. City Bank & Tr. Co.*, C. C. A., 186 Fed. 419. See §§ 41, 119, *supra*. For the reversal of a judgment of dismissal because the evidence did not prove that the value of the matter in dispute was below the jurisdictional amount, see *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682. *Cf.* *Blackburn v. Portland Gold Mine Co.*, 175 U. S.

so direct.¹² If the case is dismissed for this reason, the Supreme Court of the United States may review the decision upon the facts, as well as upon the law.¹³ If the jurisdiction appears upon the record, and the District Court refuses to dismiss or remand the case under this clause of the statute, the Supreme Court will ordinarily refuse to review its decision,¹⁴ but it may do so,¹⁵ although not, it has been said, by mandamus.¹⁶ A determination that the defendants did not act jointly, when joint conduct by them is charged in good faith in the complaint, is a decision of the merits, not of the jurisdictional facts, and does not justify such a dismissal.¹⁷ Where an alias summons had been quashed, and the Federal Court had no power to issue process that would subject the defendant to its jurisdiction; the case was remanded.¹⁸ It has been held that there is a controversy in the case, and that the suit is not collusive, when instituted to procure the appointment of a receiver and an administration of its assets by two creditors without judgments or securities at the request of the defendant.¹⁹ The conveyance of all the property of a partnership to a corporation, organized for the purpose by the partners, and the division between them of its capital stock, a small part only of which consisted of lands in controversy in an action subsequently brought by the corporation in a Federal Court; was held not to be such a transfer as to defeat the court of jurisdiction.²⁰ In an analogous case,

571, 44 L. ed. 276; *Howe v. Howe & Owen Ball Bearing Co.*, C. C. A., 154 Fed. 820. Before the Act of 1875, it was held that a defendant, between whom and the complainant the requisite difference of citizenship existed, could not raise an objection on account of the citizenship of another defendant. *Harrison v. Uramm*, 1 Story, 64; *Pond v. Vt. Valley R. Co.*, 12 Blatchf. 280.

¹² *Put-in-Bay Waterworks &c. Co. v. Ryan*, 181 U. S. 409, 431, 45 L. ed. 927, 937; *Hartford Fire Ins. Co. v. Erie R. Co.*, 172 Fed. 899.

¹³ *Smithers v. Smith*, 204 U. S. 632, 51 L. ed. 656.

¹⁴ *Put-In-Bay Water Works, etc.*,

Co. v. Ryan, 181 U. S. 409, 431, 45 L. ed. 927, 937.

¹⁵ *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269.

¹⁶ *Re Cleland*, 218 U. S. 120, 54 L. ed. 962.

¹⁷ *Smithers v. Smith*, 204 U. S. 632, 633, 51 L. ed. 656.

¹⁸ *Stowe v. Santa Fe Pac. R. Co.*, 117 Fed. 368.

¹⁹ *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403. See *Bowdoin College v. Merritt*, 63 Fed. 213.

²⁰ *Slaughter v. Mallet Land & Cattle Co.*, C. C. A., 141 Fed. 282. See *supra*, § 16.

where substantially all the property of the corporation was involved in the litigation, it was held that the transaction was a fraud upon the court, and jurisdiction was not sustained.²¹ If there is no collusion and an original defect in the jurisdiction has been cured,²² or the jurisdiction appears upon the record,²³ before the objection is raised; the suit may be retained. It has been said that, where the want of jurisdiction does not appear on the record, the court may exercise its discretion in determining whether it will permit the issues of fact to be tried at a late stage of the case.²⁴ It has been held that where the difference of citizenship is averred in the plaintiff's pleading, and denied by defendant, the burden of proof is upon the defendant.²⁵ If the record does not know affirmatively that the court has jurisdiction, the case may be dismissed at any time by motion before issue joined,²⁶ or thereafter at the close of plaintiff's proofs;²⁷ after as well as before judgment; and the objection may be taken for the first time in the appellate court.²⁸ An appellate court will rarely direct the dismissal of a case for collusion; but will ordinarily direct a trial of that question by the court below.²⁹ When, after all the pleadings are filed in a suit which is brought in or removal to a Federal court on the claim that it is a case arising under the Constitution and laws of the United States, it appears that the averments upon which the

²¹ *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444.

²² *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 299, 25 L. ed. 932, 936.

²³ *Mahoning Valley Ry. Co. v. O'Hara*, C. C. A., 196 Fed. 945.

²⁴ *Briggs v. Traders' Co.*, 145 Fed. 254. But see *Pennsylvania Co. v. Bay*, 138 Fed. 203.

²⁵ *Adams v. Shirk*, 117 Fed. 801; *Kilgore v. Norman*, 119 Fed. 1006.

²⁶ *Bicycle S. Co. v. Gordon*, 57 Fed. 529; *La Vega v. Lapsley*, 1 Woods, 428; *Municipal Inv. Co. v. Gardiner*, 62 Fed. 954. But see *Fuller v. Metropolitan L. Ins. Co.*, 31 Fed. 696. "Such an objection ought to be raised at the first opportunity, and delay in its presentation should be considered in examining into the

grounds upon which it is alleged to rest." *Deputron v. Young*, 134 U. S. 241, 251, 33 L. ed. 923, 928. It has been held that upon a motion to dismiss, leave to amend may be given where it does not affirmatively appear that the court has no jurisdiction. *Home Ins. Co. of N. Y. v. Nobles*, 63 Fed. 641.

²⁷ *Streat v. American Rubber Co.*, 115 Fed. 634.

²⁸ *Grace v. Am. C. Ins. Co.*, 109 U. S. 278, 27 L. ed. 93; *Bors v. Preston*, 111 U. S. 252, 28 L. ed. 419; *Mansfield, C. & L. M. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462.

²⁹ *Ashley v. Supervisors of Presque Isle County*, C. C. A., 60 Fed. 55.

jurisdiction is claimed are immaterial, it is the duty of the court to dismiss or remand the cause.³⁰ To justify a dismissal under this statute, the court must be satisfied that the object was to create a case cognizable in the Federal courts.³¹ Where a collusive transfer of the cause of action was evidently made for another purpose, it was held that the jurisdiction should be retained.³² Admissions by the defendant after a suit is brought cannot by reducing the matter in dispute divest the court of jurisdiction.³³ If the question of jurisdiction is doubtful, the decision thereupon may be reserved until the final hearing.³⁴ The dismissal should be without prejudice.³⁵

§ 364. Motions to dismiss because the complaint shows no cause of action. Demurrers have been abolished.¹ Objections which formerly were raised by demurrer "shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court."² This new

³⁰ Robinson v. Anderson, 121 U. S. 522, 30 L. ed. 1021; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764; Minnesota v. No. Securities Co., 194 U. S. 48, 65, 48 L. ed. 870; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 288, 46 L. ed. 910, 914; *supra*, § 24. But see Peoples' Sav. Bank v. Layman, 134 Fed. 635; where, there being two questions involved, one Federal and the other not, it was held that the decision of the Federal question adversely to the complainant did not deprive the court of jurisdiction to decide in its favor upon the other ground.

³¹ Lanier v. Nash, 121 U. S. 404, 410, 30 L. ed. 947, 949; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878.

³² Lanier v. Nash, 121 U. S. 404, 30 L. ed. 947.

³³ Fuller v. Met. L. Ins. Co., 37 Fed. 163. See Chicago C. Co. v. Fogg, 53 Fed. 72, 76, and *supra*, § 22.

³⁴ York County Sav. Bank v. Abbot, 131 Fed. 980.

³⁵ Thompson v. Railroad Co., 6 Wall. 134, 18 L. ed. 765; Kendig v. Dean, 97 U. S. 423, 24 L. ed. 1061; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719. A New York court said that, in such a case, the case resembled one in which an arbitrator duly chosen had refused to act and pass upon the claims of the parties. Dunlevie v. Spangenberg, 66 Misc. (N. Y.) 364.

§ 364. ¹ Eq. Rule 29.

² Eq. Rule 29. Under the former practice, the prevailing opinion was that a motion to dismiss a bill for want of equity could not be made before the hearing. La Vega v. Lapsley, 1 Woods, 428; Betts v.

method of procedure is borrowed from the English chancery orders.³ The former decisions upon demurrers, as well as the English cases upon motions to dismiss, will probably, to a large extent, be followed, except in so far as they relate to technical questions.

§ 365. **Demurrers under the former practice.** A demurrer was a pleading which admitted the truth of a bill, but claimed that the defendant should be excused from answering thereto and the complainant be denied relief on account of some irregularity or insufficiency existing in it. As the name denotes, demurrers were borrowed from the common law.¹ They are so termed because the defendant *demoratur*, or will go no farther.² It has been said that a demurrer must not be addressed to a point within the discretion of the court; and if so, that it will be overruled.³ A demurrer may be to the whole, or to a part of a bill,⁴ or to both the whole and separate parts of a bill.⁵ Separate demurrers may be filed for different causes to separate parts of a bill.⁶ If only a part of the bill be demurred to, the demurrer must be accompanied by a plea or answer to what remains.⁷

§ 366. **Admissions by a demurrer.** A demurrer admitted the truth of the allegations of fact in the bill.¹ "As a matter of construction of an ambiguous clause, the court is bound to adopt

Lewis, 19 How. 72, 15 L. ed. 576; Fuller v. Met. L. Ins. Co., 31 Fed. 696. But see Person v. Fidelity Cas. Co., 84 Fed. 759. Cf. Willis v. Willis, 42 W. Va. 522; s. c., 26 S. E. R. 515; Carlsbad v. Tibbetts, 51 Fed. 852; State v. Hemingway, 69 Miss. 491; Reilly v. Reilly, 139 Ill. 180; Russell v. Lamb, 82 Iowa, 558; Am. Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn., 181 Fed. 375; Hardinge Conical Mill Co. v. Abbe Engineering Co., 182 Fed. 848.

³ See Odgers.

§ 365. ¹ Langdell's Eq. Pl., §§ 53, 92.

² Daniell's Ch. Pr. (5th Am. ed.), 543; 3 Bl. Com. 314.

³ Verplank v. Caines, 1 J. Ch. (N. Y.) 57.

⁴ Equity Rule 32.

⁵ Int. T. C. Lumber Co. v. Marner, 44 Fed. 621.

⁶ North v. Earl of Strafford, 3 P. Wms. 148; Roberdeau v. Rous, 1 Atk. 544; Daniell's Ch. Pr. (5th Am. ed.), 584.

⁷ See Story's Eq. Pl., § 442; Daniell's Ch. Pr. (5th Am. ed.) 583.

§ 366. ¹ Bailey v. Birkenhead, L. & C. J. Ry. Co., 12 Beav. 433, 443; Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522, 28 L. ed. 498, 504; Boyer v. Boyer, 113 U. S. 689, 701, 28 L. ed. 1089, 1092.

that interpretation which is least favorable to the plaintiff; but the defendant is not entitled to press this principle so far as to draw any inferences of fact he pleases which may happen to be not inconsistent with the averments of the bill."² It has been said that "reasonable presumptions are admitted by demurrer as well as the matters expressly alleged."³ The court will not infer from an allegation that a fraud was committed at a time beyond the limit of the Statute of Limitations, that the fraud was then discovered.⁴ "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms, nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."⁵ The preponderance of authority holds: that where *profert* is made of a recorded paper, it is for all purposes presented to the court as a part of the pleading, and an objection to the same may be taken by demurrer.⁶ A demurrer

² Sir Page Wood, V. C., in *Simpson v. Fogo*, 1 J. & H. 18, 23; s. c., 6 Jurist (N. S.), 949. See *Union Pac. Ry. Co. v. Mercer*, 28 Fed. 9.

³ Clifford, J., in *Amory v. Lawrence*, 3 Clifford, 523, 526.

⁴ *Sheldon v. Keokuk N. L. P. Co.*, 8 Fed. 769, 777; *Johnson v. Powers*, 13 Fed. 315; *Jones v. Slawson*, 33 Fed. 632, 636.

⁵ Field, J., in *Dillon v. Barnard*, 21 Wall. 430, 437, 438, 22 L. ed. 673, 676, 677. See also s. c., 1 Holmes, 386; *U. S. v. Ames*, 99 U. S. 35, 45, 25 L. ed. 295, 300; *Cornell v. Green*, 43 Fed. 105, 107; *Interstate L. Co. v. Maxwell L. Co.*, 139 U. S. 569, 35 L. ed. 278; *Willard v. Davis*, 122 Fed. 363. Where deeds and other written instru-

ments were set out in a pleading, from which a certain inference as to their legal effect might plausibly be drawn, but it was alleged as a fact that a reason existed for their execution which would justify a different inference as to their legal effect, it was said that it could not be held on demurrer that the former inference should, and the latter should not, be drawn, but proof must be adduced to show the actual facts which determine the proper effect of the instruments. *Smith v. Glasgow Ins. Co.*, C. C. A., 74 Fed. 332.

⁶ *Bogart v. Hinds*, 25 Fed. 484; *Knott v. Burleson*, 2 G. Greene (Iowa), 600; *Wilder v. McCormick*, 2 Blatchf. 31, 35; *Grahame v.*

did not admit conclusions of law; and in the construction of the bill upon the argument they might be disregarded.⁷ Such, for example, are allegations that a State statute is unconstitutional and a direct burden on interstate commerce and an impairment of the usefulness of the complainant's facilities for that purpose;⁸ that orders by the interstate commerce commission were beyond its powers and as to the effect of the same upon the carriers subject thereto;⁹ that a certain combination and agreement is a conspiracy or a monopoly;¹⁰ that a tax is "unreasonable and excessive," without the statement of any valid reasons for so considering it;¹¹ that a fee charged by an ordinance styling it wharfage "is not real wharfage, but a duty on tonnage."¹² "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another they have no more effect than other words of unpleasant signification."¹³

Cooke, 1 Cranch, C. C. 116; Douglass v. Rathbone, 5 Hill (N. Y.), 143; Rantin v. Robertson, 2 Strobb. Law. (S. C.), 366; 1 Chitty's Pl. 415, 416. So held of patents and reissued patents, in International T. C. L. Co. v. Maurer, 44 Fed. 618, 619; Enterprise Mfg. Co. v. Snow, 67 Fed. 335; U. S. Credit S. Co. v. Am. Credit Co., 53 Fed. 818; German v. Wilgus, 67 Fed. 597; Heaton P. B. F. Co. v. Schlochtermeyer, 69 Fed. 592; Edison v. Am. Mutoscope & B. Co., 127 Fed. 361; Hogan v. Westmoreland Specialty Co., 145 Fed. 199. But see Indurated F. Ind. Co. v. Grace, 52 Fed. 124, 128; *supra*, §§ 144, 147. In Ulman v. Jaeger, 67 Fed. 980, 982, held, that exhibits filed with a bill are upon a demurrer to be read as part of the bill. *Contra*, held under Code practice in Penrose v. Pac. Mut. L. I. Co., 66 Fed. 253. See Keshner v. Lyon, 40 W. Va. 161, 20 S. E. R. 933.

⁷ Dillon v. Barnard, 21 Wall. 430,

22 L. ed. 673; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922.

⁸ Southern Ry. Co. v. King, 217 U. S. 524, 54 L. ed. 868.

⁹ Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 204, 205, 56 L. ed. 729, 733, 734.

¹⁰ Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945, 955.

¹¹ Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169.

¹² Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584.

¹³ Waite, C. J., in Ambler v. Choateau, 107 U. S. 586, 591, 27 L. ed. 322, 324. For allegations held sufficient, see Pac. R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498.

The words "fraudulently," "deceitfully," and "by mistake" are conclusions of law, and will be disregarded.¹⁴ Averments that what was done was "colorable," "a fraud," "a breach of trust," and "a scheme by which Blair and Taylor were to get" certain stock or shares of stock in a corporation "without paying for them," are allegations of conclusions of law, which a demurrer did not admit.¹⁵ An allegation, that defendant received certain property, in trust, is a conclusion of law.¹⁶ An allegation, that plaintiff is a preferred stockholder, without stating the facts concerning the contract under which the stock was issued, in a conclusion of law.¹⁷ The following averment was held to be an allegation of fact, which was admitted by a demurrer, and not to be a conclusion of law: "The business of the complainants is founded almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof, and that the human race does possess the inmate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and (complainants) discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and they are confined to practical scientific treatment emanating from the source aforesaid."¹⁸ When the value of the matter in dispute is not liquidated by law, a statement as to the same was admitted by a demurrer.¹⁹ An averment that a thing was done with the intent to defraud is an allegation of fact.²⁰ An allegation as to the future effect of an act threatened by the defendant was held to be admitted by a demurrer.²¹ An averment that the injury

¹⁴ *Magniac v. Thompson*, 2 Wall. Jr. 209; *supra*, §§ 136, 137.

¹⁵ *Fogg v. Blair*, 139 U. S. 118, 127, 35 L. ed. 104, 107.

¹⁶ *Young v. Mercantile Trust Co.*, 140 Fed. 61.

¹⁷ *Hackett v. Northern Pac. Ry. Co.*, 140 Fed. 717.

¹⁸ *Am. School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 103, 47 L. ed. 90, 94.

¹⁹ *Texas & Pac. Ry. v. Kuteman*, C. C. A., 54 Fed. 547; *Louisville & N. R. Co. v. Smith*, C. C. A., 128 Fed. 1; *supra*, § 6.

²⁰ *Platt v. Mead*, 9 Fed. 91.

²¹ *St. Louis v. Knapp Co.*, 104 U. S. 658, 26 L. ed. 883. In *Hutton v. Joseph Baneroff & Sons*, 83 Fed. 17, it was held that a bare allegation that certain matters "will be" done was insufficient.

would be irreparable is not.²² It has been held: that an allegation as to the law of a foreign country is admitted by a demurrer.²³ In a suit for the infringement of certain trademarks; it was held, that the objection that they were invalid, because consisting of geographical names, could not be considered upon demurrer.²⁴ A demurrer did not admit a false allegation concerning a fact of which the court will take judicial notice.²⁵ Thus, a demurrer does not admit the allegation that a town is in a certain county, when in fact it is in another county of which the court can take judicial notice.²⁶ Upon a demurrer to an infringement bill the court might take judicial notice of facts within the common knowledge of persons ordinarily well informed; and it might refresh its recollection upon the subject by a reference to books published before the application, which show that the patent is void for lack of novelty, utility or patentability.²⁷ But it would not apply any special knowledge which the judge may possess,²⁸ nor investigate the prior state of the art,²⁹ nor even, it has been said, examine other patents mentioned in the bill,³⁰ nor recitals as to the prior state of the art in the specifications of the letters-patent of which profert is made;³¹ and, in such case, every doubt was resolved against the de-

²² *Indian Land & Tr. Co. v. Shoenfelt*, C. C. A., 135 Fed. 484.

²³ *Ligeois v. McCracken*, 10 Fed. 664; XX *Harvard Law Review*, 74. *Contra*, *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54; 113 Am. St. Rep. 863.

²⁴ *Jewish Colonization Ass'n v. Solomon*, 125 Fed. 994.

²⁵ *Taylor v. Barelay*, 2 Simons, 213. *Compare Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 252, 27 L. ed. 922, 924.

²⁶ *Ross v. Fort Wayne*, 63 Fed. 466.

²⁷ *Am. Fibre Ch. Co. v. Williamson*, 69 Fed. 247; *Am. Fibre Ch. Co. v. Buckskin F. Co.*, C. C. A., 72 Fed. 508; *Fowler v. New York, C. C. A.*, 122 Fed. 747; *Hogan v. Westmoreland Specialty Co.*, 145

Fed. 199; *Gilbert Mfg. Co. v. Post & Lester Co.*, 189 Fed. 81; *Charles Boldt Co. v. Nivison-Weiskopf Co.*, C. C. A., 194 Fed. 871. See an essay by Samuel H. Fisher in 5 *Yale Law J.* 213.

²⁸ *Cleveland F. Co. v. Vulcan B. Co.*, 72 Fed. 505; *International Mausoleum Co. v. Sievert*, 197 Fed. 936.

²⁹ *Rowe v. Blodgett & C. Co.*, 87 Fed. 868; *Star Ball Retainer Co. v. Klahn*, 145 Fed. 834; *Voightmann v. Seely*, 176 Fed. 371.

³⁰ *Cleveland F. Co. v. Vulcan B. Co.*, 72 Fed. 505; *Southern Plow Co. v. Atlanta Agricultural Works*, 165 Fed. 214; *Voightmann v. Seely*, 176 Fed. 871.

³¹ *Indurated F. I. Co. v. Grace*, 52 Fed. 124.

murrer,³² and the patent was not held invalid unless the court was entirely satisfied from its face that by no possible proof could patentable invention and validity be made to appear.³³

§ 367. **Classification of demurrers.** Demurrers were either to the relief or to the discovery. Demurrers to the relief claim that for some reason apparent upon the face of the bill the plaintiff is not entitled to the relief prayed for in it. They are classified by Mitford, afterwards Lord Redesdale, substantially as follows:¹ Demurrers to the relief are founded on objections to the jurisdiction; to the person; or to the matter of the bill, either in substance or in form. Demurrers to the jurisdiction are allowed either (1) because the subject of the suit is not within the jurisdiction of a court of equity; or (2) because some other court of equity has the proper jurisdiction. A demurrer of this last class is much more frequent now than formerly. For the rule, that in a superior court of general jurisdiction the presumption is that nothing shall be intended out of its jurisdiction that is not shown or intended to be so,² does not apply to the courts of the United States; whose jurisdiction is confined to what is expressly given them by the Constitution and statutes and must always appear upon the record.³ It was held that the objection that one of two plaintiffs suing to enforce a common, not a joint right, is a citizen of the same State as a defendant, could not be raised by a demurrer to the whole bill.⁴ Causes of demurrer to the person were: that it appears upon the face of the bill that the plaintiff has not the legal capacity to sue; either at all, as an alien enemy, or an unincorporated association suing as a corporation; or alone, as an infant, idiot, lunatic, and in some States a married woman.⁵ Demurrers to the substance of a bill were that it appears upon

³² *Drainage Constr. Co. v. Englewood*, 67 Fed. 141.

³³ *Jacks-Evans Mfg. Co. v. Hemp & Co.*, C. C. A., 140 Fed. 254.

³⁴ *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, 193 Fed. 69.

§ 367. ¹ Mitford's Pl., ch. 11, § 2.

² Daniell's Ch. Pr. (2d Am. ed.) 615; *Earl of Derby v. Duke of Athol*, 1 Ves. Sen. 203.

³ *Turner v. Bank of N. A.*, 4 Dall.

8; *Godfrey v. Terry*, 97 U. S. 171.

⁴ *Nebraska City Nat. Bank v. Nebraska City H. G. L. Co.*, 14 Fed. 763. But see *Hodge v. North Mo. R. Co.*, 1 Dill. 104.

⁵ *Supra*, §§ 87-89. A bill filed by a next friend was held demurrable when it did not show that the plaintiff was disabled to sue alone. *West v. Reynolds*, 35 Fla. 317, 71 So. 740. See also *Wheeler & Wilson Mfg. Co.*

the face of the bill: (1) That the plaintiff has no interest in the subject-matter of the bill. It has been held that the objection that one of two plaintiffs has no interest in the subject-matter can be raised by a general demurrer for want of equity.⁶ (2) That the defendant is not answerable to him, but to some other person. (3) That the defendant has no interest in the subject-matter of the suit. (4) That the plaintiff is not entitled to the relief he prays; but if the bill showed a case for some relief, and yet ask for too much or the wrong relief, it was not demurrable provided it contain the prayer for general relief.⁷ (5) That the value of the subject-matter is beneath the dignity of the court. In England the Court of Chancery declined to interfere when the value of the matter in dispute was less than ten pounds, except in suits brought by or on behalf of charities and under bills to obtain relief on account of fraud, or to establish a right.⁸ In the District Courts of the United States the bill should show affirmatively that the matter in dispute, exclusive of interest and costs, exceeds three thousand dollars,⁹ except in certain cases for which the statute specially provides.¹⁰ (6) That the bill does not embrace the whole matter concerning which the suit is brought, and which is capable of being immediately disposed of, so that there is danger of the defendant's being harrassed with other suits about the same.¹¹ (7) That there is a want of proper parties, plaintiff or defendant.¹² (8) That there is a misjoinder¹³ of parties plaintiff. A superfluity of

v. Filer, 52 N. J. Eq. 164; Paige v. Broadfoot, 100 Ala. 610.

⁶ Hodge v. North Mo. R. Co., 1 Dill. 104. But see Nebraska C. Nat. Bank v. Nebraska C. H. G. L. Co., 14 Fed. 763.

⁷ Patrick v. Isenhardt, 29 Fed. 339; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106.

⁸ Daniell's Ch. Pr. (2d Am. ed.) 378, 379; Brace v. Taylor, 2 Atk. 253; Moore v. Lyttle, 4 J. Ch. (N. Y.) 183.

⁹ U. S. v. Pratt C. & C. Co., 18 Fed. 708; 24 St. at L., ch. 373. But see Sharon v. Terry, 36 Fed. 337. The text was cited with approval in

Oleson v. No. Pac. R. Co., 44 Fed. 12.

¹⁰ See §§ 4, 5, *supra*.

¹¹ Anon., 2 Ch. Cas. 164; Purefoy v. Purefoy, 1 Vern. 29; Shuttleworth v. Laycock, 1 Vern. 245;

Margrave v. Le Hooke, 2 Vern. 207.

¹² Dwight v. Central Vt. R. Co., 9 Fed. 785.

¹³ Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; Lansdale v. Smith, 106 U. S. 391, 27 L. ed. 219;

Taylor v. Holmes, 14 Fed. 498;

Markey v. Mutual Ben. L. I. Co., 6 Ins. L. J. 537; Wollensak v. Reiher, 115 U. S. 96, 29 L. ed. 350.

defendants, not accompanied by multifariousness, is the subject of objection by those only who were improperly joined.¹⁴ (9) That the plaintiff's remedy is barred by length of time or laches.¹⁵ When a bill praying an injunction to restrain the infringement of a reissued patent sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or three years has taken place in applying for the reissue, not explained by special circumstances giving sufficient ground for the delay; the question of laches is a question of law arising on the face of the bill, which avails as a defense upon a general demurrer for want of equity.¹⁶ If it appeared by the face of the bill that the case of the complainant was barred by the statute of limitations, it was demurrable.¹⁷ The facts which show that the delay is excusable must be set up in the bill.¹⁸ Where the suit was brought within the time fixed by the statute of limitations, and no special circumstances tending to create an equitable estoppel appeared in the bill; it was held: that the bill was not demurrable for laches because of the delay alone.¹⁹ A demurrer would also be sustained where the bill shows that the plaintiff's case was repugnant to the statute of frauds;²⁰ but when the face of the bill does not show that a contract, conveyance, or agreement was not in writing, there seems to be no presumption

¹⁴ *Cherrey v. Monro*, 2 Barb. Ch. (N. Y.) 618; *Toulmin v. Hamilton*, 7 Ala. 362. But see *Bank v. Carrollton R. Co.*, 11 Wall. 624, 20 L. ed. 82.

¹⁵ *Maxwell v. Kennedy*, 8 How. 210, 12 L. ed. 1051; *Badger v. Badger*, 2 Wall. 87, 94, 17 L. ed. 836, 838; *Marsh v. Whitmore*, 21 Wall. 185, 22 L. ed. 485; *Sullivan v. P. & K. R. Co.*, 94 U. S. 806, 24 L. ed. 324; *Brown v. Buena Vista*, 95 U. S. 161, 24 L. ed. 423; *Godden v. Kimmel*, 99 U. S. 201, 25 L. ed. 431; *National Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815. For a definition of equitable laches see *De Gendre v. Byrnes*, 44 N. J. Eq. 372.

But see *Beekman v. Hudson R. W. S. Ry. Co.*, 35 Fed. 3.

¹⁶ *Wollensak v. Reiher*, 115 U. S. 96, 101, 29 L. ed. 350, 351; *Lockhart v. Leeds*, 195 U. S. 427; *Thurmond v. Ches. & O. Ry. Co.*, C. C. A., 140 Fed. 697.

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¹⁸ *Edison El. L. Co. v. Equitable Life Assur. Soc. of U. S.*, 55 Fed. 478; *supra*, § 137. But see *Brush El. Co. v. Ball El. L. Co.*, 43 Fed. 899.

¹⁹ *Sabre v. United Traction & Electric Co.*, 156 Fed. 79.

²⁰ *Randall v. Howard*, 2 Black, 585, 589. But see *Chapman v. School Dist.*, 1 Deady, 108.

that it was invalid.²¹ (10) That the bill is multifarious.²² It has been held that only such defendants as would suffer by the multifariousness can raise this objection.²³ (11) That there is another suit pending between the parties for the same cause of action. Demurrers for insufficiency as to form were either: (1) That the plaintiff's place of abode is not stated; or that a compliance has not been made with any of the other requirements of Rule 20.²⁴ (2) That the facts essential to the plaintiff's right and within his own knowledge are not alleged positively.²⁵ (3) That the bill is deficient in certainty.²⁶ (4) That the plaintiff does not in his bill offer to do equity, when it is the custom of the court to require him to do so.²⁷ (5) That the bill is not signed by counsel.²⁸ (6) That the bill is not supported by an affidavit when one is necessary.²⁹ A demurrer to the relief would not lie upon the ground that the bill contains irrelevant matter. The proper remedy for this was an exception for impertinence.³⁰ Neither was a bill demurrable because indispensable parties, whom it names and against whom it prays process, have not been served with subpoenas to appear and answer.³¹ If any part of the relief prayed was proper the demurrer was overruled.³² "This period is within the statute of limitations; and, when this is the fact, it is held by good authority that the bill is not demurrable in the absence of other circumstances than mere delay, but the defense of laches must be set up in the answer."³³

²¹ Sage Land & Improvement Co. v. Ripley, C. C. A., 191 Fed. 785.

²² See §§ 139-143, *supra*.

²³ Atwill v. Ferrett, 2 Blatchf. 39, 44; Buerk v. Imhaeser, 3 Fed. 457; Hill v. Bonaffon, 2 W. N. C. (Pa.) 356; *supra*, §§ 139-143.

²⁴ Mitford's Pl., ch. 2, § 2; Rowley v. Eccles, 1 Sim. & S. 511.

²⁵ Mitford's Pl., ch. 2, § 2; Daniell's Ch. Pr. 412, 625.

²⁶ Taylor v. Holmes, 14 Fed. 498; Goldsmith v. Gilliland, 22 Fed. 865.

²⁷ U. S. v. Pratt C. & C. Co., 18 Fed. 708. See § 152.

²⁸ Rule 24; Dwight v. Humphreys, 3 McLean, 104.

²⁹ Findlay v. Hinde, 1 Pet. 241, 244, 7 L. ed. 128, 130.

³⁰ Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 522, 28 L. ed. 498, 504; Howe & Davidson Co. v. Hagan, 140 Fed. 182; Rule 26; *supra*, §§ 237, 238.

³¹ Kilgour v. N. O. G. Light Co., 2 Woods, 145.

³² Chicago, M. & St. P. Ry. Co. v. Hartshorn, 30 Fed. 541; Strawberry Hill v. Chicago, M. & St. P. Ry. Co., 41 Fed. 568.

³³ Sabre v. United Tr. & El. Co., 156 Fed. 79, 82.

§ 368. Election and transfer to the law side of the court. The Equity Rules now provide: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."¹ "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."² By the previous practice, when the plaintiff is sued both at law and in equity, at the same time, for the same matter, the defendant was entitled to an order that the plaintiff elect whether he will proceed in equity or at law.³ The case of a mortgagee is an exception to this rule; for, in the absence of any statutory restriction, he can proceed at the same time to foreclose his mortgage in equity and sue on the bond at law.⁴ This exception, however, did not extend to the case of a vendor seeking to enforce his lien and sue at law for his debt.⁵

§ 368. ¹Eq. Rule 22. It had been previously said: "In the Federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in a State court, but only to the law side of the Federal court." U. S. Life Ins. Co. v. Cable, C. C. A., 98 Fed. 761, 39 C. C. A. 264; North Carolina Min. Co. v. Westfeldt, 151 Fed. 290. Where there was no cause of action at common law, the bill was dismissed. Wingert v. First Nat. Bank, 223 U. S. 670.

²Eq. Rule 23.

³Mitford's Pl. (Tyler's ed.) 340; Carlisle v. Cooper, 3 C. E. Green (N. J.), 241; Livingston v. Kane, 3 J. Ch. (N. Y.) 224. It was said in a recent case: "Where a wrong has been perpetrated and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one, and, in the absence of

facts creating an equitable estoppel, his prosecution of the wrong remedy to a judgment of defeat will not estop him from subsequently pursuing the right one to victory. Bierce v. Hutchins, 205 U. S. 340, 347; 27 Sup. Ct. 524, 51 L. ed. 828; Thomas v. Sugarman, 218 U. S. 129, 133, 30 Sup. Ct. 650, 54 L. ed. 967, 29 L.R.A. (N.S.) 250; Standard Oil Co. v. Hawkins, 74 Fed. 395, 398, 399, 20 C. C. A. 468, 472, 473, 33 L.R.A. 739; Barnsdall v. Waltemeyer, 142 Fed. 415, 420, 73 C. C. A. 515, 520; Harrill v. Davis, 168 Fed. 187, 195, 94 C. C. A. 47, 55, 22 L.R.A. (N.S.) 1153; In re Stewart (D. C.) 178 Fed. 463, 468; Nauman Co. v. Bradshaw, 193 Fed. 350, 354, 113 C. C. A. 274." Rankin v. Tygard, C. C. A. 198 Fed. 795, 806.

⁴Booth v. Booth, 12 Atk. 343; Dunkley v. Van Buren, 3 J. Ch. (N. Y.) 330.

⁵Barker v. Smark, 3 Beav. 64.

In a special case, the plaintiff might be allowed to proceed partly at equity and partly at law, and compelled to make a special election.⁶ The principle of election was extended to a case where the plaintiff sued at once in both a foreign and a domestic court.⁷ A plaintiff, who had sued at law and recovered nominal damages for a breach of a contract, could not thereafter sue in equity for the specific performance thereof.⁸ If, as the trial of the action at law progressed, he discovered that he was not likely to secure sufficient damages, he asked leave to withdraw a juror, in order that he might thereafter apply for equitable relief.⁹ The defendant could not move for the order, that plaintiff elect until after he had answered, and the time for exceptions had expired without one being taken, or the answer had been adjudged sufficient.¹⁰ The order should allow the plaintiff a reasonable time within which to make his election.¹¹ The plaintiff may remove to discharge the order for irregularity in obtaining it, or upon the merits confessed in the answer or proved in an affidavit.¹² If, upon such a motion, any doubt arises as to whether the suit in equity and the action at law are for the same matter, it is customary to direct an inquiry into that fact;¹³ during the progress of which all proceedings in both courts were usually stayed,¹⁴ unless the plaintiff could show that justice would be better done by permitting proceedings to some extent, when he may by special leave continue in one or both, at the court's discretion.¹⁵ If the plaintiff required further time within which to make his election, he applied for it to the court by motion upon notice.¹⁶ At the expiration of the time allowed him he

⁶ *Barker v. Dumaesque*, 2 Atk. 119; *Anon.*, 1 Vern. 104; *Franklin v. Hersch*, 3 Tenn. Ch. 467.

⁷ *Pieters v. Thompson*, G. Cooper, 294.

⁸ *Slaughter v. La Compagnie Francaises Des Cables Telegraphiques*, C. C. A., 119 Fed. 588.

⁹ *Ibid.*

¹⁰ *Mitford's Pl.* (Tyler's ed.) 340; *Leicester v. Leicester*, 10 Siml. 87. See *Fisher v. Mee*, 3 Meriv. 45; *Soule v. Corning*, 11 Paige (N. Y.), 412.

¹¹ *Bracken v. Martin*, 3 Yerg. (Tenn.) 55; *Rogers v. Vosburgh*, 4 J. Ch. (N. Y.) 84.

¹² *Daniell's Ch. Pr.* (2d Am. ed.) 817.

¹³ *Mouseley v. Basnett*, 1 Ves. & B. 382, n.

¹⁴ *Mills v. Fry*, 3 Ves. & B. 9; *Anon.*, 2 Madd. 395; *Daniell's Ch. Pr.* 817.

¹⁵ *Amory v. Brodrick*, Jacob, 530; *Carwick v. Young*, 2 Swanst. 239.

¹⁶ *Daniell's Ch. Pr.* (5th Am. ed.) 817.

made his election, which was usually done by filing a written statement of it signed by him or his solicitor in the clerk's office;¹⁷ or else his bill was dismissed.¹⁸ If he elected to proceed in equity, his proceedings at law were stayed by the order,¹⁹ and either the defendant was allowed to recover the costs of the action, or the plaintiff was directed by the court of equity to pay them.²⁰ If the plaintiff elected to proceed at law, his bill in equity was dismissed with costs.²¹ Such a dismissal was, however, no bar to a subsequent suit.²² Where, upon a bill for partition, a defendant claimed a paramount title and possession upon colorable grounds, against which the plaintiffs were not entitled to equitable relief; the proper course was to suspend the bill until the plaintiffs had an opportunity to sue at law,²³ although, in a similar case, the court has dismissed the bill without prejudice.²⁴ By the former practice in a proper case, the court might require the complainant to separate the same by filing a declaration at law for the recovery of damages, and retaining the bill so far as the same sought equitable relief.²⁵

¹⁷ Ibid.

¹⁸ Daniell's Ch. Pr. (5th Am. ed.) 816; Boyd v. Heinzelman, 1 Ves. & B. 381.

¹⁹ Daniell's Ch. Pr. (5th Am. ed.) 816.

²⁰ Simpson v. Sadd, 16 C. B. 26; Carwick v. Young, 2 Swanst. 239.

²¹ Jones v. Earl of Strafford, 3 P. Wms. 79, 90, n. B.

²² Countess of Plymouth v. Bladon, 2 Vern. 32; Livingston v. Kane, 3 J. Ch. (N. Y.) 224; Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

²³ Clark v. Roller, 199 U. S. 541.

²⁴ Carlson v. Sullivan, C. C. A., 46 Fed. 476.

²⁵ Chapman v. Yellow Poplar Lumber Co., C. C. A., 143 Fed. 201.

CHAPTER XXIII.

THE HEARING.

§ 369. **Bringing a suit to a hearing.** The old practice on bringing a suit to a hearing was the procurement of an order by the plaintiff setting it down for hearing within four weeks after the closing of the evidence. Upon his failure to do this defendant might either set it down himself, or move to dismiss the bill for want of prosecution. The party setting down was obliged to sue out a subpoena to hear judgment, and to have the same served upon the solicitors of the other parties.¹ If a plaintiff wished to set a cause down for a hearing upon bill and answer, he was obliged to do so within the time allowed him for filing the replication.² The Equity Rules now provide: "After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."³

§ 369. ¹ Daniell's Ch. Pr. (5th U. S. 405, 28 L. ed. 733; Adams Am. ed.) 963-971; 3 Bl. Com. 450. v. Howard, 21 Off. Gaz. 264;

² Daniell's Ch. Pr. (5th Am. ed.) Mackaye v. Mallory, 80 Fed. 256; 964, 965. Walsbach L. Co. v. Mahler, 88

³ Eq. Rule 57. See *supra*, § 362. Fed. 427. For a case where the Reynolds v. First Nat. Bank, 112 delay was held excusable, see Beirne

Under the former practice, when the bill had been dismissed for failure of the complainant to appear at the final hearing, his default might be opened and a new hearing allowed upon terms, such as a bond for security for costs.⁴

§ 370. Judges who can try cases at law and in equity. The Judicial Code provides: "When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed."¹ "When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit

v. Wadsworth, 36 Fed. 614. See § 370. ¹Jud. Code, § 13, 36 St. *Ex parte* Poultney v. City of La., at L. 1087, re-enacting U. S. R. S., Fayette, 12 Pet. 472, 9 L. ed. 1161. § 591, 4 Fed. St. Ann. 675.

⁴Karns v. W. L. Imlay Rapid Cyanide Process Co., 184 Fed. 479.

in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein.”² “If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section.”³ “Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment.”⁴ “It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a district court in the place or in aid of any other district judge within the same circuit.”⁵ “Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint

² Jud. Code, § 14, 36 St. at L. 1087, re-enacting U. S. R. S., § 592, 4 Fed. St. Ann. 676.

³ Jud. Code, § 15, 36 St. at L. 1087, re-enacting U. S. R. S., § 593, 4 Fed. St. Ann. 676.

⁴ Jud. Code, § 16, 36 St. at L. 1087, re-enacting U. S. R. S., § 594, 4 Fed. St. Ann. 676.

⁵ Jud. Code, § 17, 36 St. at L. 1087, re-enacting U. S. R. S., § 596, 4 Fed. St. Ann. 677.

any circuit judge of the circuit to hold said district court.”⁶

“It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.”⁷ “When the office of judge of any district court becomes vacant, all process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in, section nineteen.”⁸

“In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district.”⁹

“If, at any time, the business of the Commerce Court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any district court or circuit court of appeals. In case of illness or other disability of any judge assigned to the Commerce Court the Chief Justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigency therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge.”¹⁰

⁶ Jud. Code, § 18, 36 St. at L. 1087.

⁷ Jud. Code, § 19, 36 St. at L. 1087, re-enacting U. S. R. S., § 595,

4 Fed. St. Ann. 676.

⁸ Jud. Code, § 22, 36 St. at L. 1087.

⁹ Ibid, § 23.

¹⁰ Ibid. Jud. Code, § 205.

§ 371. **Challenge of a judge for interest.** The Judicial Code now provides: "Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."¹ It has been said: that the judge has no option but to retire in any case except that last mentioned in the statute; but that the question whether he is so related to or connected with either party as to render him improper to sit upon the trial, is one for his discretionary decision.² Before the statute was passed, it was held that a judge might hear a cause in which he was retained before he received his judicial appointment.³ It has been held: that, even with the consent of the parties, a Federal judge should not sit in a case in which he is related to one of the parties, within the fourth degree of consanguinity,⁴ but that a District Judge is not disqualified from trying the validity of bonds issued by a county, in which he is a resident and taxpayer.⁵

§ 372. **Challenge of judge for prejudice.** "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias, or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such

¹ § 371. 1 Jud. Code, § 20, 36 St. at L. 1087, re-enacting U. S. R. S. § 601; § 14 is quoted *supra*, § 370.

² *Ex parte* N. K. Fairbank Co., 194 Fed. 978.

³ *Thelusson v. Rendlesham*, 7 H.

L. C. 429; *The Richmond*, 9 Fed. 863, and citations.

⁴ *Re Eatonton El. Co.*, 120 Fed. 1010.

⁵ *Wade v. Travis County*, 72 Fed.

985.

bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."¹ It has been held: that this does not apply to a case pending on January 1st, 1912, when the Judicial Code took effect;² that the judge challenged has the right, subject to review by the appellate court, to determine whether the facts alleged are sufficient to show personal bias or prejudice;³ that the refusal of the judge to give effect to the affidavit of prejudice in a criminal case cannot be reviewed upon *habeas corpus*;⁴ but the Supreme Court has recently granted leave to file a petition for a mandamus to review the proceedings where a new judge had been designated to hear

§ 372. ¹Jud. Code, § 21, 36 St. at L. 1087.

²Henry v. Harris, (S. D. Ga., W. D.) 191 Fed. 868; *Ex parte* N. K. Fairbank Co., (M. D. Ala., N. D.) 194 Fed. 978, 985; *Ex parte* Glasgow, (N. D. Ga.) 195 Fed. 780. *Contra*, *Re* Iron Clad Mfg. Co., D. C., E. D. N. Y., A. D. 1912 (not reported).

³*Ex parte* N. K. Fairbank Co., 194 Fed. 978, where it was contended by counsel that the prejudice was shown in correspondence resulting from their complaint of a delay in the trial of the case; Henry v. Harris, 191 Fed. 868, where the judge upon an *ex parte* petition had written an opinion concerning the law of the case and had insisted upon publishing the same after the application had been withdrawn. In

both these cases the judges disregarded the affidavits in Epstein v. U. S., C. C. A., 196 Fed. 354, the judge had said at a hearing in bankruptcy. "This is a nasty piece of business. This estate has been looted by someone," and accompanied this by a direction to an officer of the court that he use what was left in the estate, even to the last penny, to investigate the matter and to institute proceedings against anyone who had committed any act that could be reached and punished under the law, and it was held that this did not disqualify him from trying an indictment against a person present at the hearing in bankruptcy for suborning a witness to commit perjury there.

⁴*Ex parte* Glasgow, 195 Fed. 780.

a case after such an affidavit had been filed;⁵ that a certificate of good faith is insufficient when made by nonresident counsel who have not been admitted to the bar of the court where the affidavit is filed.⁶ The decisions by the State courts under analogous statutes may be useful to the practitioner.⁷

⁵ *Re* Iron Clad Mfg. Co., February 1912.

⁶ *Ex parte* N. K. Fairbank Co., 194 Fed. 978.

⁷ It was held too late to make the motion when the action had been pending more than one year, a demurrer and several motions had been passed upon by the judge, the issues had been joined and the case by agreement set down for trial, *Eberville v. Leadville Coloring, Tunneling & Drainage Co.*, 28 Colorado, 241, 64 Pac. 200. But see *Re Ironclad Mfg. Co.*, U. S. D. C. S. D. N. Y., 1912; after an appearance to the merits or the submission of preliminary motions, *German Ins. Co. v. Landram*, 88 Ky. 433, 11 S. W. 367, 592, 10 Ky. Law Rep. 1039; after the judge had filed several orders in the cause, *Dupoyster v. Ft. Jefferson Imp. Co's. Receivers*, 121 Ky. 518, 28 Ky. Law Rep. 504, 89 S. W. 509; and, when the affidavit was filed, after the arrival of the day fixed for the trial or final hearing of any motion upon which the judge was called upon to pass, *State v. Donlan*, 32 Montana, 256, 88 Pac. 244. It was held not too late when the application was made before any other motion was disposed of, *Gibbons v. Lord Crawshaw*, 21 Ky. Law Rep. 1618, 55 S. W. 905; and even after the issues were framed when it was based upon facts since discovered, *Vance v. Field*, 89 Ky. 178, 11 Ky. Law Rep. 388, 12 S. W. 190. It has been held that the affidavits must state

the charges against the judge, in such a way that they will subject the parties making them to criminal punishment if they are false, and that an affidavit based entirely on hearsay is insufficient, *Schmidt v. Mitchell*, 101 Ky. 570, 19 Ky. Law Rep. 763, 41 S. W. 929, 72 Am. St. Rep. 427. Upon an indictment charging the defendant as an accessory in a murder alleged to have been committed as part of a political conspiracy, an affidavit was held to be sufficient when it set forth that the judge was a member of the same political party as the deceased, his intimate personal friend, in close sympathy with him in the political imbroglio resulting in the assassination, and that by reason thereof and of the great excitement at the time, the judge had conceived a feeling of hostility against the defendant, which would prevent him from affording a fair and impartial trial, and which he had shown upon a former trial by vicious acts established by the selection of an unfair and prejudiced jury, *Powers v. Commonwealth*, 114 Ky. 237, 24 Ky. Law Rep. 1007, 1186, 70 S. W. 644, 1059. It was held to be insufficient to state nothing more than that the trial judge did not do justice to the parties, *Dupoyster v. Ft. Jefferson Imp. Co's. Receivers*, 121 Ky. 518, 28 Ky. Law Rep. 504, 89 S. W. 509; and that he was a party to the suit and interested therein, and that he was personally hostile to the party objecting, *Sparks v.*

§ 373. **Arrangement of calendar.** By statute, a preference is given in all district courts and in the Supreme Court to actions in which a State is a party or in which the execution of the revenue laws of a State is enjoined.¹ A suit in equity under "the act to protect trade and commerce against unlawful restraints and monopolies," or under the Interstate Commerce law whenever the Attorney General filed with the clerk of the court a certificate that, in his opinion, the case is of general public importance, is given precedence and assigned for hearing at the earliest practicable day, before not less than three Circuit Judges of the Circuit, if there be three or more. If not, then before two Circuit Judges and a District Judge selected by them.² This law is still in force, notwithstanding the enactment of the Judicial Code,³ and it applies to the settlement of a decree upon the mandate of the Supreme Court.⁴ It has been said that it does not require three judges to hear a motion for a preliminary injunction or for any relief sought before a formal hearing.⁵ There is no rule that civil suits brought under the Sherman Act to dissolve the combination must await the trial of criminal actions against the same defendants.⁶ If an original and a cross cause have been set down for hearing at different times, and other causes intervene, the plaintiff in whichever of them is below the other will usually upon motion obtain leave to bring it forward, so that both causes may be heard together.⁷

Colson, 109 Ky. 711, 22 Ky. Law Rep. 1369, 60 S. W. 540, where the pleadings did not show that the judge had such an interest, *Metcalf v. Merchants' & Planters' Bank*, 89 Miss. 649, 41 So. Rep. 377; and in a contested election as to local option, statements in an affidavit that the judge "is opposed to the sale and traffic in such liquors to the extent that he has a pronounced bias against it," *Erwin v. Benton*, 120 Ky. 536, 27 Ky. Law Rep. 909, 87 S. W. 291, 9 Ann. Cas. 264.

§ 373. 1 U. S. S., § 949; *Ward v. State*, 12 Wall. 163, 20 L. ed. 260; *Hoge v. R. & D. R. Co.*,

93 U. S. 1, 23 L. ed. 781; *Davenport v. Dows*, 15 Wall. 390; *Miller v. State*, 12 Wall. 159, 20 L. ed. 259.

² Act of February 11, 1903, 32 St. at L. 823.

³ *Ex parte* U. S., 226 U. S. 420, 57 L. ed. —, setting aside *United States v. Terminal Ass'n of St. Louis*, 197 Fed. 446.

⁴ *Ibid.*

⁵ *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 166 Fed. 134, 136.

⁶ *Standard Sanitary Mfg. Co. v. U. S.*, 226 U. S. 20.

⁷ *Hinde's Pr.* 415; 3 Bl. Com. 451.

§ 374. **Manner of hearing a cause.** The English practice upon the hearing of a cause where all parties appear upon its being called, has been thus described: "The leading counsel for the plaintiff opens the plaintiff's case and in so doing states, first the bill, and then the answers, if any: pointing out the matters in issue, and questions in equity arising therefrom; after which the plaintiff's evidence is read, either by his leading or his junior counsel, and their arguments in support of the case are adduced. The counsel for the defendant are then heard, in support of the defendant's case, and his evidence is read by them; and the plaintiff's senior counsel is then heard in reply. When all are heard, the court pronounces the decree, either immediately or at a subsequent day."¹ It is usual in the United States, to waive the reading, and for counsel to state the substance of the pleadings and testimony, which are submitted to the judge at, or shortly after, the conclusion of the oral arguments, with written arguments upon the law and the facts, called briefs or points. The course is much the same where the cause is set down for a hearing upon bill and answer. The pleadings only are then read, and the answer is admitted to be true in all its material allegations of fact,² although not responsive to the bill,³ even when not stated positively, and the defendant only avers that he believes and hopes to be able to prove such facts.⁴ But the plaintiff does not thereby admit conclusions of law, nor allegations as to matters concerning which the court takes judicial notice.⁵ No other evidence is

§ 374. ¹ Daniell's Ch. Pr. (5th Am. ed.) 1988. By Eq. Rules S. D. N. Y. "6. In the trial of a Patent cause, whenever in the opinion of the Court the cause involves intricate technical or scientific questions of fact the Court will upon consent of all parties appoint some disinterested person skilled in the art to act as an assessor, the reasonable fee for whose services when fixed by the Court shall be a part of the taxable disbursements and enforceable as is a Master's fee. Such assessor shall sit with the Judge at the hearing of the evidence and shall assist the

Court in its deliberations upon the cause in such manner as the trial Judge may request, and any written opinion rendered by the assessor at the request of the Judge shall be a portion of the record on appeal."

² Lake E. & W. R. Co. v. Indianapolis Nat. Bank, 65 Fed. 690; Parker v. Concord, 39 Fed. 718.

³ Lake E. & W. R. Co. v. Indianapolis Nat. Bank, 65 Fed. 690.

⁴ Brinkerhoff v. Brown, 7 J. Ch. (N. Y.) 217; Dale v. McEvers, 2 Cow. (N. Y.) 118.

⁵ Taylor v. Barclay, 2 Sim. 213. See supra, §§ 329, 366.

then permitted except matters of record to which the answer refers.⁶ Unless relevant to some issue, it is not necessary to produce the mortgage bonds upon the hearing of a foreclosure suit.⁷ A hearing will not be given upon an agreed statement of facts without pleadings,⁸ even if a State statute authorizes such a practice.⁹

§ 375. Rules of decision upon a hearing. All decisions made in a former stage of the cause are open for review upon the final hearing.¹ But if the evidence is unchanged, a judge will rarely refuse to follow a ruling made by one of his colleagues in the same² or a similar³ case. The District Courts are bound to follow the decisions of the Supreme Court of the United States⁴ and those of the Circuit Court of Appeals in their own circuit;⁵ but they are not bound by the decisions of a District Court⁶ or of a Circuit Court of Appeals⁷ of the United States in another circuit; although, ordinarily, they will follow the same.⁸ Greater respect is paid to a ruling by the Circuit Justice

⁶ Anon., 1 Barb. Ch. (N. Y.) 13.

⁷ Dickerman v. Northern Tr. Co., 176 U. S. 181, 44 L. ed. 423; Northern Tr. Co. v. Columbia S. P. Co., 75 Fed. 936; Toler v. East Tenn. V. & G. Ry. Co., 67 Fed. 168, 181.

⁸ Nickerson v. A. T. & S. F. R. Co., 30 Fed. 85; s. c., 1 McCrary, 383.

⁹ Nickerson v. A. T. & S. F. R. Co., 30 Fed. 85; s. c., 1 McCrary, 383. But see *supra*, § 83, *infra*, § 476.

§ 375. ¹ Fourniquet v. Perkins, 16 How. 82; Pulliam v. Pulliam, 10 Fed. 53. But see Coupe v. Weatherhead, 37 Fed. 16.

² Cole S. M. Co. v. Va. & G. H. W. Co., 1 Saw. 685; Wakelee v. Davis, 44 Fed. 532; Taylor v. Decatur M. & Ld. Co., 112 Fed. 449.

³ Worswick Mfg. Co. v. Philadelphia, 30 Fed. 625. But see N. P. R. Co. v. Sanders, 47 Fed. 504.

⁴ Am. Bell Tel. Co. v. McKeesport Tel. Co., 57 Fed. 661; Westinghouse

Air Brake Co. v. Christensen Eng. Co., 113 Fed. 594; Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945.

⁵ Armat Moving Picture Co. v. Edison Mfg. Co., 121 Fed. 559; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945; Stockbridge v. Phoenix Mut. Life Ins. Co., 193 Fed. 558; § 479, *supra*.

⁶ Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489, 44 L. ed. 856, 858; Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945; Lawson v. Barber & Co., 189 Fed. 165; § 479, *supra*.

⁷ Ibid.; South Penn Oil Co. v. Miller, C. C. A., 175 Fed. 729.

⁸ Re Baird, 154 Fed. 215; Imbrovek v. Hamburg-American Steam

than to one by a Circuit Judge;⁹ and a ruling by a Circuit Judge has more weight than one by a District Judge.¹⁰ In matters of substantive as distinguished from adjective law, that is, of the law creating rights but not of that merely regulating practice, the Federal courts are—certainly so far as property in land is affected thereby, and probably altogether—bound by and will follow the statutes of the State within whose jurisdiction is the property that is the subject of the suit.¹¹ A State statute, however, which is merely declaratory of the law cannot affect the rules applying to causes of action that arose before its enactment.¹² Whether a State statute has been properly passed so as to take effect is a question of law, in determining which the courts of the United States will follow the decisions in the State wherein it is claimed to be in force.¹³ So, too, in construing a statute or the Constitution of a State, the Federal courts will in general follow the construction put upon it by the State courts, “when that construction has been settled by the decisions of its highest tribunal.”¹⁴ Even if, before the State courts have construed it, a State statute is given one construction by a Federal court, and subsequently the highest court of the State construes it differently; or if the Federal court have first construed it in ignorance of its construction by the highest tribunal of the State,—the Federal courts will, in subsequent cases, disregard their

Packet Co., 190 Fed. 229; § 479, *supra*. Nat Home v. Parrish, C. C. A., 194 Fed. 940, § 479, *supra*.

⁹ Preston v. Walsh, 10 Fed. 315. But see U. S. v. Huggell, 40 Fed. 636, 644.

¹⁰ Cf. E. Regensberg & Sons v. Am. Exch. Cigar Co., 130 Fed. 549.

¹¹ Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437; McGoon v. Scales, 9 Wall. 23, 19 L. ed. 545; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Brine v. Insurance Co., 96 U. S. 627, 24 L. ed. 858; Pulliam v. Pulliam, 10 Fed. 53, 77. See *infra*, § 477.

¹² Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886.

¹³ South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; Post v. Super-

visors, 105 U. S. 667, 26 L. ed. 1204; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225.

¹⁴ Polk's Lessee v. Wendal, 9 Cranch, 87, 3 L. ed. 665; Nesmith v. Sheldon, 7 How. 812, 12 L. ed. 925; Walker v. State H. Com'rs, 17 Wall. 648, 21 L. ed. 744; Elmwood v. Marcy, 92 U. S. 289, 23 L. ed. 710; East Oakland v. Skinner, 94 U. S. 255, 24 L. ed. 125; Louisville, N. O. & T. Ry. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784; Peters v. Bain, 133 U. S. 670, 33 L. ed. 696; Case v. Kelly, 133 U. S. 21, 33 L. ed. 513. Where it was claimed that the decision of such a question was pending before the State Supreme Court, a motion for an adjournment until that court had

former ruling and follow that of the State court.¹⁵ It has even been held that the Federal courts will not investigate the claim that the decision of the State court was obtained by collusion between the parties to the case in which it was obtained.¹⁶

Where a question is pending before the highest court of a State, it is the duty of a District Court of the United States to postpone its decision thereupon until after that of the State tribunal, unless irreparable injury should otherwise be caused.¹⁷ The courts of the United States are not bound by a decision of a State court construing a statute which is claimed to be a contract by the State; since otherwise the clause in the national Constitution forbidding a State to pass a law impairing the obligations of contracts might be violated with impunity.¹⁸ For a similar reason, if different constructions have been given to the same statute or constitutional provision by the courts of a State at different times, the Federal courts are not "bound to follow the latter decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected."¹⁹ Otherwise, said Chief Justice Taney, "the provision of the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory."²⁰ It seems that the Federal courts will give to a right created by a well-recognized local custom established and acquiesced in within a State, the

made its decision was denied. *Detroit v. Detroit City Ry. Co.*, 55 Fed. 569. See *infra*, § 477.

¹⁵ *Faireld v. County of Gallatin*, 100 U. S. 47, 25 L. ed. 544. A decree will be reversed on this ground when the decision of the State court was rendered pending the appeal. *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018. But see *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; and *infra*, § 477.

¹⁶ *East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125.

¹⁷ *F. W. Cook Brewing Co. v. Garber*, 168 Fed. 942. See Act of March 3, 1913, quoted § 172, *supra*.

¹⁸ *Jefferson Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173. See *Railroad Co. v. Falconer*, 103 U. S. 821, 822, 26 L. ed. 471.

¹⁹ *Waite, C. J.*, in *Douglass v. County of Pike*, 101 U. S. 677, 686, 25 L. ed. 968, 971. See also *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Ohio L. Ins. & Tr. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612.

²⁰ *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85.

same force as if it had been created by a State statute.²¹ In deciding questions of general commercial law, however, upon which the statutes of a State are silent, the Federal courts are not bound by the decisions of the State courts, but decide according to their own views of what the law is and should be.²²

§ 376. Objections which cannot be made at the hearing.

As the provisions of the equity rules and the other regulations of practice are chiefly designed to facilitate the speedy and orderly progress of a cause to a hearing, after a cause has been brought to a hearing it is a general rule that no objections as to form or the delay in taking a previous proceeding will be allowed to be taken then for the first time.¹ Thus, the rules provide that "if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties."² "Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book in the form or to the effect following

²¹ *Swift v. Tyson*, 16 Pet. 1, 18, 10 L. ed. 865, 871; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Railroad Co. v. National Bank*, 102 U. S. 14, 29, 26 L. ed. 61, 67. See *supra*, §§ 79, 82.

²² *Swift v. Tyson*, 16 Pet. 1; 10 L. ed. 865; *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet. 495, 10 L. ed. 1044; *Oates v. National Bank*, 100 U. S. 239, 25 L. ed. 580; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Butler v. Douglass*, 3 Fed. 612. See *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359. See *infra*, § 477. A plea of *res adjudicata* by a decision of a State court between the same par-

ties or their privies is valid, although the question there decided arose on demurrer and was a question of general commercial law and equity jurisprudence. *Fuller v. Hamilton County*, 53 Fed. 411. See § 186, *supra*. In one case, where the rule of the Federal was different from that of the State courts, Judge McCrary followed the latter, since otherwise there was a probability that a party to the suit would be subjected to a double payment. *Sonstiby v. Keeley*, 7 Fed. 447.

§ 376. ¹ *Allen v. Mayor, etc.*, of N. Y., 18 Blatchf. 239.

² Rule 53.

(that is to say): 'Set down upon the defendant's objection for want of parties.' And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill."³ An amended bill filed without leave upon the day of the hearing may be disregarded by the court.⁴ The objection that the allegations in the bill show no ground for the interference of a court of equity may be taken by motion.⁵ The objection that the plaintiff has an adequate remedy at law is waived by the defendant unless raised in a demurrer, plea or answer,⁶ but it may be taken by the court at any time.⁷

§ 377. Action of the court upon a hearing. The court may upon the hearing of a cause either decide all the questions raised therein and make a final decree, or merely dispose of some of them and give directions to facilitate the decision of those which remain.¹ Where, in a suit to enjoin the infringement of a patent, the defendant has defaulted after the evidence has been taken, the court should not pass in detail upon the questions that have arisen, but should only go over the case sufficiently to dispose of the actual controversy, not to establish a precedent that might be used in subsequent patent litigation between other parties.² Where, at the time a bill was filed, the plaintiff had the right to the injunction which was the only relief therein prayed except costs, but subsequent events make it

³ Rule 52.

⁴ Terry v. McLure, 103 U. S. 442, 26 L. ed. 403.

⁵ Baker v. Biddle, Bald. 394; Quirolo v. Ardito, 1 Fed. 610.

⁶ Reynes v. Dumont, 150 U. S. 354, 32 L. ed. 934; Kilburn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005; Brown v. Lake Sup. I. Co., 134 U. S. 530, 33 L. ed. 1021. See Lawson v. Barber & Co., 189 Fed. 165.

⁷ Lewis v. Cocks, 23 Wall. 436, 23 L. ed. 70; Oelrichs v. Spain, 15

Wall. 211, 21 L. ed. 43; Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945; Beyer v. Le Fevre, 186 U. S. 114, 118, 46 L. ed. 1080, 1082.

§ 377. It has been held that where the court has denied an *ex parte* application which has been withdrawn, it is not improper for it to file an opinion upon the question. Henry v. Harris, 191 Fed. 868.

² Victor Talking Mach. Co. v. Leed & Catlin Co., 180 Fed. 778.

improper to grant this relief on the final decree, the bill may be retained for the assessment of any damages to the plaintiff that have accrued;³ or, if no damages are awarded for costs and in case an undertaking has been filed as a condition for an interlocutory injunction, for a declaration that plaintiff was entitled to that relief in order to relieve him and his sureties from liability upon such undertaking;⁴ but no appeal will lie from a decree in such a case when the only grievance of the plaintiff is that he has been denied his costs.⁵ If the court inclines in favor of the defendant, it will usually render a final decree dismissing the bill. The dismissal may be absolute or without prejudice. An absolute decree of dismissal is an absolute bar to any subsequent suit brought for the same cause.⁶ A dismissal without prejudice is no bar to another suit brought for the same cause of action, provided that the defects on account of which the bill was dismissed are remedied.⁷ A dismissal without prejudice is usually ordered when a bill is dismissed for want of parties,⁸ or for want of jurisdiction in a Federal court,⁹ or for multifariousness,¹⁰ or for "a slip or mistake in the pleadings or in the proof,"¹¹ or because of the complainant's election to proceed at law.¹² The Supreme Court will reverse a decree which dismissed a bill absolutely when the dismissal should

³ *Wingert v. First Nat. Bank of Hagerstown*, 223 U. S. 670, 56 L. ed. 605.

⁴ *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 7 Misc. (N. Y.) 374, 377; *Williams v. United Wireless Tel. Co.*, (N. Y. Sup. Ct., per Bischoff, J.) N. Y. L. J. April 24, 1912, in which the writer was counsel.

⁵ *Wingert v. First Nat. Bank of Hagerstown*, 223 U. S. 670, 56 L. ed. 605.

⁶ *Case v. Beauregard*, 101 U. S. 688, 25 L. ed. 972; *Durant v. Essex Co.*, 7 Wall. 107, 19 L. ed. 154.

⁷ *Walden v. Bodley*, 14 Pet. 156, 161, 10 L. ed. 398, 400; *Daniell's Ch. Pr.* (5th Am. ed.) 994, 995; *Rosse v. Rust*, 4 J. Ch. (N. Y.) 300.

⁸ *Kendig v. Dean*, 97 U. S. 423, 24 L. ed. 1061.

⁹ *Hartell v. Tilgham*, 99 U. S. 547, 25 L. ed. 357; *Gaylords v. Kelshaw*, 1 Wall. 81, 17 L. ed. 612; *Hollins v. Brierfeld C. & T. Co.*, 150 U. S. 371, 37 L. ed. 1113.

¹⁰ *Williams v. Jackson*, 107 U. S. 478, 484, 27 L. ed. 529, 531.

¹¹ *Daniell's Ch. Pr.* (2d Am. ed.) 994, 995; *McNeill v. Cahill*, 2 Bligh, 228; *Woollam v. Haern*, 7 Ves. 211, 222; *Rosse v. Rust*, 4 J. Ch. (N. Y.) 300. For example, when the bill showed a good ground of equitable relief as to one plaintiff, but failed to show what interest the other had in the subject-matter of the litigation. *House v. Mullen*, 22 Wall. 42, 22 L. ed. 838. But see *Oggsbury v. La Farge*, 2 N. Y. 113, and § 187.

¹² *Countess of Plymouth v. Bladon*, 2 Vern. 32; *Livingston v. Kane*,

have been without prejudice.¹³ Where the dismissal is because the plaintiff has an adequate remedy at law, the decree should state that it is without prejudice to a suit at law.¹⁴ Upon a hearing of a demurrer a case improperly upon the common-law docket may be transferred to the equity docket and at the same time decided.¹⁵ If, on the other hand, the court inclines in favor of the plaintiff, unless the bill pray merely for a perpetual injunction, it rarely renders a final decree at the first hearing of the cause. It often directs a reference to a master to take accounts and assess damage;¹⁶ and it not infrequently gives leave to either party to apply for further orders or directions "at the foot of the decree" which it orders entered.¹⁷ If the court is in doubt concerning the facts, it may direct a feigned issue, or an action at law, or a reference to a master, to aid in determining the same. In one case, when a bill had been filed by a bondholder praying for the appointment of a receiver of a canal company, the court at the hearing denied the application for a receiver, but retained the bill so far as to compel the corporation to file an annual account.¹⁸

3 J. Ch. (N. Y.) 224; *Rogers v. Vosburgh*, 4 J. Ch. (N. Y.) 84.

¹³ *House v. Mullen*, 22 Wall. 42, 22 L. ed. 838; *Texas & P. Ry. Co. v. Interstate Tr. Co.*, 155 U. S. 585, 39 L. ed. 271; *Fougere v. Jones*, 66 Fed. 316.

¹⁴ *Sanders v. Devereux*, C. C. A., 60 Fed. 311, 316.

¹⁵ *Dancel v. United Shoe Mach. Co.*, 120 Fed. 839.

¹⁶ See ch. XXV.

¹⁷ *Legrand v. Whitehead*, 1 Russ. 309; *Wetmore v. St. Paul & P. R. Co.*, 3 Fed. 177, *infra*, § 405. But see *Hughes v. Jones*, 3 De G., F. & J. 307.

¹⁸ *Stewart v. C. & O. C. Co.*, 5 Fed. 149.

CHAPTER XXIV.

ISSUES AT LAW.

§ 378. Power of courts to direct issues at law. When the chancellor was in doubt concerning any question of fact arising in the cause, the evidence in regard to which was conflicting or insufficient,¹ it was his custom to compel its trial before a jury upon a feigned issue; and, if their verdict was satisfactory to him, to assume the truth of the facts established by the same as the basis of his decree.² This power of the chancellor is also vested, independently of any special statute, in all the courts of the United States which have equitable jurisdiction;³ but in cases arising under the patent laws it has been increased by a statute providing that the Circuit Courts of the United States, "when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may from time to time be made by the Supreme Court,⁴ and submit to them such questions of fact arising in such cause as such Circuit Court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings."⁵ The trial of an issue may be directed at any time.⁶ The court may decide a cause without a trial of an issue which it has ordered, and even without revoking its previous order directing one.⁷ The order of a judge directing

§ 378. ¹ *Moons v. De Bernales*, 1 Russ. 301; *Burkett v. Randall*, 3 Mer. 466.

² 3 Bl. Com. 452.

³ *Harding v. Handy*, 11 Wheat. 103; 6 L. ed. 429; *Goodyear v. Providence R. Co.*, 2 Cliff. 351; *Johnson v. Harmon*, 94 U. S. 371, 378, 24 L. ed. 271, 273.

⁴ No rules upon this subject have hitherto been made.

⁵ 18 St. at L., ch. 77, p. 315; 1 Supp. U. S. R. S. 136; *Watt v. Starke*, 101 U. S. 247, 25 L. ed. 826.

⁶ *N. J. & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co.*, 113 Fed. 395.

⁷ *Field v. Holland*, 6 Cranch, 8.

an issue at law is discretionary, and it is doubtful whether or not it may be reviewed upon appeal.⁸ It was formerly an almost invariable custom to direct an issue when the question to be determined was the validity of a will as against an heir, or the true heir-at-law of a decedent, or the right of a rector to tithes.⁹ It was very common, moreover, when an allegation in a sworn answer, the plaintiff not having waived answer under oath, was only controverted by the testimony of a single witness supported by corroborating circumstances;¹⁰ or when, by determining in the way he inclined, the judge would find a person guilty of forgery.¹¹ It seems to have been the opinion of Judge Hammond that it is the duty of a Federal court of equity to direct an issue at law of a common-law claim against a receiver.¹² An issue may be directed notwithstanding a report of auditors upon the facts.¹³ The court sometimes directs only a single issue, and sometimes several, according to the number of substantial points upon which it deems it necessary to take the opinion of a jury; and it will, when the question to be decided embraces several disputed circumstances, direct an issue upon each of them.¹⁴ If the parties cannot agree upon the form of an issue, it will be settled either by the judge or by a master, as the court deems most expedient.¹⁵ By going to trial upon an issue neither party is precluded from any right he may afterwards have to appeal from the order directing it.¹⁶

§ 379. Matters concerning which an issue is directed.
No party will be permitted to take an issue in a different form

3 L. ed. 136; *Cook v. Bay*, 4 How. (Miss.) 485.

⁸ See *Black v. Lamb*, 1 Beasley (N. J.), 108; *Ward v. Hill*, 4 Gray (Mass.), 593; *Crittenden v. Field*, 8 Gray (Mass.), 621.

⁹ 3 Bl. Com. 452; *Lord Fingal v. Blake*, 1 Molloy, 113; *Vaigneur v. Kirk*, 2 Desaus. (S. C.) 640; *Williams v. Price*, 4 Price, 156, 160.

¹⁰ *Daniell's Ch. Pr.*, ch. xxvi, § 1.

¹¹ *Bishop v. Winchester v. Four-nier*, 2 Ves. Sen. 445, 446; *Apthorp v. Comstock*, 2 Paige (N. Y.) 482.

But see *Peake v. Highfield*, 1 Russ. 559.

¹² *Atkyn v. Wabash Ry. Co.*, 41 Fed. 193; *supra*, § 313.

¹³ *Field v. Holland*, 6 Cranch, 8, 3 L. ed. 136.

¹⁴ *Bryan v. Parker*, 1 Y. & C. 170; *Bailey v. Sewell*, 1 Russ. 239; *Earl of Newburgh v. Countess*, 5 Madd. 364.

¹⁵ *Daniell's Ch. Pr.*, ch. xxvi, § 1.

¹⁶ *White v. Lisle*, 3 Swanst. 342; *Legare v. Daly*, 1 Ves. Sen. 192; *De Tastet v. Bordenave*, Jacob, 516.

from that which he has stated in his pleadings;¹ but the court may upon its own motion direct an issue to try a matter not in issue arising upon the hearing, and which it thinks should be determined before a final decree is rendered.² An issue also may be directed upon claims brought in under a decree by persons not upon the record.³ An issue will not, however, be directed to establish a point which a party set up in his pleading but omitted in his proof.

§ 380. Time when an issue is directed. According to the old practice an issue was rarely directed before the original hearing of a cause.¹ Instances have occurred, however, when this has been done before that time upon motion,² and even to determine the facts upon a motion for an injunction or a receiver, when the affidavits for or against the motion were conflicting.³ An issue has been often granted after the original hearing at a hearing for further directions;⁴ and even afterwards.⁵ Under the statute providing for the direction of issues in patent causes, it would seem that one can now be directed by an interlocutory order more frequently than formerly.⁶

§ 381. Manner of trying an issue. The manner of trying a feigned issue is thus described by Blackstone. "But as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of King's bench, or at the assizes of a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff, by a fiction, declares that he laid a wager of 5*l.* with the defendant that A was heir-

§ 379. ¹ *St. Paul's v. Kettle*, 2 V. & B. 1; *Bennett v. Neale*, Wightw. 324; *Savage v. Carroll*, 1 Ball & B. 548.

² *Balch v. Tucker*, 2 Ch. Cas. 40.

³ *Price v. Price*, cited in 2 Smith's Ch. Pr. 76.

⁴ *Savage v. Carroll*, 1 Ball & B. 548; *Price v. Berrington*, 3 Macn. & G. 486.

§ 380. ¹ *Fullagar v. Clark*, 18 Ves. 481.

² *Middleton v. Sherburns*, 4 Y. & C. 358; *Kent v. Burgess*, 11 Sim.

361; *Townley v. Deare*, 3 Beav. 213; *Lancashire v. Lancashire*, 9 Beav. 259.

³ *Gardiner v. Rowe*, 4 Madd. 236; *De Tastet v. Bordenave*, Jacob, 516.

⁴ *New Orleans G. L. & B. Co. v. Dudley*, 8 Paige (N. Y.) 452.

⁵ *Price v. Price*, cited in 2 Smith's Ch. Pr. 76. See *Goodyear v. Providence R. Co.*, 2 Fish. Pat. Cas. 499.

⁶ 18 St. at L., ch. 77, p. 315; 1 Supp. U. S. R. S. 136.

at law to B; and then avers that he is so; and therefor demands the 5*l*. The defendant admits the feigned wager, but avers that A is not the heir to B, and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the juror at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans: and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause.”¹ The legal fiction is, however, now practically out of use; and issues are tried upon the common-law side of a Circuit or District Court frequently by the same judge that directed them.² The course of proceeding upon the trial of an issue is substantially the same as that in ordinary trials at common law, unless the judge who directed it has given special directions upon the subject.³ When, however, a will was sought to be proved against an heir-at-law, at the suit of a devisee, it was necessary by the former practice to prove the execution of the will by examining all the witnesses who were alive and capable of giving testimony.⁴ If the order for an issue direct that a number of witnesses be examined, but the plaintiff declines to call some, the judge himself will call and examine the rest.⁵ It seems, too, that the jury should be sworn in the words of the order of issue.⁶ The order of issue, however, usually contains directions as to admissions to be made and documents to be produced by the parties.⁷ No admission of any fact not clearly admitted by the pleadings will, however, be required.⁸ If such directions are omitted in the order for the issue, they may be obtained afterwards upon motion.⁹ The party upon whom the burden of proof rests, whether he be plain-

§ 381. 13 Bl. Com. 452.

² See *Wilson v. Riddle*, 123 U. S. 608, 31 L. ed. 280.

³ See *Kerr v. South Park Com'rs*, 117 U. S. 379, 29 L. ed. 924; *Wilson v. Riddle*, 123 U. S. 608, 31 L. ed. 280.

⁴ *Townsend v. Ives*, 1 Wilson, 216; *Ogle v. Cook*, 1 Ves. Sen. 177; *Bullen v. Michel*, 2 Price, 399; *Boote v. Blundell*, 19 Ves. 494.

⁵ *Groom v. Chambers*, 2 Mont. & Ay. 742.

⁶ *Wilson v. Barnum*, 1 Wall. Jr. 342.

⁷ *Duke of Beaufort v. Morris*, 2 Phil. 683; *Apthorp v. Comstock*, 2 Paige (N. Y.), 482; *Cart v. Hodgkin*, 3 Swanst. 161.

⁸ *Duke of Beaufort v. Morris*, 2 Phil. 683.

⁹ *Marsh v. Sibbald*, 2 V. & B. 375.

tiff or defendant in the original suit, is directed by the order to act as plaintiff in the issue.¹⁰ It is the defendant's duty to name an attorney to appear for him at the trial of the issue. If he fails to do so, it has been held that an order may be obtained directing that he name an attorney in four days, or else that the issue be taken as tried and a verdict given for the plaintiff.¹¹ The decree or order for the issue should specify a time when it is to be tried.¹² If the plaintiff make default in having the case ready for trial at the appointed time,¹³ or either party fail then to appear, the court will order the issue taken *pro confesso* against him, unless he can show a reasonable ground for a postponement.¹⁴ It seems that an application for a postponement,¹⁵ or for a special jury, if one be desired,¹⁶ should be made to the judge who directed the issue. A person interested in the result of an issue, but who refuses to be a party to it, may be allowed to attend the trial by counsel, in which case he may be compelled to produce documents material to the case and in his possession.¹⁷ After the trial, the trial judge certifies how the verdict was found, but judgment should not be entered upon it.¹⁸ If any special circumstances have occurred at the trial which he thinks it right to report to the court, he indorses them on the *postea*.¹⁹ He may also furnish to the court of equity a description of the trial.²⁰ An irregularity or omission in this respect may, however, be corrected or disregarded.²¹

§ 382. Effect of the finding of a jury upon an issue.

"The verdict of a jury upon an issue out of chancery is only advisory and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded,

¹⁰ Parker v. Morrell, 2 Phil. 453.

¹¹ Wilson v. Ginger, 2 Dick. 521; Hartland v. Dancocks, 5 De G. & Sm. 561.

¹² Daniell's Ch. Pr., ch. xxvi, § 1.

¹³ Bearblock v. Tyler, 1 J. & W. 225; Casborne v. Barsham, 5 M. & C. 113.

¹⁴ Casborne v. Barsham, 5 M. & C. 113; Hargrave v. Hargrave, 8 Beav. 289.

¹⁵ Kebel v. Philpot, 9 Sim. 614.

¹⁶ Anon., 2 P. Wms. 68. As to

depositions, see Cahoon v. Ring, 1 Cliff. 592.

¹⁷ Pindar v. Smith, Mad. & Geld. 48.

¹⁸ Kerr v. S. Park Com'rs, 117 U. S. 379.

¹⁹ White v. Lisle, 3 Swanst. 342; Trenton B. Co. v. Russell, 1 Green, Ch. (N. J.) 492.

²⁰ Bassett v. Johnson, 1 Green, Ch. (N. J.) 154.

²¹ Wilson v. Riddle, 123 U. S. 608, 31 L. ed. 280.

and a decree rendered contrary to it.”¹ If therefore, either party be dissatisfied, he must move for a new trial on the equity and not on the common-law side of the court;² “and for that purpose the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the Chancellor. This is done either by moving the Chancellor to send to the judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other proper way. The Chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken.”³ Unless such a motion is made, no error committed in the course of the trial of the issue can be reviewed upon appeal.⁴ Such an application should be made by motion or petition before the cause comes on for hearing upon further directions.⁵ The form of an issue cannot, however, be changed in this manner. A party desiring to alter it must do so by presenting a petition for a rehearing of the decree or order directing it.⁶ The manner in which the verdict is reviewed in equity is thus described by Lord Eldon: “In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there; and look-

§ 382. ¹Bradley, J., in *Watt v. Starke*, 101 U. S. 247, 252, 25 L. ed. 826, 827. See also *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452; *Allen v. Blunt*, 3 Story, 742, 746.

²*Watt v. Starke*, 101 U. S. 247, 250, 25 L. ed. 826, 827; *Johnson v. Harmon*, 94 U. S. 371, 378, 24 L. ed. 271, 273.

³Bradley, J., in *Watt v. Starke*, 101 U. S. 247, 250, 251, 25 L. ed. 826, 827. See also *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271.

⁴*Brockett v. Brockett*, 3 How. 691, 11 L. ed. 786; *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271; *Watt v. Starke*, 101 U. S. 247, 25 L. ed. 826.

⁵*Atty. Gen. v. Montgomery*, 2 Atk. 378; *Van Alst v. Hunter*, 5 J. Ch. (N. Y.) 148, 152.

⁶*Daniell's Ch. Pr.* (3d Am. ed.) 1114.

ing at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds."⁷ Upon an appeal an assignment of an error in instructions to the jury will not be considered.⁸ The usual grounds for directing a new trial of an issue are, "1st, the alleged improper summing up of the judge; 2dly, because the weight of evidence is against the verdict; and 3dly, because of an informality in the evidence."⁹ Surprise and fraud are also reasons for granting a new trial.¹⁰ When the dispute concerns the title to land, in imitation of courts of law two trials of the issue have often been granted, when the first verdict was satisfactory upon the evidence;¹¹ and sometimes the court has directed a second trial for the solemn determination of the matter, without setting aside the first verdict, the effect of which was that the first verdict was admitted in evidence upon the second trial, and had its weight with the jury.¹² In such case, the court usually made it a condition of granting a second trial, that the applicant should pay to the other party the costs of the first.¹³

§ 383. Proceedings after the trial of an issue. After the trial of an issue and the completion of the record by the

⁷ Lord Eldon in *Barker v. Ray*, 2 Russ. 63. See also *Bootle v. Blundell*, 19 Ves. 494; *Tatham v. Wright*, 2 Russ. & M. 1; *Watt v. Starke*, 101 U. S. 247, 252, 25 L. ed. 826, 827; *McKinley Creek Minn. Co. v. Alaska Min. Co.*, 183 U. S. 563, 46 L. ed. 331.

⁸ *McKinley Creek Min. Co. v. Alaska Min. Co.*, 183 U. S. 563, 46 L. ed. 331.

⁹ *Smith's Ch. Pr.* (Phila. ed.), vol. ii, p. 84. See also *Tatham v.*

Wright, 2 Russ. & M. 1; *Watt v. Starke*, 101 U. S. 247, 253, 25 L. ed. 826, 828.

¹⁰ *Exton v. Turner*, 2 Ch. Cas. 80; *Standen v. Edwards*, 1 Ves. Jr. 133.

¹¹ *Earl of Darlington v. Bowes*, 1 Eden, 271; *Stace v. Mabbot*, 2 Ves. Sen. 552.

¹² *Baker v. Hart*, 3 Atk. 542.

¹³ *Baker v. Hart*, 3 Atk. 542; *Edwin v. Thomas*, 1 Vern. 489.

addition of the *postea*, the cause, unless a new trial is obtained should be set down for hearing.¹ This may be done in the usual manner; but it seems, not before the expiration of the first four days of the term following the trial, in order that the party against whom the verdict has been found may have an opportunity of moving for a new trial.² The course then comes on in the regular course, when such final or other decree as is proper is pronounced. The costs of an issue do not follow the verdict as a matter of course, but are in the discretion of the court which directed the issue;³ though they are usually given to the party in whose favor the verdict was rendered.⁴ In one case the court ordered an advance out of a fund in its possession, in order to enable the parties to try an issue directed by it.⁵

§ 383. ¹Allen v. Blunt, 3 Story, 742; Daniell's Ch. Pr., ch. xxvi.

⁴Corporation of Rochester v. Lee, 2 De G., M. & G. 427.

²1 Newland's Ch. Pr. 357.

⁵Coombs v. Brooks, 3 De G. & S.

³Decker v. Caskey, 2 Green Ch. 452.
(N. J.) 446.

CHAPTER XXV.

PROCEEDINGS IN A MASTER'S OFFICE.

§ 384. **References to masters in general.** The labors of a judge in a court of equity are often materially lightened by referring the consideration of matters of fact to a master in chancery, who is directed by it to investigate the same and report his opinion thereon to the court. Certain ministerial acts which a court of equity undertakes are also performed by it through a master. The matters which are ordinarily referred to masters in chancery are: as to who are the heirs, next of kin, creditors, or members of a particular class of legatees of a person whose estate is in the lands of the court for distribution; as to whether the title to real estate is good; as to the state of the law of a foreign country; as to whether one of two books or other publications is pirated from the other; as to the amount of damage suffered by the granting or withholding of an injunction; the taking of accounts;¹ the computation of interest; the settlement of conveyances, and other deeds; the selling of property; the appointment of trustees, receivers, and guardians; and the superintendence of the performance of their duties by receivers to supervise an election of directors of a corporation.² The judge may himself, however, attend to any of these matters without the aid of a master.³ The decision of the case or of the issues joined by the pleadings cannot be referred to a master, except by consent.⁴ Such references are, however, very frequent,

§ 384. ¹ As to the preliminary proof required before a reference for an accounting, see *Columbian Eq. Co. v. Merc. Tr. & D. Co.*, C. C. A., 113 Fed. 23.

² *Bartlett v. Gatès*, 118 Fed. 66; which contains the order. For subsequent proceedings, see 37 Am. Law Rev. 124.

³ *Pepper v. Addicks*, 153 Fed. 383.

⁴ *Kimberley v. Arms*, 129 U. S. 512, 523, 524, 32 L. ed. 764, 768, 769; *Morris v. Taylor*, 23 N. J. Eq. 131; *Haight & Freese Co. v. Weiss*, C. C. A., 156 Fed. 328, 334; *Garinger v. Palmer*, C. C. A., 126 Fed. 906.

especially in the First Circuit. A reference is usually ordered in a suit to enjoin the enforcement of a statute regulating the charges of a corporation engaged in a public service,⁵ and it has been said that this is the proper practice.⁶ Where the order recited that the master was appointed to investigate the cause and report to the court what amount, if any, was due by reason of the claim, and that his report be filed "subject to the further orders of the court"; it was held that this did not refer the issues him for final decision.⁷ Where the record did not show that there was any objection to the reference to the master, the court presumed that there was an implied consent thereto.⁸ A consent to a reference to a master is a waiver of the objection that there is an adequate remedy at law.⁹ The extent of a master's authority is limited by the decree or order appointing him;¹⁰ and it has been said that it cannot be extended even by consent,¹¹ nor upon appeal.¹² The rules provide that "every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is

⁵ *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417; *Lincoln Gas & El. Light Co. v. City of Lincoln*, 223 U. S. 349, 357, 56 L. ed. 466, 469.

⁶ *Lincoln Gas & El. Light Co. v. City of Lincoln*, 223 U. S. 349, 361, 56 L. ed. 466, 471.

⁷ *Blassengame v. Boyd*, C. C. A., 178 Fed. 1. Where, after a reference to report to the court, a stipulation was signed that the court might refer the cause, with respect to a supplemental bill subsequently filed and the proceedings thereupon, to the master for the same purposes of the original bill and agreeing that he might include in his report of the case made by the original bill his report of that made by the supplemental bill and the proceedings thereupon; it was held that the stipulation did not broaden the master's authority conferred by the original order and confined his ju-

risdiction over the supplemental issues within the limits of the authority given him over those originally raised, so that it was the duty of the judge to examine the evidence and to determine the law and facts after the report was filed. *Keller v. U. S., C. C. A.*, 168 Fed. 697.

⁸ *Haight & Freese Co. v. Weiss*, C. C. A., 156 Fed. 328, 334. *Contra*, *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, C. C. A., 164 Fed. 809, where the reference was under a general order made before the suit was brought; *Southern Ry. Co. v. Simon*, 184 Fed. 959.

⁹ *Sanders v. Riverside*, C. C. A., 118 Fed. 720.

¹⁰ *Lonsdale Co. v. Moies*, 2 Cliff. 538.

¹¹ *Farmers' L. & Tr. Co. v. Central R. Co. of Iowa*, 2 Fed. 656; *Gordon v. Hobart*, 2 Story, 243.

¹² *Briggs v. Neal*, C. C. A., 120 Fed. 224.

parts, if any, of such personal estate are outstanding undisposed referred to take the same to inquire and state to the court what of, unless the court shall otherwise direct.”¹³ Where no objection to the language of an order of reference was made for several years, and in the meanwhile one of the parties had died, the Circuit Court of Appeals refused to modify it on an appeal from the final decree.¹⁴ A standing master need not be required to file a bond.¹⁵

§ 385. Who may be appointed master. The District Courts, “a majority of all the judges concurring in the appointment,” have the power to appoint standing masters in chancery in their respective districts.¹ A District Court may also appoint a master *pro hac vice* in any particular case.² “No clerk of a district court of the United States, or deputy, shall be appointed a receiver or master in any case, except where a judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.”³ An order appointing a clerk of the court master, to conduct a judicial sale, without assigning special reasons for the same, is to that extent erroneous; but the error does not affect the rest of the order, which is amendable in that respect.⁴ It has been held that it can only be set aside upon appeal, and cannot be questioned in a collateral proceeding, as by exceptions to his report of a sale, or by a motion to set aside an appraisal by him.⁵ Another statute provides that “no person related to any justice or judge of any court of the United States by affinity or consan-

¹³ Rule 73.

¹⁴ *Gunn v. Black*, C. C. A., 60 Fed. 151.

¹⁵ *Seaman v. N. W. Mut. L. I. Co.*, 86 Fed. 49.

§ 385. ¹ Eq. Rule 68, re-enacting rule 82 of 1842.

² *Ibid.*

³ Ind. Code § 68, 36 St. at L. 1087 re-enacting 20 St. at L., ch. 183, p. 415. It has been held: that this prohibition is for the benefit of the parties to the litigation, and may be waived by their consent to an order appointing such an officer master in a particular case; that after

such an order of decree has thus been entered and the parties have proceeded before the master, it may be amended by the assertion of a clause stating that the court has determined that such consent is a sufficient special reason for such appointment. *Fisher v. Hayes*, 22 Fed. 92.

⁴ *Quinton v. Neville*, C. C. A., 154 Fed. 432.

⁵ *N. W. Mut. L. I. Co. v. Seaman*, 80 Fed. 357; s. c. in C. C. A., *Seaman v. N. W. Mut. L. I. Co.*, 86 Fed. 493.

guinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to be employed by such court or judge in any office or duty in any court of which such notice or judge may be a member.”⁶

§ 386. Bringing on a reference. The rules provide that, whenever a reference is made, the party at whose instance or for whose benefit it was directed must bring the same to a hearing on or before the rule-day next succeeding the date of the order for a reference.¹ Otherwise the adverse party may forthwith cause proceedings to be had before the master at the cost of the party who procured the reference.² The master need not report evidence unless required by either party.³ It is the master's duty, as soon as he reasonably can after the matter referred to him is brought before him, to assign a time and place for proceeding, and to give due notice thereof to each of the parties, or their solicitors.⁴ Notice may be served by mail or otherwise.⁵ It need not be served by the marshal.⁶ By the old English practice parties interested in the subject-matter of a reference were brought before the court by the service of a warrant. This was a memorandum, upon a slip of paper entitled in the cause, and signed by the master, appointing a day and hour for all parties concerned to attend him on the matter of the reference.⁷ It was in substantially the following form: “By virtue of an order of reference, I do appoint to consider the matters thereby to me referred, on — next, at — of the clock, in the — noon, at my Chambers in —, at which time and place all parties concerned are to attend. [Signature.] Dated the — day of —, —.”⁸ It is a better practice,

⁶ 24 St. at L., p. 552, ch. 373, § 7. A final decree entered upon the report of a master whose appointment was forbidden by this statute is not void, and cannot be set aside upon motion at a subsequent term. *Farmers' L. & Tr. Co. v. Iowa Water Co.*, 80 Fed. 467. Whether the statute forbids the appointment of a man who has married a sister of the judge's wife is an open question. *Farmers' L. & Tr. Co. v. Iowa Water Co.*, 80 Fed. 467, 469.

§ 386. ¹ Eq. Rule 59.

² Eq. Rule 59.

³ *Union S. R. v. Mathiesson*, 3 Cliff. 146, 149. See *Kerosene L. H. Co. v. Fisher*, 1 Fed. 91.

⁴ Eq. Rule 60.

⁵ *Kerosene L. H. Co. v. Fisher*, 1 Fed. 91.

⁶ *Ibid.*

⁷ *Daniell's Ch. Pr.*, ch. xxvi.

⁸ *Ibid.*

however, for the warrant to contain a statement of the nature of the reference.⁹ This warrant is often called a "summons."¹⁰ There was required to be at least one clear day between the day of issuing the warrant and the day appointed by it for the attendance of the parties thereon.¹¹ The warrant was obtained from the master's clerk by the solicitor applying for it; and the latter underwrote a memorandum expressing its object, and saw that due service of it was made.¹² Whenever a document of any kind was left at the master's office by the solicitor of either of the parties, he usually took out a warrant, which he underwrote, "on leaving the," &c.¹³ This was termed a "warrant on leaving," and was served in the usual manner, but was considered a mere formal notice, to afford the opposite party an opportunity of obtaining a copy of the document left that he might either admit or contest the circumstances there stated, as he might be advised.¹⁴ A certified copy of the decree and opinion of the court may stand as the commission to the master.¹⁵

§ 387. Parties entitled to attend a reference before a master. The general rule appears to be, that all parties beneficially interested, either in the estate or in the fund or matter in question, are entitled to attend before the master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund.¹ The only exception to this rule is said to be the case of a reference to a master of the title to an estate purchased under a decree, when the vendor's solicitor only has the right to appear before the master on the inquiry.² An executor, as the legal representative of his testator, is entitled to attend on all proceedings relating to the charges of creditors seeking payment out of the personal estate; but after there has been a report of debts, if all the persons interested in the personal estate are before the court, the

⁹ *Manhattan Co. v. Evertson*, 4 Paige (N. Y.), 276.

¹⁰ *Ibid.*

¹¹ *Newland's Ch. Pr.* 324. See *Bernie v. Vandever*, 16 Ark. 616.

¹² *Daniell's Ch. Pr.*, ch. xxvi.

¹³ *Ibid.*

¹⁴ *Ibid.* See *Manhattan Co. v. Evertson*, 4 Paige (N. Y.) 276.

¹⁵ *Bay State Gas Co. v. Rogers*, 147 Fed. 557.

§ 387. ¹ *Daniell's Ch. Pr.*, ch. xxvi. See *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547.

² *Daniell's Ch. Pr.*, ch. xxvi.

executor is only entitled to attend on those proceedings in which he is personally interested as an accounting party.³ Trustees were formerly not allowed (except in proceedings carried on by themselves) to attend before the master in cases where all the beneficiaries were before the court; but if there were any persons *in esse*, or who might "come into *esse*," who might become interested and whose interests were only represented by the trustees, and were not too remote, the trustees were entitled to attend the proceedings affecting those interests.⁴ The rule that all parties interested in the result are entitled to attend before the master applies not only to those who are parties to the record, but to those who are "quasi-parties," by having come in under the decree and established a claim.⁵ In a suit for the distribution of a fund, or creditors' suit, it is the usual practice for the court to make an order directing that all parties interested present their claims within a time prescribed in the order or by the master; and that the master publish a notice to that effect in certain newspapers.⁶ Such an order does not apply to a person who claims the title to specific property, such as a trust fund, of which a receiver has possession,⁷ nor to one who has a prior lien which is recognized at common law;⁸ but an order may be made limiting the time for the presentation of claims for a preference.⁹ The court may require the claimant of a share in the fund to contribute to the expense of the suit before he proves his claim,¹⁰ even if he is entitled to a preference.¹¹ After the expiration of the time thus limited, any

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ *Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642, 646. For an order directing a balance to be held ten years, in order to meet unproved claims, see *Fowler v. Jarvis Conklin Co.*, 118 Fed. 1022.

⁷ *N. Y. Security & Tr. Co. v. Lombard I. Co.*, 75 Fed. 172.

⁸ *Trust Co. of America v. Norfolk & S. Ry. Co.*, 183 Fed. 803.

⁹ *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 200 Fed. 312, 316,

holding that typical claims of this character upon *ex parte* application should be sent to the master for determination as to their *status*; and that after a determination that one claim of a certain class was entitled to a preference, a general order should be made requiring all persons with claims of a similar character to present them within a specified time. See *s. c.*, *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 187 Fed. 287; *supra*, § 305.

¹⁰ *Chick v. Northwestern Shoe Co.*, 118 Fed. 933.

¹¹ Ibid.

creditor or other person interested in the fund may come in and prove his claim at any time before the final distribution of the fund, even, it seems, although the order for an advertisement has provided to the contrary,¹² although an order from the court authorizing such belated proofs is usually required.¹³ An infant will always be allowed indulgence in this respect.¹⁴ In case a partial but not a complete distribution of the funds has then been made, in bankruptcy at least, he can only share in the subsequent dividends.¹⁵ After distribution a person who has thus failed to prove his claim before the master may file a bill against the persons between whom the funds have been distributed to compel them to refund his *pro rata* share, but he cannot sue the master or receiver.¹⁶ A party who has appeared, but allowed a decree to be taken against him by default for want of an answer, is, it seems, entitled to notice of the proceedings against him under the decree in the master's office;¹⁷ but cannot appear upon such notice before such master without previously obtaining an order for that purpose, which is usually only granted upon terms.¹⁸ The proper course to test a party's right to attend before a master is, after the latter's refusal, to apply to the court by petition for an order permitting the party to attend before him.¹⁹

§ 388. Proceedings before a master in general. The rules give the master authority to regulate all the proceedings upon a reference to him.¹ In case of an abuse of his discretion by a master, any party aggrieved may apply to the court for an

¹² *Harrison v. Kirk*, House of Lords, 1904, 1. *Contra, Re Ennis*, C. C. A., 198 Fed. 381, a case in bankruptcy, where there was no proof that the claimant did not have actual knowledge of the notice within the period of limitation. It has held that such an order will not be presumed to apply to and bar a claimant whose claim is then in suit before the same court. *Southern Ry. Co. v. Townsend*, C. C. A., 161 Fed. 310.

¹³ *Wilder v. Keeler*, 3 Paige (N. Y.), 164, 23 Am. Dec. 781.

Fed. Prac. Vol. II.—77.

¹⁴ *Park v. N. Y., L. E. & W. R. R.*, 140 Fed. 799.

¹⁵ *Re Stein*, 94 Fed. 124.

¹⁶ *David v. Frowd*, 1 M. & K. 200, *Gillespie v. Alexander*, 3 Russ. 130; *Sawyer v. Birchmore*, 1 Keen, 391; *Daniell's Ch. Pr.* (1st Am. ed.) 1403.

¹⁷ *King v. Bryant*, 3 M. & C. 191; *Daniell's Ch. Pr.*, ch. xxvi.

¹⁸ *Heyn v. Heyn*, Jacob, 49; *Daniell's Ch. Pr.*, ch. xxvi.

¹⁹ *Daniell's Ch. Pr.*, ch. xxvi.

§ 388. 1 Eq. Rule 62.

order, requiring the master to act properly;² but such applications are not encouraged,³ and are only granted in extraordinary cases.⁴ If any party fail to appear at the appointed time and place, the master may either proceed *ex parte*, or, in his discretion, may adjourn the proceedings.⁵ In the latter case, he should give notice of the adjournment to the party who failed to appear, or to his solicitor.⁶ Where a claimant before a master dies pending a hearing, no report can be made upon the claim until an executor or administrator has been appointed.⁷ It is the master's duty to proceed in the reference with all reasonable diligence and with the least practicable delay.⁸ Otherwise, either party may apply to the court, or a judge thereof, for an order requiring the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.⁹ When the claimants are dilatory, the master may be directed to require them to present their proofs within a time to be fixed by him, and if they fail so to do to disallow the same for lack of proof.¹⁰ There is no necessity for the master's taking any oath, unless the order of reference especially requires him to do so.¹¹ By the English practice, the time for a single hearing before a master did not usually exceed one hour, unless the master continued the hearing longer, when an increased fee might, it seems, be charged.¹² It was the duty of the master or his clerk to mark in the master's book the names of the solicitors who attended, and no other attendance than those so marked was allowed in taxing costs.¹³

² Daniell's Ch. Pr., ch. xxvi; Bate Ref. Co. v. Gillette, 28 Fed. 673; Eq. Rule 60. See *Re Thomas*, 35 Fed. 337, 340.

³ Lull v. Clark, 20 Fed. 454; Wooster v. Gumbirner, 20 Fed. 167; Bate Ref. Co. v. Gillette, 28 Fed. 673.

⁴ Lull v. Clark, 20 Fed. 454; Wooster v. Gumbirner, 20 Fed. 167; Bate Ref. Co. v. Gillette, 28 Fed. 673.

⁵ Eq. Rule 60.

⁶ Eq. Rule 60.

⁷ Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470.

⁸ Biber-White Co. v. White River Valley El. R. Co., 175 Fed. 470, where a delay of six years before the completion of the reference was held to be improper.

⁹ Eq. Rule 60.

¹⁰ Pennsylvania Steel Co. v. New York City Ry. Co., 175 Fed. 811. See *supra*, § 387, and *infra*, § 394.

¹¹ Thompson v. Smith, 2 Bond 20.

¹² Daniell's Ch. Pr., ch. xxvi.

¹³ Daniell's Ch. Pr., ch. xxvi.

§ 389. **Proceedings upon accountings.** A reference to a master to take an account will not be directed unless the complainant affords some proof tending to show that the accounting-party has collected something as to which an account should be made.¹ "A reference will not be made to state an account without some evidence to show the necessity for the accounting."² Where the defendant to a patent case had made only a small number of the infringing articles, which sold for a trifling amount, and had discontinued the infringement before the suit was brought, the court refused to direct an accounting.³ All parties who are required to account before a master must bring in their accounts in the form of debtor and creditor.⁴ Should a party fail to do so, the master may make an order requiring him to furnish such an account.⁵ The order should not be granted till the first hearing of the reference.⁶ The order must be served personally with a copy of this order and a notice of the day to which the hearing is adjourned.⁷ Service may be made by any disinterested person.⁸ If the defendant then fails to appear and account, he is in contempt.⁹ Upon a decree for an accounting by defendant, of profits made by his infringement of a patent, it seems that the complainant cannot be required by the master to bring in an account, if the court has not so directed.¹⁰ Where fire insurance companies sued in equity to restrain the prosecution of several actions at law on policies covering the same property praying a cancellation of the policies as fraudulent, and in the alternative that, in case they should be found to be valid, the damage sustained be apportioned and that an accounting be then directed for that purpose; it was

§ 389. ¹ *Columbian Equipment Co. v. Mercantile Tr. & Dep. Co.*, C. C. A., 113 Fed. 23; *Ludington Novelty Co. v. Leonard*, C. C. A., 127 Fed. 155, 157, 62 C. C. A. 269, a trademark case; *Keystone Type Foundry v. Portland Pub. Co.*, 180 Fed. 301, a trademark case; *Perkins El. Switch Mfg. Co. v. Yost El. Mfg. Co.*, 189 Fed. 625.

² *Columbian Equipment Co. v. Mercantile Tr. & Dep. Co.*, C. C. A., 113 Fed. 23, 25.

³ *Perkins El. Switch Mfg. Co. v. Yost El. Mfg. Co.*, 189 Fed. 625.

⁴ Eq. Rule 63.

⁵ *Kerosene L. H. Co. v. Fisher*, 1 Fed. 91.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Goss Printing Press Co. v. Scott*, 148 Fed. 393.

held that the court had power to render judgment against them upon such accounting and that the costs of the actions at law might be therein included;¹¹ but where, upon a receivers' accounting, a bank intervened to prove its claim to a preference for money borrowed by the receivers, it was held to be error for the master, when disallowing its claim for a preference, without pleading or process against the bank or notice of an application to the master for such a recommendation to report that it should return payments made to it by the receivers.¹² An isolated case, which is in conflict with the usual practice, holds that when the decree directs an accounting of profits made by the infringement of a separable improvement on an old device, since the burden of proof is held to rest upon the complainant, the defendant cannot be required to furnish at its own expense the information required to prove complainant's case, and that the equity rule, respecting an ordinary accounting between a debtor and a creditor, does not apply.¹³ The accounts should contain items of both debits and credits and should be verified by affidavit.¹⁴ If any of the other parties is dissatisfied with the accounts rendered, he may examine the accounting party either orally or by interrogatories or by deposition, as the master directs.¹⁵ At the end of a specified time fixed by the master, the complainant should file what is termed "the charge, or surcharge. This it has been said should contain a transcript of all the debit items of the account as filed together with the added items or increases in items, with which it has been said he seeks to charge the defendant,"¹⁶ it should also contain a statement of the items of credits which he wishes disallowed.¹⁷ The more usual modern practice, however, is for the charge merely to contain the items which the complainant wishes added or increased or disallowed and not to transcribe all the debit items of the account as originally filed. When the charge has been filed with the master, the case proceeds upon

¹¹ *Spring Garden Ins. Co. v. Amusement Syndicate Co.*, C. C. A., 178 Fed. 519.

¹² *People's Savings Bank & Trust Co. v. Rogers*, C. C. A., 177 Fed. 386.

¹³ *Beckwith v. Malleable Iron Range Co.*, 195 Fed. 291, Sanborn, J. But the question is not pending before the Circuit Court of Appeals.

¹⁴ *Ommen v. Talcott*, 175 Fed. 261, 267.

¹⁵ Eq. Rule 63 re-enacting Eq. Rule 79 of 1842.

¹⁶ *Ommen v. Talcott*, 175 Fed. 261, 267.

¹⁷ *Remsen v. Remsen*, 2 Johns. Ch. (N. Y.) 495. 501.

the examination of the defendant and the taking of other testimony until all evidence concerning the items in the charge has been completed. Thereupon it has been said, that the defendant should file his "discharge," consisting of all the credit items taken from the account and separated by his vouchers for amounts over twenty dollars and testimony then taken on the items of the discharge, and upon the completion thereof the master should state the account.¹⁸ The burden of proof is upon the complainant as to any items of debits which are not admitted in the account as filed,¹⁹ and upon the party accounting as to all the credits claimed;²⁰ although, in New York at least, his affidavit annexed to the account is sufficient to substantiate a receipt for an account not in excess of twenty dollars,²¹ when the creditor swears positively to the fact of payment and states to whom paid and for what and when; but the items so established cannot exceed five hundred dollars, and the defendant cannot, by way of charge, charge another person in this manner.²² The question of defendant's liability is concluded by the decree and cannot be reopened before the master.²³ The complainant cannot before the master take a position inconsistent with the allegations or case made by his bill.²⁴ Where, after a decree for an accounting of infringements of a patent, it was claimed that there had been subsequent infringements of devices not mentioned in the interlocutory decree; it was held that the proper practice was to set up such new infringements by supplemental bill upon the disposition of which the order of reference could be modified as required, rather than extend the accounting to those devices without any prior adjudication upon the same.²⁵ Where the bill alleged the marking of the patented article in accordance with the Revised Statutes and notice to defendant of the infringement, the court permitted

¹⁸ *Ommen v. Talcott*, 175 Fed. 261, 267. But see *Hoffmen's Ch. Pr. I.* 522-525.

¹⁹ *Ommen v. Talcott*, 175 Fed. 261, 267.

²⁰ *Ibid.*

²¹ *Remsen v. Remsen*, 2 Johns. Ch. (N. Y.) 495, 501.

²² *Remsen v. Remsen*, 2 Johns. Ch. (N. Y.) 495, 501.

²³ *De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co.*, 159 Fed. 292.

²⁴ *Lorain Steel Co. v. New York Switch & Crossing Co.*, C. C. A., 184 Fed. 301.

²⁵ *Murray v. Orr & Lockett Hardware Co.*, C. C. A., 153 Fed. 369. But see *Walker Patent Pivoted Bin Co. v. Miller*, 146 Fed. 249.

proof of these allegations to be made upon the accounting after an interlocutory decree, in order to carry the accounts back of the filing of the bill, when no objection founded upon the omission had been raised upon the hearing and no proof upon the point had then been introduced by either party.²⁶ Applications to the court for instructions to the master are more favorably considered when they concern intricate accountings than in other cases.²⁷ Where the master upon an accounting makes rulings limiting the scope of the inquiry, it is proper to apply immediately to the court for instructions.²⁸ Where an accounting of profits is made by the infringement of a patent or copyright, the infringer is not entitled to deduct, from the profits made during a certain term, a loss subsequently incurred in a separate transaction. Losses concurrent with the profits and directly resulting from the particular transactions that resulted in such profits are all that can be considered.²⁹ Where the infringement was a play and the defendant had made its contracts by the theatrical season, each season was taken as a unit in the computation, and the defendant was disallowed credits against the profits of one season for losses incurred in another.³⁰

Upon an accounting of profits, made by the infringement of a trade mark or by unfair competition in the description of an article sold by the defendant, it may be presumed that the simu-

²⁶ Underwood Typewriter Co. v. Elliott-Fisher Co., 171 Fed. 116.

²⁷ Thompson v. Smith, 2 Bond (N. Y.) 320; Pennsylvania Steel Co. v. New York City Ry. Co., 182 Fed. 155, 159, Lacombe, J.: "This accounting may be a long, difficult, and expensive operation, and it would be most unfortunate if the special master should conduct it to a conclusion upon one theory only, to have his conclusion reversed by the court of last resort, leaving the work to be done all over again on some other theory. This might be avoided by an application to this court to instruct the special master that in stating these accounts he should consider the lease as terminating on such a date, or as con-

tinuing in force till such another date, or to give him any further instructions which may be thought necessary. That application may be made on any parts of the record which may be material, and on further evidence, if necessary. It surely ought not to take long to submit this question, and when it is finally disposed of the accounting will be greatly simplified and can be much sooner disposed of.

²⁸ Thompson v. Smith, 2 Bond (N. Y.) 320.

²⁹ Canada Bros. v. Michigan Malleable Iron Co., C. C. A., 152 Fed. 178; Dam v. Kirk La Shelle Co., 189 Fed. 842.

³⁰ Dam v. Kirk La Shelle Co., 189 Fed. 842.

lation of complainant's manufactures was one of the causes which induced the defendant's sales and which prevented sales by the complainant; and where it is impossible to determine whether that or some other cause induced a sale, defendant may be required to account for the whole profit made.³¹ Upon an accounting for the infringement of a copyright, when the infringement constitutes a material part of the defendant's publication and is so intermingled with the rest that it is impracticable to separate the profits derived from each, all the profits made by the sale of the defendant's book may be allowed.³² Where, however, as in the case of a single illustration in a book or newspaper, the piratical matter is an insignificant part of the defendant's publication, it is very doubtful whether any profits can be allowed.³³ In determining the profits that are to be allowed the complainant, the actual and legitimate manufacturing cost should be deducted from the gross sales.³⁴ When resales have been made of second-hand books purchased subsequent to their original sale, the profits of

³¹ *G. & C. Merriam Co. v. Saalfeld*, C. C. A., 198 Fed. 369, 378; *N. K. Fairbank Co. v. Windsor*, 118 Fed. 96; *Saxlehner v. Eisner & Mendelson Co.*, C. C. A., 138 Fed. 22, 70 C. C. A. 452. See, also, *Regis v. Jaynes*, 191 Mass. 245, 249, 77 N. E. 774. But see *Ludington Novelty Co. v. Leonard*, C. C. A., 127 Fed. 155.

³² *Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177. In case of the infringement of a copyright controlling the parts of instruments serving to reproduce mechanically a musical work, the infringing manufacturer must pay a royalty of two cents on each such part manufactured. He must account therefor under oath on the 20th of each month. "In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing

the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee; and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this act, not exceeding three times such amount." Act of March 4th, 1909, 35 Stat. at L. 1075, *Pierce's Fed. Code, Supp.* § 1578.

³³ *Lillard v. Sun Printing & Pub. Ass'n*, 87 Fed. 213.

³⁴ *Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177. It has been held that the cost to others of similar work is inadmissible, except for comparison in testing defendant's claims for credit. *Conroy v. Penn. El. & Mfg. Co.*, C. C. A., 199 Fed. 427.

the second sale should also be included.³⁵ It has been held that no credit can be allowed for stereotyping printed matter³⁶ and that the cost of producing unsold books containing the infringement cannot be credited to the accounting.³⁷ The amount of salaries paid for their services to different members of an infringing firm can also not be considered to be a part of the cost which should be deducted from the proceeds of the sales when estimating the profit.³⁸ Where the defendant was engaged in selling other goods as well as those which constituted infringements and sold more of them than it did of the infringing articles, it was held that the travelling expenses and salaries of such salesmen should be charged to general expenses and not against the profits of the infringements.³⁹ When an infringement has been made by a corporation and extended to its entire business, the usual salaries of managing officers may be allowed; but where these seem to be excessive and to be in reality a division of the profits, the credit for such expenses is reduced to a reasonable amount.⁴⁰ In such a case, an allowance is made for the travelling expenses of salesmen, rent, drayage and the reasonable salaries and wages of those engaged, directly or indirectly, in the infringement;⁴¹ also for amounts paid commercial agencies for reports concerning customers and intending purchasers of the infringing articles;⁴² but not fire insurance,⁴³ nor accident insurance, nor attorneys' fees, nor, it has been held, for payments to physicians for injuries to employees, nor for taxes.⁴⁴

The rules regulating the accounting of profits made by the infringement of patents are not clearly settled. The following

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ *Saxlehner v. Eisner & Mendelson Co.*, C. C. A., 138 Fed. 22, 70 C. C. A., 452.

⁴⁰ *Rubber Co. v. Goodyear*, 9 Wall. 788; *Williams v. Leonard*, 9 Blatchf. 476, 29 Fed. Cas. No. 1372; *Winchester Repeating Arms Co. v. Am. Buckle & Cartridge Co.*, 62 Fed. 278, 280; *National Folding-Box & Paper*

Co. v. Dayton Paper Novelty Co., 95 Fed. 991, 994.

⁴¹ Ibid.

⁴² Ibid.

⁴³ *Winchester Repeating Arms Co. v. Am. Buckle & Cartridge Co.*, 62 Fed. 278, 280; *National Folding-Box & Paper Co. v. Dayton Paper Novelty Co.*, 95 Fed. 991, 993.

⁴⁴ *National Folding-Box & Paper Co. v. Dayton Paper Novelty Co.*, 95 Fed. 991, 994.

principles seem, however, to be determined. Where the infringer has sold or used a patented article,⁴⁵ the plaintiff is entitled to recover all the profits thereof. Where a patent, although using old elements, gives entire value to the combination, the plaintiff is entitled to recover all of the profits of its use.⁴⁶ Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits, unless he can show—and the burden is on him to show—that a part of them is the result of some other thing used by him.⁴⁷ Where the plaintiff's patent applies to only part of a machine and consequently creates only part of the profits, he must give evidence tending to separate or apportion the defendant's profits or his own damages between the patented and the unpatented features, and such evidence must be reliable and tangible, not merely conjectural or speculative, or else he must show by equally satisfactory evidence that the profits and damages are to be calculated on the whole machine because the entire value thereof as a marketable article is properly and legally attributable to the patented features.⁴⁸ It seems that the testimony of experts is admissible upon this point.⁴⁹ Where the patentee proves that some profits were made by the sale of the infringing articles and defendant proves that there were other elements contributing to the same, it seems that it then devolves upon the plaintiff to apportion the amount of profits;⁵⁰ but where the infringer by intermingling the elements renders it impossible for the patentee to make such apportionment, the entire inseparable profit must be awarded to the patentee.⁵¹

⁴⁵ *Westinghouse El. Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 614, 56 L. ed. 1225.

⁴⁶ *Hurlbut v. Schillinger*, 130 U. S. 456, 472, 32 L. ed. 1011, 1016; *Westinghouse El. Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 614, 56 L. ed. 1222, 1225.

⁴⁷ *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. ed. 1000; *Westinghouse El. Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 614, 56 L. ed. 1222, 1225; *Clark v. Johnson*, C. C. A., 199 Fed. 116, and cases cited.

⁴⁸ *Garretson v. Clark*, 111 U. S.

120, 28 L. ed. 371; *Westinghouse El. Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 615, 56 L. ed. 1222, 1225; *Beckwith v. Malleable Iron Range Co.*, 195 Fed. 291.

⁴⁹ *Westinghouse El. Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 617, 56 L. ed. 1222, 1227; *Conroy v. Penn. El. & Mfg. Co.*, C. C. A., 199 Fed. 427.

⁵⁰ *Ibid.*

⁵¹ *Westinghouse El. Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 618, 56 L. ed. 1222, 1227; *Roth v. Harris*, 197 Fed. 929.

Profits are not disallowed because the infringement was made in connection with a structure; the cost of which, aside from the improvement, was much greater than that of the patented device.⁵² Unless the infringement is purely fraudulent and wanting, interest upon the profits will not be allowed prior to the filing of the master's report.⁵³ Interest is usually allowed from the date of the filing of the master's report, which was affirmed.⁵⁴ When the court set aside two inconsistent reports made by a master and finally reached a result, which was a substantial confirmation of one of these, interest was allowed from the date of such report.⁵⁵ Exceptions to the report of a master upon a reference to compute damages for the infringement of a patent, which raised the points that the infringement was not wilful, that the reduction of plaintiff's profits was not solely due to the infringement, and that the master should have reported nominal damages, were held sufficient to bring before the court the whole subject of the computation of damages.⁵⁶ In suits to enjoin the infringement of trade-marks, the court has the power to increase the damages in its discretion, provided that they do not exceed three times the amount of the actual damages sustained, "and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed."⁵⁷ In suits to enjoin the infringement of patents, the court has the power to increase the damages awarded to an amount not exceeding three times the amount of the actual damages sustained.⁵⁸ An infringer of a patent for a design is liable to damages in the amount of \$250, in addition to the total profit made by him.⁵⁹ Trifling errors in a master's statement of an account will be disregarded.⁶⁰ Where upon an accounting the court sustained

⁵² *Roth v. Harris*, 197 Fed. 929.

⁵³ *Tilgham v. Proctor*, 125 U. S. 136, 160, 31 L. ed. 664, 8 Sup. Ct. 906; *National Folding-Box & Paper Co. v. Dayton Paper Novelty Co.*, 97 Fed. 331.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Boesch v. Graff*, 133 U. S. 697.

⁵⁷ Act of May 4, 1906, 34 St. at L. 168, § 19, 10 Fed. St. Ann. 408,

Comp. St. p. 667, *Pierce Fed. Code*, § 8825.

⁵⁸ U. S. R. S., § 4921, as amended 29 St. at L. 692, § 6, 5 Fed. St. Ann. 577, *Pierce Fed. Code*, § 8788.

⁵⁹ Act of February 4, 1887, 24 St. at L. 387, 5 Fed. St. Ann. 603, Comp. St. 3398, *Pierce Fed. Code*, § 8785.

⁶⁰ *Taylor v. Robertson*, 27 Fed. 537.

an exception by one of several persons having a common interest in the fund, and thus surcharges the account, it was held by the courts of two States that all persons interested took the benefit of the exception and of the increase of the fund, and that the decree should not merely add to the share of the exceptor his proportion of the amount surcharged.⁶¹

§ 390. A state of facts and claim. By the English practice a party who intended to examine witnesses before a master under a decree was obliged to carry in a state of facts detailing the circumstances which he desired to prove.¹ This was also the general form by which the prosecution of every reference to a master was commenced.² "A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a master, of the facts and circumstances upon which he relies, either in support of his own cause, or in contradiction or defeasance of that of his adversary. It is, in effect, the pleading of the party before the master, and is governed by nearly the same rules and principles as pleadings in the court, although, not being signed, nor, in general, prepared by counsel, they are not always so strictly observed. A state of facts, however, must be pertinent to the matter, and must not, any more than any other proceeding in the cause, contain any scandal; and if it is either scandalous or impertinent, the scandalous or impertinent matter may be expunged, in the manner which will be presently pointed out. A state of facts is intitled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party: when the party carrying in the state of facts makes any claim upon the fund in court, it is usual to conclude the statement with the particulars of the claim, in the manner of a prayer for relief to the bill, as follows:—'And the said A. B., therefore, claims, etc.;' in such case the proceeding is called 'a state of facts and claims.' When the object of

⁶¹ Martin's Appeal, 33 Pa. St. 395; Landis v. Scott, 32 Pa. St. 495; Estate of Chalmers, N. Y. L. J. of April 8, 1897; People v. Am. Loan & Tr. Co., 177 N. Y. 467. Cf. Union Tr. Co. v. Trumbell, 137 Ill. 146, 27 N. E. Rep. 24. Ordinarily, no interest th... his accrued sub-

sequent to a receivership is allowed to preferred creditors, as against those who are unpreferred. People v. Am. Loan & Tr. Co., 172 N. Y. 371.

§ 390. ¹ Daniell's Ch. Pr., ch. xxvi.

² Ibid.

the party is to charge another with the receipt of money, etc., the state of facts concludes with a charge in the following form:—"and the said A. B., therefore, charges, etc.;" in such case the proceeding is called 'a state of facts and charge.' It may be remarked, that a charge is not always preceded by a state of facts, but if the matter appear from any admissions in any account, or examination or proceeding in the master's office, and requires no other proof in support of it, it is usual to make 'a charge' only. When a state of facts is prepared, it is carried in to the master's office and a warrant 'on leaving' must be served upon the other parties, who may then apply for and obtain copies from the master's clerk, and if they have a counter state of facts to leave, they must proceed in the same manner. It is usual to add to a state of facts, a sort of petition, that the party may be at liberty to add to, alter, or vary the state of facts, as he may be advised; and it is presumed, that such form was originally considered necessary, to enable the party to amend his state of facts, after it has been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant, 'on leaving,' should be taken out and served, as when an original state of facts is left."³ It has been held that an amendment should not be allowed after the case has been submitted to the master for decision.⁴ Parties severally, although similarly, interested cannot ordinarily unite in the same claim.⁵

§ 391. Evidence before a master. "All affidavits, depositions, and documents which have been previously made, read or used in the court upon any proceedings in any cause or matter may be used before the master."¹ These should, how-

³ Daniell's Ch. Pr., ch. xxvi.

⁴ Clyde v. Richmond & D. R. Co., 59 Fed. 394; Central Tr. Co. v. Marietta & N. G. Ry. Co., 75 Fed. 41.

⁵ Pa. Steel Co. v. New York City Ry. Co., U. S. C. C., S. D. N. Y., N. Y. L. J. May 27, 1908.

§ 391. ¹ Equity Rule 80. But see Hammacher v. Wilson, 32 Fed. 796. Upon the reference of a claim

of a judgment creditor for a preference, his judgment roll is admissible to prove the date when he began the suit, the nature of his cause of action and the amount of damages recovered by him, and it was held to be *prima facie* evidence of those facts against a mortgagee. Southern Ry. Co. v. Bouknight, C. C. A., 70 Fed. 442, per Fuller, C. J.

ever, be regularly offered in evidence, so that the other party may have an opportunity to explain or rebut them.² Otherwise, they cannot be referred to upon the argument, or used in support of the report.³ The master has power to examine under oath the parties in the cause, and any witnesses produced by them,⁴ and any creditor or other person coming in to claim before him.⁵ The evidence should be taken down in writing by the master, or by some one in his presence, so that the court may use the same.⁶ Witnesses who live in the district may, upon due notice to the opposite party, be summoned to appear before a master, by a subpoena issued from the clerk's office in blank and filled by the party applying for the same, or by the master, requiring the attendance of the witnesses at a time and place therein specified.⁷ Such witnesses are entitled to the same compensation as for attendance in court.⁸ A refusal to appear in obedience to such subpoena is a contempt punishable by the court or a judge thereof by an attachment issued upon the master's certificate.⁹ The production of documents may be compelled by a master.¹⁰ Upon the master's certificate a commission issues from the clerk's office to take the depositions of witnesses according to the acts of Congress or equity rule.¹¹ Under extraordinary circumstances, a master may take testimony beyond the territorial jurisdiction of the court.¹² A master has power to direct the mode in which matters requiring evidence shall be proved before him.¹³ The court¹⁴ may but rarely will interfere with the master's ruling in this respect before his report is brought before it for review.¹⁵ It is the safer practice, when a master erroneously excludes evidence, to move the court for an immediate correction of his error.¹⁶ It

² Bell v. U. S. Stamping Co., 32 Fed. 549.

³ Ibid.

⁴ Equity Rule 77.

⁵ Equity Rule 81.

⁶ Equity Rule 81.

⁷ Equity Rule 78.

⁸ Equity Rule 78.

⁹ Equity Rule 77.

¹⁰ Goss Printing-Press Co. v. Scott, 119 Fed. 941.

¹¹ Equity Rule 77.

¹² Bate Ref. Co. v. Gillette, 28 Fed. 673.

¹³ Equity Rule, 77.

¹⁴ Webster L. Co. v. Higgins, 43 Fed. 673.

¹⁵ Lull v. Clark, 20 Fed. 454; Wooster v. Gumbirner, 20 Fed. 167; Third Nat. Bank of Philadelphia v. Nat. Bank of C. V., 86 Fed. 852.

¹⁶ Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476.

has been held that the failure to object to the taking of evidence before a master is not equivalent to a consent to his appointment, nor an estoppel to controvert his findings of fact.¹⁷

§ 392. **Master's report and compensation.** The final decision of a master upon matters referred to him is embodied in his report to the court. He is forbidden by the rules to recite at length any part of any paper or deposition brought in or used before him.¹ He is, however, required to refer to and identify every state of facts, charge, affidavit, deposition, examination, or answer used before him, so as to inform the court concerning the pleadings and evidence which he considered in reaching the conclusions embodied in his report.² Unless required by the order of reference, it is not necessary for him to report all of the evidence taken before him.³ It is the better practice for a master before making his report to prepare and serve on the parties a draft of the same, with notice of a time and place when and where he will hear their objections thereto.⁴ At the appointed time, counsel should appear, make their objections to the proposed report, and see that these objections are noted in writing and filed with the master.⁵ This is the practice in the Second Circuit.⁶ The practice is, however, in some Circuits very loose in this respect.⁷ It has been said that the master may embody his conclusions in separately numbered findings if he chooses, but that it is the better practice to write the report as a narrative without such interruptions,⁸ and that he should not rule on requests to find, nor incorporate such rulings in his report.⁹ The objections made to the draft should

¹⁷ *Southern Ry. Co. v. Simon*, 184 Fed. 959.

§ 392. ¹ Equity Rule 76.

² Equity Rule 76. See *Re Thomas*, 35 Fed. 337, 339.

³ *Weiss v. Haight & Freese Co.*, 148 Fed. 399; *aff'd on appeal Haight & Freese Co. v. Weiss, C. C. A.*, 156 Fed. 328; *certiorari denied*, 207 U. S. 594, 52 L. ed. 356.

⁴ *Fischer v. Hayes*, 16 Fed. 469; *Jennings v. Dolan*, 29 Fed. 861; *Bliss v. Anaconda Copper Min. Co.*, 156 Fed. 309.

⁵ *Fischer v. Hayes*, 16 Fed. 469; *Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200.

⁶ *Fischer v. Hayes*, 16 Fed. 469; *Jennings v. Dolan*, 29 Fed. 861.

⁷ *Hatch v. Indianapolis & S. R. Co.*, 9 Fed. 356.

⁸ *Ommen v. Talcott*, 175 Fed. 261, 270. But it has been said that the master should make findings of fact and adopt conclusions of law. *Des Moines Water Co. v. City of Des Moines*, 192 Fed. 193.

⁹ *Ibid.*

not be included in the report when made.¹⁰ It has been said to be improper for the master to report the entire evidence taken before him unless there is an order from the court to that effect, nor to report such portions of the evidence as relate to the exceptions without a request from the party excepting.¹¹ The report may be either general, covering all the matters referred; or special, confined to a part which can be conveniently severed from the rest, where it is for the interest of persons thereby affected not to delay till the whole case is determined.¹² As soon as the report is ready, the master should file the same in the clerk's office; and the clerk should enter the day of the return in the order book.¹³ If no exceptions are filed within one month from the time of filing, the report is considered as confirmed on the next rule day after the month has expired.¹⁴ Upon consent of the parties¹⁵ or at the request of the master the court may allow the report to be withdrawn for the correction of a mistake by him; but in such case it is improper for him to reverse his rulings upon the law or the evidence, except upon notice to all parties affected, and after a hearing of any of them who wish to be heard.¹⁶

§ 393. Exceptions to masters' reports. Exceptions to the report of a master must be filed within one month from the filing of the report.¹ No exception will lie to a ruling before the report was made which was not objected to before the master.² In Circuits where it is not the practice for masters to serve drafts of their reports, an exception to the report, but not an exception to a ruling in evidence, can be filed without a preliminary objection.³ Such an exception has also been per-

¹⁰ Ibid.

¹¹ *Massie Wireless Tel. Co. v. Enterprise Transp. Co.*, C. C. A., 175 Fed. 6, 10.

¹² *Daniell's Ch. Pr.* (1st Am. ed.) 1475, 1476.

¹³ Eq. Rule 83.

¹⁴ *Equity Rule 83; Burns v. Rosenstein*, 135 U. S. 449, 455, 34 L. ed. 193, 195.

¹⁵ *W. U. Tel. Co. v. Am. Bell Tel. Co.*, 50 Fed. 662.

¹⁶ *National F. B. & P. Co. v. Dayton P. N. Co.*, 91 Fed. 822.

§ 393. ¹ *Equity Rule 83; Fidelity*

Ins. & S. D. Co. v. Shenandoah I. Co., 42 Fed. 372. But see *Central T. Co. v. Wabash, St. L. & P. Ry. Co.*, 27 Fed. 175.

² *Troy I. & N. Factory v. Corning*, 6 Blatchf. 328; *Fischer v. Hayes*, 16 Fed. 469; *Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200; *Ommen v. Talcott*, 175 Fed. 261, 270. But see *Hatch v. Indianapolis & S. R. Co.*, 9 Fed. 856; *Jennings v. Dolan*, 29 Fed. 861.

³ *Hatch v. Indianapolis & S. R. Co.*, 9 Fed. 856; *Fidelity I. & S. D. Co. v. Shenandoah I. Co.*, 42 Fed.

mitted after a draft of the report had been served, and no objection made thereto.⁴ Objections in support of exceptions may be allowed to be filed *nunc pro tunc*. Where the master has submitted a draft of his report to counsel, who have filed objections to the same before it was finally made, it is a convenient practice to provide, by stipulation or order, that objections filed before the order shall stand as exceptions filed with the clerk.⁶ Exceptions to a master's report are in the nature of a special demurrer.⁷ They should specifically point out the errors of which they complain, and if they rely upon any part of the testimony, it is the safer practice to have them either state the same or refer thereto, so that the court can without difficulty find it.⁸ It has been held that the point that a statute is unconstitutional need not be specifically stated in the exception.⁹ Exceptions to the admission or exclusion of evidence, taken upon the hearing before the master, need not be restated in the exceptions filed to his report.¹⁰ If the court is in session when exceptions are filed, they are argued at that session;¹¹ otherwise at the next session.¹² Every presumption

372. See *Jennings v. Dolan*, 29 Fed. 861.

⁴ *Jennings v. Dolan*, 29 Fed. 861.

⁵ *Fischer v. Hayes*, 16 Fed. 469.

⁶ *Bliss v. Anaconda Copper Min. Co.*, 156 Fed. 309.

⁷ *General Fire Extinguisher Co. v. Lamar, C. C. A.*, 141 Fed. 353.

⁸ *Harding v. Handy*, 11 Wheat. 103, 6 L. ed. 429; *Foster v. Goddard*, 1 Black, 506, 17 L. ed. 228; *Greene v. Bishop*, 1 Cliff. 186; *Stanton v. Alabama & G. R. Co.*, 2 Woods, 506; *Cutting v. Florida Ry. & Nav. Co.*, 43 Fed. 743, 747; *General Fire Extinguisher Co. v. Lamar, C. C. A.*, 141 Fed. 353; *Sandford v. Embry, C. C. A.*, 151 Fed. 977; *H. C. Cook Co. v. Little River Mfg. Co.*, 164 Fed. 1005. In *Duden v. Maloy*, 43 Fed. 407, the following exception was held to be insufficient according to the practice in the Second Circuit, and was consequent-

ly disregarded: "For that the master has found contrary to the preliminary requisitions and objections of defendant to his proposed draft report, and which requisitions and objections he here repeats, and contends that fresh evidence should be taken thereon." All that is necessary is that the exception should distinctly point out the finding and the conclusion of the master which it seeks to reverse. *Foster v. Goddard*, 1 Black, 506, 509, 17 L. ed. 228, 229, per Swayne, J. See *Central Tr. Co. v. Wabash, St. L. & P. Ry. Co.*, 57 Fed. 441, 444. For a construction of exceptions, see *People v. American Loan & Trust Co.*, 87 App. Div. (N. Y.) 139.

⁹ *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.*, 42 Fed. 372, 374.

¹⁰ *Marks v. Fox*, 18 Fed. 713.

¹¹ Equity Rule 83.

¹² Equity Rule 83.

is in favor of the correctness of the decision of a master.¹⁵ It has been said that this rule does not apply to a suit to enjoin the enforcement of a legislative or municipal regulation of the charges by a public service corporation.¹⁶ If the testimony is conflicting, the court will rarely interfere with the master's decision on the facts, provided he made no errors in law which affected the result.¹⁷ Where the order directed the master to state the facts, his findings have as much weight as the verdict of a jury upon a feigned issue.¹⁸ His findings of fact cannot be impeached in the absence from the record of his certificate or other competent proof either that the evidence presented to the court is the entire evidence before him or that it was all the evidence before him relative to the specific finding or findings challenged;¹⁹ but where the order of reference required the master to report the testimony, it was presumed that the testi-

¹⁵ *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. ed. 654; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. ed. 664; *Callaghan v. Myers*, 128 U. S. 617, 666, 32 L. ed. 547, 562; *Kimberly v. Arms*, 129 U. S. 512, 524, 32 L. ed. 764, 768; *Sandford v. Embry*, C. C. A., 151 Fed. 977; *Houck v. Christy*, C. C. A., 152 Fed. 612; *McNulty v. Wiesen*, 158 Fed. 221; *Blassengame v. Boyd*, C. C. A., 178 Fed. 1; *Peterson v. Mettler*, 198 Fed. 938. This sentence was quoted with approval in *Chandler v. Pomroy*, 87 Fed. 262, 266.

¹⁶ *San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County*, 191 Fed. 875. *Contra*, *Des Moines Gas Co. v. City of Des Moines*, 199 Fed. 204.

¹⁷ *Welling v. La Bau*, 34 Fed. 40; *Mason v. Crosby*, 3 W. & M. 258; *Gottfried v. Crescent Brg. Co.*, 22 Fed. 433; *Jaffrey v. Brown*, 29 Fed. 476; *Central Tr. Co. v. T. & St. L. Ry. Co.*, 32 Fed. 448; *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, C. C. A., 164 Fed. 809. But it is the duty of the court to weigh Fed. Prac. Vol. II.—78.

the evidence and find its own facts, although the testimony is conflicting, whenever either party excepts to the master's report. *Southern Ry. Co. v. Simon*, 184 Fed. 959, 960.

¹⁸ *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289. But see *Hapgood v. Berry*, C. C. A., 157 Fed. 807; *Re Senoia Duck Mills*, 193 Fed. 711.

¹⁹ *Wheeler v. Abilene Nat. Bank Bldg. Co.*, C. C. A., 16 L.R.A. (N.S.) 892, 159 Fed. 391, 393, 14 Ann. Cas. 917; *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, C. C. A., 164 Fed. 809; *Stromberg-Carlson Telephone Mfg. Co. v. Simmons*, 199 Fed. 256. In *Jefferson Hotel Co. v. Brumbagh*, C. C. A., 168 Fed. 867, held that a prayer that the other parties prove their accounts and their respective priorities before one of the masters of the court, did not bind the pleader to abide the master's judgment upon the facts or law; but that the master's findings and conclusions should be followed, unless some obvious error had intervened in the application of the law.

mony attached to his report was all that was taken before him.²⁰ Where the issues are by stipulation tried before a master, only questions of law can be reviewed.²¹ Where after a master's report had been filed a judgment finding facts opposite to those found by the master had been entered in a State court, in a suit between the same parties, it was held that the judgment of the State court must be followed on the hearing of the exceptions to the report of the master.²² Exceptions to a master's report are only proper when he has made an erroneous decision upon the matters referred to him.²³ An irregularity in his appointment cannot thus be questioned.²⁴ The remedy for an irregularity in his proceeding, or for his neglect to report upon all the matters referred to him, is a motion to set aside the report, or to refer the same back to the master.²⁵ It is not usual to recommit a report for further testimony and a revision of the master's conclusions, when full opportunity to offer evidence has been given to the parties;²⁶ but where it appeared that the parties did not fully understand their rights and necessities, the report was sent back to the master to give them an opportunity to supply their omission of taking evidence.²⁷ When there has been no irregularity in the master's proceedings, a report will rarely be recommitted for the taking of further testimony upon the motion of a party who has filed no exceptions.²⁸ A report of a master may be corrected without a re-reference, from facts appearing in the case aside from the evidence taken before him.²⁹ Where exceptions to the report of a master are sustained, the court has discretionary power to order a re-reference

or some serious mistake had been made in the consideration of the evidence.

²⁰ *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, C. C. A., 164 Fed. 809, 811.

²¹ *Shipman v. Ohio Coal Exchange*, C. C. A., 70 Fed. 552; *Farrar v. Bernheim*, C. C. A., 75 Fed. 136.

²² *Duden v. Maloy*, 43 Fed. 407.

²³ *Taylor v. Robertson*, 27 Fed. 537.

²⁴ *Seaman v. N. W. M. L. Ins.*

Co., 86 Fed. 493, 497; *N. Y. M. L. Ins. Co. v. Seaman*, 80 Fed. 357.

²⁵ *Tyler v. Simmons*, 6 Paige Ch. (N. Y.) 127.

²⁶ *Empire Trust Co. v. Egypt Ry. Co.*, 182 Fed. 100.

²⁷ *Westlake v. Marrin*, 176 Fed. 742.

²⁸ *Empire Trust Co. v. Egypt Ry. Co.*, 182 Fed. 100.

²⁹ *Witters v. Soule*, 43 Fed. 405; *Kelsey v. Hobby*, 16 Pet. 269, 10 L. ed. 961; *Parks v. Booth*, 102 U. S. 96, 26 L. ed. 54.

for further testimony or to enter a final decree upon the facts appearing in the case; and an appellate court will not ordinarily interfere with the exercise of such discretion.³⁰ It has been held in the Second Circuit that if the master errs by an improper rejection of evidence, his error should be corrected by an immediate motion to compel him to receive the same, and is not the proper subject of an exception to his report.³¹ The party who files exceptions is obliged to pay costs for each exception overruled, and is entitled to costs for each exception allowed.³² The amount of costs is fixed by the court in accordance with a standing rule in each Circuit.³³ By leave of the court exceptions may be amended.³⁴ It has been held that objections to the report which are not discussed in the brief of the objectors will be presumed to be waived.³⁵ An objection to a master's report not raised below will ordinarily not be considered upon an appeal.³⁶ The review of a master's report upon a receiver's account is described in a preceding section.³⁷

§ 394. Judicial sales by masters and other officers. Sales under the direction of a court of equity are usually made by masters, either by one of the general masters or a special master appointed by the court.¹ A receiver in equity may be authorized to sell property without the intervention of a master.² A receiver³ or trustee in bankruptcy, has also the same powers.⁴ But ordinarily when receivers have been appointed by a court of equity, public sales of property in their possession are made by a master. A sale of real estate beyond the jurisdiction of the court was void unless confirmed by the owner.⁵

³⁰ Mosher v. Joyce, 51 Fed. 441.

³¹ Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476, 478.

³² Equity Rule 84.

³³ Equity Rule 84.

³⁴ Jones v. Lamar, 39 Fed. 585.

³⁵ Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470.

³⁶ Topliff v. Topliff, 145 U. S. 156, 173, 36 L. ed. 658, 665.

³⁷ *Supra*, § 319.

§ 394. ¹ Guaranty Tr. Co. v. Metropolitan St. Ry. Co., C. C. A., 168 Fed. 937, 177 Fed. 925.

² Horner v. Continental & Commercial Trust & Savings Bank, C. C. A., 198 Fed. 832.

³ Re Becker, 98 Fed. 407.

⁴ Re Britannia Mining Co., 197 Fed. 459. Chapter on Bankruptcy, *infra*.

⁵ James v. Milwaukee & M. R. Co., 6 Wall. 752, 18 L. ed. 885; Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47; Alabama & G. M. Ry. Co. v. Robinson, C. C. A., 56 Fed. 690; Grape C. C. Co. v. Farmers' L. & Tr. Co., C. C. A., 63 Fed. 891.

Where all parties in interest were before the court and could be compelled by its order to confirm the sale, sales of land beyond the outside of the jurisdiction were allowed.⁶ A foreclosure sale should not be ordered until the amount due from the mortgagor has been judicially determined so that he and junior incumbrancers may be able intelligently to decide whether to redeem.⁷ A substantial error in such an adjudication will necessitate a reversal of the decree.⁸ It is customary to order a reference to a master to determine the amount due, but the court may make the computation without a master's aid.⁹ In a proper case, a court of equity having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory decree or order for the sale of the property by a master before the rights of the parties under the several mortgages have been fully ascertained and determined.¹⁰ Where all the lienors are before it, the court of equity may order a sale of the property which is the subject-matter of the action, without settling the respective rights and priorities of the parties, and will then transfer their respective liens to the proceeds.¹¹ This has been done in a suit in equity by an assignee in bankruptcy,¹² and the same power is exercised by courts of bankruptcy in bankruptcy proceedings.¹³ It has been held that this can be done in the case of maritime liens when the lienors have voluntarily submitted themselves to the jurisdiction of the court

⁶ § 66 *supra*, § 398, *infra*.

⁷ *Chicago, D. & V. R. Co. v. Fostick*, 106 U. S. 47, 27 L. ed. 47. It has been said that a decree is not defective where it fails to adjudicate before the sale the amount of costs, counsel fees and compensation to the trustee which it requires the mortgagor to pay in order to redeem the property. *Grape C. C. Co. v. Farmer's L. & Tr. Co., C. C. A.*, 72 Fed. 708, 712.

⁸ *James v. Milwaukee & M. R. Co.*, 6 Wall. 752.

⁹ *Brown v. Grove, C. C. A.*, 80 Fed. 564.

¹⁰ *Pennsylvania R. Co. v. Allegheny V. R. Co.*, 42 Fed. 82, 85;

First Nat. Bank v. Schedd, 121 U. S. 74, 30 L. ed. 877. The fact that the title to land is being litigated in another court is not an insuperable objection to its judicial sale. *Fidelity I. Tr. & S. D. Co. v. Roanoke Iron Co.*, 84 Fed. 752. *Cf. supra*, § 52.

¹¹ *McGraw v. Mott, C. C. A.*, 179 Fed. 646; *Bowling Green Trust Co. v. Virginia P. & P. Co.*, 164 Fed. 753; *Guaranty Trust Co. v. Metropolitan St. Ry. Co.*, 168 Fed. 937, *aff'd.*, C. C. A., 177 Fed. 925.

¹² *Re Mead*, 58 Fed. 312.

¹³ *Re Keet*, 128 Fed. 651. See Chapter on Bankruptcy, *infra*.

of equity.¹⁴ A court of equity will not make an interlocutory order for an immediate sale of mortgaged property upon terms discharging the lien of a mortgage not yet due, unless it clearly appears that in the end there must be not only a sale of the property, but a sale upon those terms.¹⁵ In determining when a sale should be made, the court may consider a plan of reorganization which has been proposed by interested parties.¹⁶ In such cases an appeal may be taken at once from the order for the sale, provided the sale is to take place immediately;¹⁷ but not if any subsequent proceedings and order must precede the sale.¹⁸ Pending an appeal, the court which ordered the sale may postpone the same, although no *supersedeas* has been obtained and the term at which the decree was entered has expired.¹⁹ Where the property is perishable, a sale should be ordered immediately;²⁰ and in such a case the purchaser acquires a good title against all the world, which will not be affected by a subsequent adjudication of bankruptcy that invalidates the lien, in proceedings to enforce which the sale was made.²¹ When property is ordered to be sold by a master, it must be sold at public auction, unless the court otherwise directs.²² Such a sale is conducted under the superintendence of the solicitor for the party at whose prayer the sale is made, and in all questions which subsequently arise between the buyer and the seller it has been said that he is considered as the agent of all the parties to the suit.²³ The particulars, conditions and notices of the sale

¹⁴ *Hudson v. N. Y. & Albany Transp. Co.*, C. C. A., 180 Fed. 973.

¹⁵ *Pennsylvania R. Co. v. Allegheny V. R. Co.*, 42 Fed. 82, 86.

¹⁶ *Bowling Green Tr. Co. v. Virginia Passenger & Power Co.*, 164 Fed. 753; *Gay v. Hudson River El. Power Co.*, C. C. A., 169 Fed. 1020. § 394, *supra*.

¹⁷ *First Nat. Bank v. Shedd*, 121 U. S. 74, 30 L. ed. 877.

¹⁸ *Burlington, C. R. & N. Ry. Co. v. Simmons*, 123 U. S. 52, 55, 31 L. ed. 73, 74.

¹⁹ *Bound v. South Carolina Ry. Co.*, 55 Fed. 186. As to laches

which will defeat an application for an injunction to stay a sale, see *Duncan v. Atlantic M. & O. R. Co.*, 88 Fed. R. 840; *Foley v. Guaranty Tr. & S. D. Co.*, C. C. A., 74 Fed. 759.

²⁰ *Jones v. Springer*, 226 U. S. 148, 57 L. ed. —.

²¹ *Ibid*.

²² *Daniell's Ch. Pr.*, ch. xxvi; *Hutson v. Sadler*, 31 W. Va. 358; *Bound v. South Carolina Ry. Co.*, 46 Fed. 315.

²³ *Dalby v. Pullen*, 1 R. & M. 296. But see *Blossom v. Railroad Co.*, 3 Wall. 196, 207, 18 L. ed. 43, 46.

are prepared by him, subject to the approval of the master, when not prescribed in the order for the sale.²⁴ They should be entitled in the cause, and should contain a general description of the nature and situation of the property; and if land is sold, the notices should state in whose possession it is or has lately been.²⁵ In the case of a sale of a large and complicated system of street railroads operated by receivers, it was held that a provision for a minute inventory covering the amount of fuel, supplies and material for repairs, which were of a value not in excess of \$100. each, was not necessary nor practicable.²⁶

²⁴ Daniell's Ch. Pr., ch. xxvi.

²⁵ Ibid.

²⁶ Guaranty Trust Co. v. Metropolitan St. Ry. Co., 168 Fed. 937, aff'd. C. C. A., 177 Fed. 925; Lacombe, J. (938): "In the operation of a large and complicated system like this, the items of personal property required for operation, repair, and construction are constantly fluctuating. At whatever time an inventory might be made, it would be found a few weeks later to inaccurately represent then existing conditions. Such an inventory is not necessary. The cars will be listed, described, and identified by numbers, and so will the larger units of machinery. The annual inventory and the books of the receivers will be open to bidders, who will also be given access to all power houses, shops, cars, and storage barns. Certainly no one will bid for this railroad property without the advice of skilled and experienced engineers, whose inspection of the property and what may be found on it, coupled with the list of cars, etc., provided for in the decree, will give all the information needed for the exercise of an intelligent judgment." This decree was modified in this respect upon appeal by the following provision (177 Fed.

926): "That an inventory shall be prepared by the special master and by him left with the clerk of this court when and as directed by this court. This inventory will enumerate the rolling stock of the road in the possession of the receivers, stating the type and character of each item and giving its number. This inventory will also state the number and location of the various dynamos, transformers, and converters, and the number of horses. The inventory shall include such other articles of personal property in the possession of the receivers as in their opinion are of a value in excess of one hundred dollars each, and such additional articles as the special master shall think it wise to include. Such inventory and valuation shall be advisory only, and shall not, with respect to value or title or any other matter, be construed as a warranty, but all purchases shall be deemed to be made in reliance upon the purchaser's own knowledge or information as to the property purchased. The property, both real and personal, hereby directed to be sold, may be inspected by intending bidders at the sale hereunder, subject to such reasonable regulations as the receivers may prescribe."

The conditions of the sale should be in general similar to those annexed to ordinary sales of similar property in the vicinity.²⁷ A decree of foreclosure, which orders a sale of all the property of the mortgagor, is not construed as directing a sale of money collected by a receiver of his property, unless it expressly so directs.²⁸ A sale by a receiver is not invalidated by his announcement at the sale that the purchaser will have the option also to buy other property not covered by the order of sale but acquired by him in the due course of his receivership.²⁹ Where property, not embraced in a decree of foreclosure, is seized for sale by the master, he is liable to the owner in trespass; but an application to recover the possession of the property can only be made to the court that appointed him.³⁰ The sale should be advertised at least twice and the advertisement should give such a description of the property as clearly to indicate and identify it.³¹ The Act of March 3, 1893 provides: "Sec. 3. That hereafter no sale of real estate under any order, judgment, or decree of any United States Court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The notice of sale herein provided for to be made in such other paper as may seem proper."³² It was held in the district of

²⁷ Ibid. See *Bacon v. N. W. M. L. I. Co.*, 131 U. S. 258, 33 L. ed. 128; *Treadwell v. United V. C. Co.*, 47 App. Div. (N. Y.) 613.

²⁸ *Washington Irr. Co. v. California S. D. & Tr. Co.*, C. C. A., 115 Fed. 20.

²⁹ *Lake S. I. Co. v. Brown, Bonnell & Co.*, 44 Fed. 539.

³⁰ *Perry v. Tacoma Mill Co.*, C. C. A., 152 Fed. 115.

³¹ *Kauffman v. Walker*, 9 Md. 229; *Merwin v. Smith*, 1 Green Ch. (N. J.) 182; *Daniell's Ch. Pr.*, ch. xxvi. See *Ray v. Oliver*, 6 Paige (N. Y.), 489; *Treadwell v. United V. C. Co.*, 47 App. Div. (N. Y.) 613.

³² 27 St. at L. 751, 3 Fed. St. Ann. 54, Comp. St. 710, § 3, *Pierce's Fed. Code*, § 7684. It has been held, in bankruptcy, that an advertisement is sufficient when it requests

Florida, that real property must be sold at the door of the courthouse in the county where the land is situated.³³ This statute is mandatory.³⁴ It has been held that a purchaser, even after confirmation, can reject the title because of a failure to comply with the act.³⁵ It is the safer practice for trustees and receivers in bankruptcy to comply with the same.³⁶ This statute supercedes the provisions in any mortgage and trust deed and a foreclosure decree need not conform to the latter,³⁷ although it is the safer practice to comply with both the statute and the instrument. It has been held that such an advertisement once a week for only twenty-seven days before the sale is not a compliance with the statute.³⁸ Where a sale was cried substantially at the hour advertised, and no objection because of the delay was then made, it was not invalidated because efforts made to enjoin the sale had caused a slight delay.³⁹ The master has power to adjourn the sale, even after the auction has begun and bids have been made.⁴⁰ A State court has held that, where a sale is adjourned, no advertisement of the adjournment is re-

bids to be submitted at a certain date, time and place, and calls a meeting of the creditors then and there to act upon any bid that may be submitted. *Re Nevada-Utah Mines & Smelters Corporation*, 198 Fed. 497.

³³ *Bornemann v. Norris*, 47 Fed. 438.

³⁴ *Cumberland Lumber Co. v. Tunis Lumber Co.*, C. C. A., 171 Fed. 352.

³⁵ *Cumberland Lumber Co. v. Tunis Lumber Co.*, C. C. A., 171 Fed. 352. But see *Godchaux v. Morris*, C. C. A., 121 Fed. 482. It opposing a motion to confirm the sale, of which notice has been served has been held that a party, by not waives any objection founded upon a failure to comply with this statute upon his attorney in the suit, *ute. Nevada Nickel Syndicate v. National N. Co.*, 193 Fed. 391.

³⁶ *Re Britania Mining Co.*, D.

Wis. 197 Fed. 459, holds that the statute applies to proceedings in bankruptcy. *Contra, Re National Mining Exploration Co.*, D. Mass. 193 Fed. 232.

³⁷ *Provident Life & Trust Co. v. Camden & T. Ry. Co.*, C. C. A., 177 Fed. 854. It has been held that a foreclosure sale cannot be collaterally attacked in another suit filed by creditors against the mortgagees and others because of the failure of the decree to comply with a State statute regulating the time allowed for a redemption before a sale. *Andrews v. National F. & P. Works*, C. C. A., 36 L.R.A. 153, 77 Fed. 774.

³⁸ *Wilson v. N. Y. Mut. L. I. Co.*, 65 Fed. 38.

³⁹ *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, C. C. A., 127 Fed. 32.

⁴⁰ *Blossom v. Railroad Co.*, 3 Wall. 196, 18 L. ed. 43.

quired.⁴¹ The same statute further provides: "That all real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the Court-house of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct."⁴² "That all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner."⁴³ An omission to comply with this statute does not make the sale void; or, it has been held, is it a ground for refusing confirmation, since the decree, although erroneous, is binding, unless reversed upon appeal.⁴⁴ In the case of a sale by trustees in bankruptcy of land situated in another and distant district, it was held they need not be present, but might employ an auctioneer and leave the conduct of the sale to him, the deposit required of bidders and the balance of the purchase money being paid directly to them.⁴⁵ The decree for the sale need not name the master who is to conduct it; and in case of such an omission the sale can be conducted by any master in

⁴¹ *White v. Zust*, 28 N. J. Eq. 107.

⁴² 27 St. at L. 751, 3 Fed. St. Ann. 54, Comp. St. 710, § 1, Pierce's Fed. Code, § 7682. It has been held: that, in bankruptcy, the local rule requiring the sale by the official auctioneer and a conspicuous notice in front of the premises two days before, may be disregarded; and that it is sufficient if bidders are requested and permitted to make their bids at a creditors' meeting. A public sale was thus defined: "That all persons shall have the right to come in and bid, that the bids shall not be held open, except with the bidders' consent, and that notice shall be given publicly at which all bids are invited." The court said however: "This proceed-

ing should certainly not be taken as a precedent for any other. The only justification for it was that the pledgee was threatening a sale of an important part of the property, and there was every reason to suppose that the usual time for advertisement of the property could not safely take place after the order of the referee for a sale. That justified and required in this instance a somewhat anomalous procedure." *Re Nevada-Utah Mines & Smelters Corporation*, 198 Fed. 497, 499, per Hand, J. Definition disapproved; s. c., C. C. A., 202 Fed. 126.

⁴³ *Ibid.*

⁴⁴ *Godchaux v. Morris*, C. C. A., 121 Fed. 482.

⁴⁵ *Re National Mining Exploration Co.*, 193 Fed. 232.

whose hands plaintiff places a certified copy of the decree.⁴⁶ The sale is conducted in substantially the following manner: The master, his clerk, or a person appointed by him, is present with a paper upon which the biddings for the different lots are to be marked.⁴⁷ The lots are successively put up at a price offered by any person present; such person, according to the English practice, signing his name to the sum which he offers on the paper.⁴⁸ If the property to be sold consists of a railroad and its appurtenances, it is usually sold as a single thing.⁴⁹ The same rule has been applied to a complicated street railway system⁵⁰ and to the plant and connections of a water company.^{50a} It has been said that railroad property cannot be thus sold piecemeal except by the consent of all the parties expressed in open court or in writing.⁵¹ The ordinary rule that mortgaged premises must be sold in the inverse order of their alienation is not strictly applied when it would produce an inequitable result.⁵²

⁴⁶ *Seaman v. N. W. M. L. I. Co.*, 86 Fed. 493, 497.

⁴⁷ *Daniell's Ch. Pr.*, ch. xxvi.

⁴⁸ *Daniell's Ch. Pr.* ch. xxvi. "A bid for property of a bankrupt means what is commonly understood as a bid; that is to say, the purchaser is to pay something to the receiver for the property purchased, and the receiver distributes the proceeds among the creditors." It was there held that "a proposition to have a new corporation take over all the assets of the bankrupt, except a few contracts, and then have the creditors of the bankrupt directly accept, in place of their claims against the bankrupt, unsecured obligations of the new corporation, payable at different dates in the future, running from 9 to 27 months," was not a bid. *Re J. B. & J. M. Cornell Co.*, 186 Fed. 859, 860.

⁴⁹ *Bound v. South Carolina Ry. Co.*, 46 Fed. 315; *Compton v. Jesup*, C. C. A., 68 Fed. 263. This was done where a mortgage secured

three series of bonds, each of which had a prior lien upon one of three divisions of the railroad and a subordinate lien upon the other two. *Farmers' L. & Tr. Co. v. Cape F. & V. V. Ry. Co.*, 82 Fed. 344.

⁵⁰ *Guaranty Trust Co. v. Metropolitan St. Ry. Co.*, 168 Fed. 937, aff'd. C. C. A., 177 Fed. 925. Where a part of a street railroad system covered by a first mortgage could not be successfully operated without connection with the remainder covered by another mortgage, which was also a second mortgage upon such part, and no bids were received on the sale of the part, the sale of the same was adjourned to the same date as the sale of that covered by the second mortgage. *Morton Trust Co. v. Metropolitan St. Ry. Co.*, 179 Fed. 1010.

^{50a} *City of New Orleans v. Howard*, C. C. A., 160 Fed. 393.

⁵¹ *Bound v. South Carolina Ry. Co.*, 46 Fed. 315, 316.

⁵² *Phila. M. & Tr. Co. v. Needham*,

An upset price may be fixed, below which the property cannot be sold.⁵³ The court may make a condition of the sale that no bid shall be considered unless each bidder first deposit a specified sum in cash or in check certified by a national or state bank or a trust company; in one instance \$25,000,⁵⁴ in others \$50,000,⁵⁵ in another \$100,000,⁵⁶ and that no bid be considered unless it exceed a specified amount.⁵⁷ Every subsequent bidder must do like the first until no person will advance on the last bid, when the last bidder is declared the purchaser;⁵⁸ unless there has been a reserved bidding fixed, when if the last bid does not reach the reserved one, the person conducting the sale declares that the lot has not been sold, but has been bought in by the persons interested in the estate.⁵⁹ The master may be directed to offer the property, first, in separate lots and then as entirety, and to accept the highest bid made at both sales.⁶⁰ In the case of a railroad company, the decree may provide that the property shall be sold, first, in separate lots as junk and then the whole as a railroad in operation, and for the benefit of the public direct the acceptance of the highest bid upon the second offer, although this is less than what the property fetched in separate lots,⁶¹ and a sale may be authorized for a less amount to a bidder who undertakes to continue the operation of the road.⁶² The decree may

71 Fed. 597. See *Riggs v. Clark*, 71 Fed. 560; *Central Tr. Co. v. Sheffield & B. C. I. & Ry. Co.*, 60 Fed. 1010.

⁵³ *Provident Life & Trust Co. v. Camden & T. Ry. Co.*, C. C. A., 177 Fed. 854; *New York Trust Co. v. Portsmouth & Exeter St. Ry. Co.*, 192 Fed. 728; *Re Williams*, C. C. A., 197 Fed. 1.

⁵⁴ *Farmers' L. & Tr. Co. v. G. B. & M. R. Co.*, 10 Biss. 203.

⁵⁵ *Turner v. I., B. & W. Ry. Co.*, 8 Biss. 315; *Provident Life & Trust Co. v. Camden & T. Ry. Co.*, C. C. A., 177 Fed. 854.

⁵⁶ *Guaranty Trust Co. v. Metropolitan St. Ry. Co.*, C. C. A., 177 Fed. 925, 929.

⁵⁷ *Farmers' L. & Tr. Co. v. Houston & T. C. R. Co.*, *Pardee and Sabin*, JJ., May, 1888; *Hervey v. Illinois Mid. Ry. Co.*, U. S. C. C. S. D. Ill., June 10, 1886; *Roosevelt v. Columbus, C. & I. C. Ry. Co.*, U. S. C. C., N. D. Ill., *Drummond J.*, Nov. 15, 1882; *Jesup v. Wabash, St. L. & P. Ry. Co.*, U. S. C. C., N. D. Ill., *Gresham and Jackson*, JJ., 1889; and many other foreclosure cases.

⁵⁸ *Daniell's Ch. Pr.*, ch. xxvi.

⁵⁹ *Ibid.*

⁶⁰ *Bidwell v. Huff*, 176 Fed. 174.

⁶¹ *New York Trust Co. v. Portsmouth & Exeter St. Ry. Co.*, 192 Fed. 728.

⁶² *Ibid.*

provide that the purchaser must assume liability for all claims against the property.⁶³ A limitation of the time for their presentment is usually inserted in the decree.⁶⁴ Upon confirmation, the time to present such claims may be indefinitely extended;⁶⁵ but, in such a case, the purchaser might be relieved from his bid should he so request.⁶⁶ The court may authorize payment of a bid in bonds secured by the mortgage which is foreclosed.⁶⁷ It seems that the court may direct that the sale be made for cash, in a suit under a railroad mortgage which provides that the purchase-money may be paid in bonds.⁶⁸ In general, the courts are prone to construe provisions in a trust deed regulating the time and manner of the sale as applicable only to a sale under the power without an application to the court; and unless they create substantial rights, they are not always followed in a judicial foreclosure sale.⁶⁹

A bid may be revoked any time before the hammer falls.⁷⁰ A party to the suit who is not a trustee has the right to buy at the sale without express leave in the order or decree, although it is usual to grant such permission expressly.⁷¹ Where

⁶³ Guaranty Trust Co. v. Metropolitan St. Ry. Co., 168 Fed. 937; *aff'd.* C. C. A., 177 Fed. 925; Morton Trust Co. v. Metropolitan St. Ry. Co., 170 Fed. 336; Pennsylvania Steel Co. v. New York City Ry. Co., 194 Fed. 546. Such a provision was held to be no bar to the issue of an execution against the property by a judgment creditor with a prior lien, who had failed to file his claim in accordance with the decree. Trust Co. of America v. Norfolk & S. Ry. Co., 183 Fed. 803.

⁶⁴ U. S. Trust Co. v. New Mexico, 183 U. S. 535, 46 L. ed. 316. Such an order was construed as not applying to claims which were in suit before the same court at the time it was made. Southern Ry. Co. v. Townsend, C. C. A., 161 Fed. 310.

⁶⁵ Olcott v. Headrick, 141 U. S. 543, 547, 35 L. ed. 851, 853.

⁶⁶ *Ibid.*

⁶⁷ Ketchum v. Duncan, 96 U. S.

659, 24 L. ed. 868. As to payment in stock, see Treadwell v. United V. C. Co., 47 App. Div. 613, 619.

⁶⁸ Farmers' L. & Tr. Co. v. G. B. & M. R. Co., 10 Biss. 203; s. c., 6 Fed. 100.

⁶⁹ Low v. Blackford, C. C. A., 87 Fed. 392; Toler v. East Tenn. V. & G. Ry. Co., 67 Fed. 168.

⁷⁰ Blossom v. Railroad Co., 3 Wall. 196, 18 L. ed. 43. See Mayhew v. West Va. O. & O. L. Co., 24 Fed. 205, 215.

⁷¹ Smith v. Black, 115 U. S. 308, 29 L. ed. 398; Pewabic Mining Co. v. Mason, 145 U. S. 349, 363, 36 L. ed. 732, 736. "Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others." Scholle v. Scholle, 101 N. Y. 167, 172. Where a trustee has an interest which he

the trust deed so provides, a trustee may be authorized to bid upon the sale and to buy in the property, for the benefit of those whom he represents.⁷² Bidding by the trustees, which increased the purchase price and encouraged competition, was held not to invalidate the sale.⁷³ The highest bidder for the property, who is willing and able to comply with the terms of sale, is entitled to have the bid accepted and reported for confirmation.⁷⁴ Where a trustee in bankruptcy was directed to advertise for bids of certain assets, which were to be accompanied by a certified check for a certain amount and bid upon on a specified date, the sale to be subject to confirmation by the court, with dates fixed for objections and a hearing; it was held that the trustee was only authorized to receive bids and not to sell and that the highest bidder, who had been notified to that effect, had no right to complain because the bids were reopened and the property subsequently sold for a higher price.⁷⁵ A sale does not take effect until it has been confirmed by the court.⁷⁶ It is the duty of the master to file a report of the sale, but his failure to report his costs and expenses does not affect the validity of the sale.⁷⁷ The proper practice in order to obtain a confirmation of a sale is to obtain an order *nisi*, unless cause to the contrary be shown within a specified time, that the sale shall be confirmed, and, after service of the same upon the parties to the cause or their solicitors, to apply to the court

wishes to protect by bidding at the sale, he may obtain leave to bid upon a special application to the court upon notice to all parties interested. *Scholle v. Scholle*, 101 N. Y. 167, 172; *Merkle's Estate*, 182 Pa. St. 378. See also *Cooley v. Cooley's Heirs* (Tenn. Ch. App.), 37 S. W. 1028.

⁷² *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, C. C. A., 127 Fed. 32.

⁷³ *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, C. C. A., 127 Fed. 32.

⁷⁴ *Re Williams*, C. C. A., 197 Fed. 1.

⁷⁵ *Re Chandler*, C. C. A., 194 Fed. 944.

⁷⁶ *Mayhew v. West Va. O. & O. L. Co.*, 24 Fed. 205, 215; *Pewabic M. Co. v. Mason*, 145 U. S. 349, 364, 36 L. ed. 732, 737; *Tennessee v. Quintard*, C. C. A., 80 Fed. 829, 835. But, in Illinois, where the State practice did not require confirmation and a deed by a Federal master had been given, without the sale having been confirmed it was held that this gave the purchaser possession of underlying strata of coal and constituted color of title to the same within the meaning of the State statute of limitations. *Faulds v. Tilton*, C. C. A., 192 Fed. 297.

⁷⁷ *Clark v. Iowa Fruit Co.*, 185 Fed. 604

for an order of confirmation absolute upon the production of an affidavit of the service of the order *nisi* and proof that the cause has been shown.⁷⁸ It has been held that notice of application for the decree *nisi* must be given to the solicitors in the cause, and that proof of service thereof must be filed with the motion.⁷⁹ The usual time, specified in the decree *nisi*, is eight days, in the absence of a special rule,⁸⁰ or under extraordinary circumstances. The receiver, or an interested creditor, as well as the purchaser, may make the motion.⁸¹ The court may confirm the sale in vacation as well as term time.⁸² It is doubtful whether a court has power to confirm a sale that it has not previously ordered.⁸³ When the marshal sold property not included in the decree of sale and the court's attention was not called thereto, it was held that a general order of confirmation did not ratify that part of his sale.⁸⁴ The highest bidder should usually be allowed a reasonable time within which to examine the title of the property before the sale is confirmed.⁸⁵ Before the confirmation of the sale any person interested whether a party or a stranger, may intervene and have the sale set aside upon payment of the purchaser's expenses and the offer of a sufficient advance in price.⁸⁶ When the highest bid is not accepted, the highest bidder is returned all money that he has paid and is usually also compensated for any ex-

⁷⁸ *Pewabic M. Co. v. Mason*, 145 U. S. 349, 363, 364, 36 L. ed. 732, 736, 737; *Daniell's Ch. Pr.* (1st Am. ed.) 1461. The English practice, which has been followed in the District of Michigan, is to provide in the order *nisi* that cause be shown within eight days. *Ibid.* In railroad foreclosure and other cases where the persons interested live at a distance from the place or sale, more time should be allowed. It has been held that creditors in bankruptcy are not entitled to notice of the motion. *Re Nevada-Utah Mines & Smelters Corporation*, 198 Fed. 497.

⁷⁹ *Coltrane v. Baltimore B'g & L. Ass'n*, 126 Fed. 839.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Central Tr. Co. of New York v. Sheffield & B. C. I. & Ry. Co.*, 60 Fed. 9.

⁸³ *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 641, 17 L. ed. 886, 898.

⁸⁴ *Ibid.*

⁸⁵ *Buell v. Kanawha Lumber Corporation*, C. C. A., 185 Fed. 109.

⁸⁶ *Blackburn v. Selma R. Co.*, 3 Fed. 689; *Central Tr. Co. v. Sheffield & B. C. I. & Ry. Co.*, 60 Fed. 9; *Allgair v. Fisher & Co.*, C. C. A., 143 Fed. 962; *s. c.*, as *Re William F. Fisher & Co.*, 148 Fed. 907.

penses that he has consequently incurred.⁸⁷ Before the confirmation, any person may intervene and obtain an order establishing a lien upon the property.⁸⁸ The confirmation may be upon terms,⁸⁹ or subject to such claims against the property as may thereafter be asserted.⁹⁰ But it is usual to insert in the decree a direction that they must be presented within a specified period.⁹¹ As a condition of the confirmation of the sale, the purchaser may be required to assume responsibility for obligations of the receiver or for the payment of claims entitled to a preference over the mortgage.⁹² Such provisions in the decree for a sale or for a confirmation of a sale are considered to be equivalent to the reservation of a lien for the payment of purchase-money, and they may be enforced by the court upon a

⁸⁷ *Hudson v. N. Y. & Albany Transp. Co.*, C. C. A., 188 Fed. 630. There, a year or more after boats had been sold, the sale was set aside because of erroneous statements made by the auctioneer; and it was held that the buyer was entitled to receive from the proceeds of the second sale, in addition to the amount paid on the bid, the full amount expended on the boats, which had increased their value, but not the amount of a prior lien which it had paid in reliance upon a report of the master sustaining the same, which was subsequently overruled by the court, and that it was not chargeable for the use of the boats from which it realized nothing. It was subrogated to the rights of the claimant of the lien as a general creditor for the amount thereof. *Allgair v. Fisher & Co.*, C. C. A., 143 Fed. 962; s. c., as *Re William F. Fisher & Co.*, 148 Fed. 907.

⁸⁸ *Tennessee v. Quintard*, C. C. A., 80 Fed. 829. It has been held that, after a decree of foreclosure, proceedings for an examination *pro interesse suo* may be instituted by the

complainant against persons not parties to the action claiming some interest in the property, that in such a proceeding the court may determine the title to the property and award possession of the same, that if it adjudicates in favor of the complainant the claimant may be enjoined against further interference, and that even if no such injunction has been granted it is a contempt for the claimant to appear at the auction sale and prevent the complainant by threats from selling the property. *Westlake v. Marrin*, C. C. D. Pa., October Session 1908, N. Y. L. J. July 7th 1910. See *Westlake v. Marrin*, 176 Fed. 742, *supra*, § 311.

⁸⁹ *Farmers' L. & Tr. Co. v. G. B. & M. R. Co.*, 10 Biss. 203; s. c., 6 Fed. 100; *F. L. & Tr. Co. v. Central R. Co. of Iowa*, 17 Fed. 758.

⁹⁰ *Tennessee v. Quintard*, 80 Fed. 829.

⁹¹ *U. S. Trust Co. v. New Mexico*, 183 U. S. 537, 46 L. ed. 316.

⁹² *Farmers' L. & Tr. Co. v. Central R. of Iowa*, 17 Fed. 758. Where an appeal has been taken from so much of a bill as grants a prefer-

summary application at any time.⁹³ A sale may be confirmed before the whole purchase price is paid.⁹⁴ Should the purchaser fail to pay any part of the amount promised, a resale will be ordered either before or after the confirmation of the original sale, provided that the rights of third persons have not intervened.⁹⁵ He may be compelled by attachment issued upon

ence, the confirmation may be conditioned upon the payment to a surety upon a *supersedeas* bond of the amount paid by such surety to the preferred creditor upon an affirmation; or a lien upon the property may be given to such surety. *Continental Tr. Co. v. American Surety Co., C. C. A., 80 Fed. 180.* Where a decree of sale directs that the purchaser pay certain preferential claims, he cannot upon such payment be subrogated to the rights of the original claimants and prove the claims against the fund in the hands of the receiver for distribution. *Morgan's L. & T. R. & S. S. Co. v. Moran, 91 Fed. 22. Cf. Southern Ry. Co. v. Bouknight, 70 Fed. 442.* It has been said that the assignee of a purchaser cannot set up against such claims a title acquired at a subsequent sale by another court. *Baltimore Tr. & G. Co. v. Hofstetter, C. C. A., 85 Fed. 75.* It has been held that a decree directing the sale of railroad property upon foreclosure, "subject only to the liens, in respect to the portions of property enumerated, to the burden of which such sales were specified herein directed to be made," by implication releases the purchaser from liability to pay taxes which accrued before or during the receivership; and that he can insist upon payment of such taxes from the earnings of the receivership or out of the purchase money. The same case holds that, in the absence

of a provision in the decree to the contrary, the purchaser of railroad property at foreclosure sale takes the same subject to any existing defects in its title, and that he cannot insist that claims for unpaid rights of way shall be paid from the proceeds of the sale. *First Nat. Bank v. Ewing, 103 Fed. 168. See infra, § 404.* Where a decree foreclosing two mortgages required the purchaser to pay all claims which should be adjudged "prior in lien to the mortgages foreclosed," and the proceeds paid the first mortgage in full; it was held that the purchaser must pay a claim duly filed, which was adjudged prior in lien to the second mortgage. *Central Indiana Ry. Co. v. Grantham, C. C. A., 143 Fed. 43.*

⁹³ *Continental Tr. Co. v. American S. Co., C. C. A., 80 Fed. 180.* See *Dubuque & S. C. Co. v. Pierson, C. C. A., 70 Fed. 303.*

⁹⁴ *Re National Mining Exploration Co., 193 Fed. 232.*

⁹⁵ *Stuart v. Gay, 127 U. S. 518, 32 L. ed. 191.* A purchaser who has delayed payment of his bid for some time after the confirmation of the sale will not be allowed the earnings of the property in the intervening time. *Boyle v. Farmers' L. & Tr. Co., C. C. A., 80 Fed. 930.* The court will not refuse to confirm a sale upon the ground that the purchaser has not made the full cash payment required, when he has paid a substantial sum, and there

a rule, or order to show cause without a new suit, to pay the difference between his bid and the amount realized from the second sale, even though the sale has not been confirmed.⁹⁶ The same remedy may be applied against the buyer at a private sale authorized by the court.⁹⁷ Where, at the sale, announcement is made of a lien claimed upon the property, the buyer is charged with notice of the same and takes subject thereto if it is otherwise valid.⁹⁸ A defect in the title of the property, which has not been referred to in the advertisement or terms of sale, or a misrepresentation concerning the amount of claims for prior liens made by the auctioneer, even if by inadvertence, are sufficient reasons for not enforcing the bid.^{98a} It has been held that, even after confirmation, a bidder is not obliged to pay the promised amount when the sale was not made in compliance with the statute previously quoted.⁹⁹ Such a resale may be ordered by a summary proceeding upon the return of an order to show cause served upon the purchaser,¹⁰⁰ and upon the parties at whose suit the sale was made.¹⁰¹

A judicial sale may be set aside for fraud,¹⁰² mistake,¹⁰³ accident or other unconscionable circumstances.¹⁰⁴ It seems

is no reason to suppose that he will not pay the balance upon the entry of the order of confirmation. *Fidelity L. Tr. & S. D. Co. v. Roanoke Iron Co.*, 84 Fed. 752.

⁹⁶ *Stuart v. Gay*, 127 U. S. 518, 32 L. ed. 191. *Camden v. Mayhew*, 129 U. S. 73, 32 L. ed. 608; *Central Tr. Co. v. Cincinnati, J. & M. R. Co.*, 58 Fed. 500.

⁹⁷ *Re J. Jungmann*, C. C. A., 186 Fed. 302.

⁹⁸ *The Dana*, 190 Fed. 650; *Buell v. Kanawha Lumber Corporation*, C. A. A., 185 Fed. 109. But where the buyer at a receiver's sale did not rely upon the inventory and appraisal, but before the sale examined the property; it was held that the rule of *caveat emptor* applied and that he was not entitled to an abatement of the price because of the inability of the receiver. *Fed. Prac. Vol. II.—79.*

to deliver part of the property described in the inventory. *Horner v. Continental & Commercial Tr. & Sav. Bank*, C. C. A., 198 Fed. 832.

^{98a} *Hudson v. N. Y. & Albany Transp. Co.*, C. C. A., 180 Fed. 973. See note 87, *supra*.

⁹⁹ *Cumberland Lumber Co. v. Tunis Lumber Co.*, C. C. A., 171 Fed. 352.

¹⁰⁰ *Stuart v. Gay*, 127 U. S. 518, 32 L. ed. 191. See *Jeffrey v. Brown*, 29 Fed. 476.

¹⁰¹ *Terbell v. Lee*, 40 Fed. 40.

¹⁰² *Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co.*, 174 U. S. 674, 43 L. ed. 1130; *James v. Milwaukee & M. R. Co.*, 6 Wall. 752, 18 L. ed. 885.

¹⁰³ *Whitney v. Nat. Ex. Bank*, 84 Fed. 377.

¹⁰⁴ *Schroeder v. Young*, 161 U. S.

that the stockholders of a corporation hold their voting power and control over the officers subject to a *quasi-trust* for the benefit of its creditors; that consequently when they or their officers waive a defense or take other proceedings which shorten a foreclosure suit, an arrangement made orally or in writing before the sale under which the purchasers reorganize the assets and convey them to a new corporation, the bonds and stock of which are divided among the bond and stockholders of the mortgagor, excluding any other creditors from an interest in the same, even when stockholders have to pay for the right to participate in the reorganization, is fraudulent, and that for that reason the foreclosure will be set aside.¹⁰⁵ A court of bankruptcy confirmed a sale, although objections were made

334, 40 L. ed. 721; *Seaman v. Riggs*, 2 N. J. Eq. 214, 34 Am. Dec. 200; *Chamberlain v. Larned*, 32 N. J. Eq. 295; *Woodward v. Bullock*, 27 N. J. Eq. 507; *Wetzler v. Schumann*, 24 N. J. Eq. 60; *Mut. Life Ins. Co. v. Goddard*, 33 N. J. Eq. 482. See *Gardner v. Schermerhorn*, *Clarke's Ch.* (N. Y.) 101. *Re Shea*, C. C. A., 126 Fed. 153.

¹⁰⁵ *Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co.*, 174 U. S. 674, 43 L. ed. 1130. This salutary decision of the Supreme Court, was severely criticised by Judge Wood in the same case, *Farmers' L. & Tr. Co. v. Louisville, N. A. & C. Ry. Co.*, 103 Fed. 110. See pp. 129, 130, where he cites a number of authorities in support of the validity of such a reorganization. It is believed, however, that the decision will stand and will be a means of preventing many frauds. It has been distinguished in *Wenger v. Chicago & E. R. Co.*, C. C. A., 114 Fed. 34; but followed in *Pac. Ry. Co. v. Boyd*, 228 U. S. 482. Analogous to the former case are *C. R. I. & P. R. Co. v. Howard*, 7 Wall. 392, 19 L. ed. 117; *Northern Pac. Ry. Co. v. Boyd*,

C. C. A., 177 Fed. 804. Where, on the insolvency of a land company, a reorganization agreement was made, in which all creditors were entitled to participate, and a large part of the property was bought at an upset price, fixed in the decree of sale; it was held that, after confirmation, the creditors who did not join in the reorganization, could not collaterally attack the sale because of inadequacy of the purchase price. *McEwen v. Harriman Land Co.*, C. C. A., 138 Fed. 797. *Schuler v. Woodward*, 169 Fed. 1012; *Re Pittsburg Dick Creek Mining Co.*, 197 Fed. 106. In the absence of fraud or insolvency, it seems that the failure of the purchaser at a foreclosure sale to perform a promise to allow second-mortgage bondholders to participate in the reorganization is not a reason for setting aside the sale, but that the only remedy is a suit to enforce the agreement. *Robinson v. Iron R. Co.*, 135 U. S. 522, 34 L. ed. 276. Where a stockholder objected to the confirmation, on the ground that the purchaser bought for the holders of second mortgage bonds,

because the purchaser was a corporation organized for that purpose, in which one of the three trustees of the bankrupt was a stockholder, director and treasurer, and the bid was made by a firm of lawyers employed for that purpose, who had previously acted as counsel for the bankrupt and the trustees in certain local matters, when a reorganization committee of the creditors had approved the purchase and the stockholders of the bankrupt had full opportunity to join in the reorganization.¹⁰⁶ It is no reason for vacating a judicial sale that two of the defendants have an undivided partial interest in the property and that it is impracticable to have their interest immediately adjusted.¹⁰⁷ A sale will not be set aside after the confirmation for inadequacy of price, unless the inadequacy is so gross as to shock the conscience.¹⁰⁸ The court may impose as a condition

instead of for a company, which, under a reorganization agreement, recognized the stockholders; but he failed to show that that fact resulted in less being obtained for the property, or that the value was less than the amount of the bid, or that, after payment of the first mortgage, any surplus would be left for the second mortgage bondholders, or that he himself had ever accepted the plan of reorganization; it was held that his objections were untenable. *Central Tr. Co. v. Peoria, D. & E. Ry. Co.*, C. C. A., 118 Fed. 30. For a case where a failure to assess the stock in order to prevent a foreclosure was held to be no ground for setting aside a foreclosure sale, see *Symmes v. Union Tr. Co.*, 60 Fed. 830. A judgment of foreclosure is not collusive or fraudulent simply because the mortgagor who has no valid defense enters an appearance or files an answer failing to defend the suit before his time to appear expires. *Dickerman v. Northern Tr. Co.*, 176 U. S. 181,

44 L. ed. 423. See § 258, *supra*. Nor is it a ground for setting aside a foreclosure sale that the same persons were interested as officers of corporations or otherwise upon both sides of the suit, where there was no defense and there is no proof of fraud. *Leaverworth County v. Chicago, R. I. & P. R. Co.*, 134 U. S. 688, 33 L. ed. 1064. The court refused to sustain an objection to a bid that it was the intention of the purchasers to form a corporation to create a monopoly. *Olmstead v. Distilling & C. F. Co.*, 73 Fed. 44.

¹⁰⁶ *Re National Mining Exploration Co.*, 193 Fed. 232.

¹⁰⁷ *Bidwell v. Huff*, 176 Fed. 174.

¹⁰⁸ *Fidelity I., Tr. & S. D. Co. v. Roanoke Iron Co.*, 84 Fed. 752; *Graffam v. Burgess*, 117 U. S. 180, 29 L. ed. 839; *Simmons v. Sharpe*, 138 Ala. 451, 35 So. 415; *Re Ethier*, 118 Fed. 107; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Re Metallic Specialty Mfg. Co.*, 193 Fed. 300. For cases where the amount of the price

for setting aside a sale that the moving parties first tender to the purchasers repayment of the purchase-money¹⁰⁹ or file a bond with a sufficient surety to pay the costs and expenses of the new sale.¹¹⁰ Where it was conditioned upon the petitioner's contracting with the trustees to bid a stated sum at a resale, and also enough to pay whatever sum should be awarded by the court to the former purchaser for the improvements made by him, it was held that he must pay that award, although he bought the property at a price largely in excess of what the order required him to bid.¹¹¹ The review of the refusal by a master or referee to approve a sale, because of inadequacy of price, should be deferred until the resale, since if the bidder then buys for less than his former bid he is not injured.¹¹² The validity of the decree for a sale cannot be reviewed by objections to the confirmation of the same.¹¹³ So long as the court keeps control of the case an application to set aside a judicial sale must be made in the foreclosure suit, and an original bill for that purpose will be dismissed unless the circumstances are extraordinary.¹¹⁴ How long after confirmation such relief can be granted upon motion is a matter which rests largely in the discretion of the court and depends upon the circumstances of the litigation.¹¹⁵ Where the original suit has been finally determined without leave reserved to move at the foot of the

was considered and held adequate, see *Lake S. I. Co. v. Brown B. & Co.*, 44 Fed. 539; *Re National Mining Exploration Co.*, 193 Fed. 232. A sale for \$181,000 was confirmed where the property had been appraised at \$240,653, but its operation could not be continued without the investment of at least \$100,000, and ninety per cent. of the stockholders and creditors were satisfied. *Re Peerless Finishing Co.*, 199 Fed. 350. It has been said, that after confirmation of a sale under execution, the sale cannot be set aside, except for mistake, surprise or fraud. *Cowden v. Wild Goose Min. & Trading Co.*, C. C. A., 199 Fed. 561.

¹⁰⁹ *Cunningham v. Macon & B. R. Co.*, 156 U. S. 400, 39 L. ed. 471.

¹¹⁰ *Chase v. Driver*, C. C. A., 92 Fed. 780.

¹¹¹ *Re William F. Fisher & Co.* 148 Fed. 907.

¹¹² *Re Metallic Specialty Mfg. Co.*, 193 Fed. 300.

¹¹³ *Central Tr. Co. v. Peoria, D. & E. Ry. Co.*, C. C. A., 118 Fed. 30; *Godchaux v. Morris*, C. C. A., 121 Fed. 482.

¹¹⁴ *Sayre v. Elyton Land Co.*, 73 Ala. 87, 96.

¹¹⁵ *Farmers' L. & Tr. Co. v. Bankers' & M. T. Co.*, 148 N. Y. 315; *Brown v. Frost*, 10 Paige (N. Y.) 243; *Campbell v. Gardner*, 11 N. J. Eq. 423.

decree, and the next term after the entry of the final decree has expired, relief can only be granted upon a bill.¹¹⁶ A sale which has been confirmed cannot be set aside upon the petition of a person not a party to the suit, who claims an interest in the property.¹¹⁷ Where a sale is set aside, a purchaser to whom the property has been delivered is in the position of a mortgagee in possession.¹¹⁸ The buyer at a judicial sale and those who purchase from him take the property subject to the right of the court to modify the decree upon confirmation of the sale.¹¹⁹ Where a purchaser at a foreclosure sale had paid his bid in full, it was held that the court could not compel payment of a judgment rendered against the receiver after the sale had been confirmed.¹²⁰ A material change in the terms may be a ground of relieving them from the purchase;¹²¹ but where no super-seedeas has been obtained, the reversal of the decree by an appellate court subsequent to the confirmation does not affect the validity of the sale.¹²² A material change of the terms may be a ground of relieving the purchaser. A party bidding at a foreclosure sale makes himself thereby a party to the suit, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase;¹²³ and he may be punished for contempt if he refuses to complete the purchase.¹²⁴ He has the right to apply to the court for the enforcement of such of the terms of sale as are in his favor,¹²⁵

¹¹⁶ Sayre v. Elyton Land Co., 73 Ala. 85, 96; *infra*, § 445.

¹¹⁷ Englehard-Hitchcock Co. v. Southern Banking & Trust Co., 162 Fed. 690.

¹¹⁸ Compton v. Jesup, 167 U. S. 1, 36, 42 L. ed. 55, 68; Huguley Mfg. Co. v. Galleton Cotton Mills, 94 Fed. 269. Where the sale is not set aside, the mortgagor is not entitled to have a profit subsequently made by the mortgagee credited on the judgment for the deficiency. Ramsden v. Keene Five Cents Sav. Bank, C. C. A., 198 Fed. 807.

¹¹⁹ Olcott v. Headrick, 141 U. S. 543, 547, 35 L. ed. 851, 853.

¹²⁰ Chicago & O. R. Co. v. Mc-

Cammon, C. C. A., 61 Fed. 772. But see Southern Ry. Co. v. Bouknight, C. C. A., 30 L.R.A. 823, 70 Fed. 442.

¹²¹ Olcott v. Headrick, 141 U. S. 543, 547, 35 L. ed. 851, 853.

¹²² Gray v. Brignardello, 1 Wall. 627, 634, 17 L. ed. 692; The John Twohy, Jr., 189 Fed. 965.

¹²³ Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95, 34 L. ed. 379, 382; Stuart v. Gay, 127 U. S. 518, 32 L. ed. 191.

¹²⁴ Camden v. Mayhew, 129 U. S. 73, 32 L. ed. 608. See § 428. *infra*.

¹²⁵ *Re* Two Rivers Woodenware Co., C. C. A., 199 Fed. 877. Where a purchaser agreed to provide for the release of the trust estate from the

and to be heard on all questions thereafter arising affecting his bid,¹²⁶ which are not foreclosed by the terms of the decree of sale, or expressly reserved to him by such decree.¹²⁷ Thus, when the rights of the claimants are not adjudicated in the decree of sale, which directs that the purchaser pay all receiver's debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage, he can contest the rights of such claimants, provided that they have not been previously adjudicated; and he can appeal from the order directing him to pay such a claim.¹²⁸ Where not concluded by the terms of the decree, any subsequent proceedings to determine in what securities, of diverse value his bid shall be made good are matters affecting his interests on which he has the right to be heard.¹²⁹ From the rulings thereupon, and upon all matters whereby his interests are injuriously affected, he has the right to appeal after the final decree;¹³⁰ and he is estopped by them in collateral litigation.¹³¹ He cannot appeal from so much of the decree under which he bought as provides that he shall pay a specified claim to which a preference is then or has been subsequently awarded.¹³² Where the decree is reversed upon appeal subsequent to the sale, even although no *supersedeas* has been obtained, the court will usually order restitution by the purchaser or his as-

payment of "rent" after a sale, it was held that he was not entitled to a rebate because he was obliged to pay taxes previously accrued and water rent subsequently accruing. *Ellis v. Rafferty*, C. C. A., 199 Fed. 80. See *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, C. C. A., 198 Fed. 768.

¹²⁶ *Kneeland v. Am. L. & Tr. Co.*, 136 U. S. 89, 95, 34 L. ed. 379, 382; *Williams v. Morgan*, 111 U. S. 684, 28 L. ed. 559; *Re Williams*, C. C. A., 197 Fed. 1.

¹²⁷ *Kneeland v. Am. L. & Tr. Co.*, 136 U. S. 89, 95, 34 L. ed. 379, 382; *Swann v. Wright's Ex'rs*, 110 U. S. 590, 28 L. ed. 252.

¹²⁸ *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 44 L. ed.

458; *Lackawanna I. & C. Co. v. Farmers' L. & Tr. Co.*, 176 U. S. 298, 44 L. ed. 475; *infra*, § 404.

¹²⁹ *Kneeland v. Ab. L. & Tr. Co.*, 136 U. S. 89, 95, 34 L. ed. 379, 382.

¹³⁰ *Kneeland v. Am. L. & Tr. Co.*, 136 U. S. 89, 95, 34 L. ed. 379, 382. *Blossom v. Milwaukee & C. R. Co.*, 1 Wall. 655, 17 L. ed. 673; *Williams v. Morgan*, 111 U. S. 684, 28 L. ed. 559.

¹³¹ *Grape Cr. C. Co. v. Farmers' L. & Tr. Co.*, 80 Fed. 200. See also *State of Tennessee v. Quintard*, 80 Fed. 829, 835.

¹³² *Swann v. Wright's Ex'rs*, 110 U. S. 590, 28 L. ed. 252; *St. Louis S. W. Ry. Co. v. Stark*, 55 Fed. 758. See *supra*, § 305.

signee,¹³³ who is treated as a mortgagor in possession.¹³⁴ It has been held that after a decree has been reversed by a court of review for want of jurisdiction and the Court of first instance has been directed to remand the cause, the latter court cannot confirm a sale previously made under its orders by a receiver.¹³⁵

§ 395. **Compensation of masters.** The Equity Rules provide: "The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court."¹ It has been said that the compensation of the master should be measured by the standard of judicial salaries.² Much larger amounts have, however, frequently been granted.³ The court may modify an order fixing the annual compensation of a master, although the service has been performed.⁴ An agreement between the parties as to the compensation of master,

¹³³ Robinson v. Alabama & G. Mfg. Co., 67 Fed. 189; s. c., 72 Fed. 708; s. c., as Huguley Mfg. Co. v. Galetton Cotton Mills, 94 Fed. 269. In that case the court overruled the contention that certain actions of the counsel for the mortgagor at the sale estopped his client. But see Phelps v. Elliott, 35 Fed. 455, 460; Shultz v. Sanders, 38 N. J. Eq. 154; Watson v. Ulrich, 18 Neb. 186; Dickinson v. City of Trenton, 33 N. J. Eq. 63; Bailey v. Fanning Orphan School, (Ky.), 14 S. W. 908. For the measure of damages where the purchaser so far destroyed the property that it could not be returned, see Central Tr. Co. v. Hubinger, 87 Fed. 3.

¹³⁴ Huguley Mfg. Co. v. Galetton Cotton Mills, 94 Fed. 269.

¹³⁵ Colburn v. Hill, C. C. A., 103 Fed. 340. For sales in bankruptcy see § 642 *infra*.

§ 395. ¹ Eq. Rule 68.

² Middleton v. Bankers' & Merchants' Tel. Co., 32 Fed. 524. See Brown v. King, C. C. A., 62 Fed. 529, where \$12,500 for work during two years was held to be excessive. In Finance Committee v. Warren, C. C. A., 82 Fed. 525, it was held that an allowance of \$4,000 to a master for the sale of a railroad one hundred and twelve miles long was excessive, and that \$2,500 was ample compensation.

when made before⁵ or after⁶ his appointment, was said to be against public policy and not enforced. When the reference is lengthy, the parties may be required to advance the master's fees pending the hearing and to leave the matter of adjustment between them for future determination.⁷ The fees cannot be apportioned until after the hearing upon the report,⁸ and ordinarily the amount of the same can better be fixed at that time.⁹ It seems, that payment pending a suit can only be compelled on the applicant of the master or his representative, not at the request of a party.¹⁰ The order adjusting a master's compensation should name the party who is required to pay it, and a time within which payment is to be made. The master's compensation upon an accounting is usually imposed, in the first instance, upon the accounting party.¹¹ It has been held: that each party should pay for the expense, including the stenographer's fees, of taking his own examinations, both direct and cross, and for adjournments taken at his request, when a charge is properly made for the same. Where a session is partly taken up with direct and partly with cross-examination, or partly by argument, the expense must be equally divided. Charges for time occupied in the consideration and decision of questions involved and in the preparation of the report must be equally divided. The compensation of a master appointed to determine claims against property in the custody of the court is usually paid from the proceeds of such property, and he usually has a preference above all liens upon the same.¹² In an extraordinary case, the District Court of Appeals may review the order fixing a master's compensation.¹³

³ See *Erie R. Co. v. Heath*, 10 Blatchf. 214, Fed. Cas. No. 4,516.

⁴ *Pleasants v. Southern Ry. Co.*, C. C. A., 93 Fed. 93.

⁵ *Finance Committee v. Warren*, C. C. A., 82 Fed. 525.

⁶ *Re Berkeley*, C. C. A., 203 Fed. 7.

⁷ *Harrington v. Atlantic & P. Tel. Co.*, 170 Fed. 1022.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Mallory Mfg. Co. v. Fox*, 20 Fed. 409.

¹¹ *Urner v. Kayton*, 17 Fed. 539, s. c., 17 Fed. 845; *Brickill v. Mayor*, etc., of N. Y., 55 Fed. 565. *Fennó v. Primrose*, C. C. A., 119 Fed. 801; *infra*, § 403.

¹² *Pennsylvania Co. v. Jacksonville T. & K. W. R. Co.* 93 Fed. 60.

¹³ *Brown v. King*, C. C. A., 62 Fed. 529; *Finance Committee v. Warren*, C. C. A., 82 Fed. 525.

CHAPTER XXVI.

DECREES.

§ 396. **Definition and classification of decrees.** A decree is a sentence or order of a court of equity pronounced after a hearing of the points of issue, and corresponds to a judgment of a court of law. A decree should be distinguished from a decretal order. A decretal order is an order in the nature of a decree, made upon motion or petition, either before or after the hearing, or in an independent proceeding.¹ According to the different standpoint from which they may be regarded, decrees are classified, as final or interlocutory; as *in personam* or *in rem*; as absolute, conditional, decrees *nisi*, or decrees in the nature of decrees *nisi*.

§ 397. **Final and interlocutory decrees.** Decrees are either final or interlocutory. These terms are used with different meanings in the English practice and in that in the courts of the United States. A final decree in the English Chancery was a complete determination of every question arising in a cause.¹ An interlocutory decree was one which reserved the further consideration of any question arising in a cause till a future hearing.² In strictness, moreover, every decree was said to be interlocutory until it was signed and enrolled.³ In England, an appeal lay from an interlocutory as well as from a final decree;⁴ but, under the Judiciary Acts, before that of March 3, 1891, only final decrees of a Federal court could be brought to a court of appeal for revision.⁵ On account of the inconvenience which would have followed, had the old definition been applied to the term in this statute, the Federal courts have re-

§ 396. ¹ Barb. Ch. Pr. 337.

³ Forum Romanum, 183; Seton's

§ 397. ¹ Seton's Decrees (4th ed.), 2.

Decrees (4th ed.), 2.

² Seton's Decrees (4th ed.) 2;

⁴ Forgay v. Conrad, 6 How. 201, 205, 12 L. ed. 404, 406.

Richmond v. Atwood, C. C. A., 17 L.R.A. 615, 52 Fed. 10, 21.

⁵ U. S. R. S., §§ 631, 692.

fused to follow the English Chancery in this respect. As far as appeals are concerned, a decree is considered final which decides the right to property, and orders that it be sold or delivered to a party; or creates a lien upon property by the issue of receiver's certificates or otherwise; or directs a specific sum of money to be paid to a party either by another person or out of a fund in court, provided that the successful party is entitled to compel its immediate execution,⁶ even though the consideration of other matters arising upon the pleadings is reserved "for further consideration" in it.⁷ A decree is final which settles all the rights of the parties involved in the pleadings, though it gives leave to either one of them to apply at the foot of the decree "in relation to any matter not finally determined by it."⁸ A decree dismissing a bill with costs to be subsequently taxed was held to be a final decree, although a judgment for the costs was subsequently entered after their taxation.⁹ A decree dismissing a bill as to all matters except one severable from the rest was held to be a final decree as regards the matters which it then determined.¹⁰ All other decrees which reserve

⁶ Taney, C. J., in *Forgay v. Conrad*, 6 How. 201, 204, 12 L. ed. 404, 405; *Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076; *Ray v. Law*, 3 Cranch, 179, 2 L. ed. 404; *Whiting v. Bank U. S.*, 13 Pet. 6, 10 L. ed. 33; *Wabash & E. C. Co. v. Beers*, 1 Black, 54, 17 L. ed. 41; *Bronson v. Railroad Co.*, 2 Black, 524, 17 L. ed. 347; *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 440, 17 L. ed. 860; *Thomson v. Dean*, 7 Wall. 342, 19 L. ed. 94; *Railroad Co. v. Bradleys*, 7 Wall. 575, 19 L. ed. 274; *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036; *French v. Shoemaker*, 12 Wall. 86, 20 L. ed. 270; *Marin v. Lalley*, 17 Wall. 14, 21 L. ed. 596; *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Farmers' L. & Tr. Co., Petitioner*, 129 U. S. 206, 32 L. ed. 656; *Lewisburg Bank v. Sheffey*, 140 U. S. 445, 35 L. ed. 493. So is a decree directing the payment

of a claim out of the proceeds of a future sale. *Central Tr. Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. ed. 97. See final chapter on Writs of Error and Appeals.

⁷ *St. Louis, I. M. & S. R. Co. v. Southern Ex. Co.*, 108 U. S. 24, 27 L. ed. 638; *Mo. K. & T. R. Co. v. Dinsmore*, 108 U. S. 30, 27 L. ed. 640; *Lewisburg Bank v. Sheffey*, 140 U. S. 445, 35 L. ed. 493.

⁸ *French v. Shoemaker*, 12 Wall. 86, 20 L. ed. 270. For a further reservation that was held not to make the decree interlocutory, see *Chamberlain v. Peoria, D. & E. Ry. Co.*, C. C. A., 118 Fed. 32.

⁹ *Fowler v. Hamill*, 139 U. S. 549, 35 L. ed. 266.

¹⁰ *Hill v. Chicago & E. R. Co.*, 140 U. S. 52, 35 L. ed. 331. But see *Keystone Iron Co. v. Martin*, 132 U. S. 91, 33 L. ed. 275.

any question for the court's further decision, even though they direct money to be paid into court,¹¹ or property to be delivered to a new trustee appointed by the court,¹² or dissolve an injunction,¹³ or punish a party for contempt,¹⁴ or direct a sale, but do not sufficiently specifically determine the property to be sold to warrant an immediate sale,¹⁵ or direct a sale, but do not appoint the time of sale,¹⁶ or confirm a report of commissioners to locate boundaries and direct them to determine and make the boundary lines in accordance with such report and then to make a further report of their findings,¹⁷ or confirm and adopt a report of commissioners recommending a conveyance, to certain parties, of part of the land affected by a partition suit, and a sale of the residue and distribution of the proceeds, as thereafter ordered, when the sale should be confirmed,¹⁸ are, it seems, interlocutory decrees from which no appeal can be taken under the Judiciary Acts; although, if the decision of the court in making them was erroneous, the final decree may be reversed on that ground upon an appeal by a party who was thereby injured,¹⁹ or on the entry of the final decree the court which made them may correct the error.²⁰ It has been held that the Federal court should not en-

¹¹ *Forgay v. Conrad*, 6 How. 201, 12 L. ed. 404; *Beebe v. Russell*, 19 How. 283, 15 L. ed. 668; *Louisiana Bank v. Whitney*, 121 U. S. 284, 30 L. ed. 961. But see *Wabash & E. C. Co. v. Beers*, 1 Black, 54, 17 L. ed. 41.

¹² *Pulliam v. Christian*, 6 How. 209, 12 L. ed. 408. As to receiverships before 31 St. at L. 660, see *Tornanses v. Melsing*, C. C. A., 106 Fed. 775; *Re McKenzie*, 180 U. S. 536, 45 L. ed. 657; *Forgay v. Conrad*, 6 How. 201, 12 L. ed. 404; *Beebe v. Russell*, 19 How. 283, 15 L. ed. 668; *Hentig v. Page*, 102 U. S. 219, 26 L. ed. 159; but see *Wabash & E. C. Co. v. Beers*, 1 Black, 54, 17 L. ed. 41.

¹³ *Young v. Grundy*, 6 Cranch, 51, 3 L. ed. 149; *Moses v. Mayor*, 15 Wall. 387, 21 L. ed. 176; *Verden v. Coleman*, 18 How. 86, 15 L. ed. 272;

Knox County v. Harshman, 132 U. S. 14, 33 L. ed. 249.

¹⁴ *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95.

¹⁵ *Railroad Co. v. Swasey*, 23 Wall. 405, 23 L. ed. 136; *Royal Tr. Co. v. Washburn, B. & I. R. Ry. Co.*, 113 Fed. 531. See *McGourkey v. Toledo & I. C. Ry. Co.*, 146 U. S. 536, 36 L. ed. 1079.

¹⁶ *Parsons v. Robinson*, 122 U. S. 112, 30 L. ed. 1122; *Burlington, C. R. & N. Ry. Co. v. Simmions*, 123 U. S. 52, 31 L. ed. 73.

¹⁷ *Iowa v. Illinois*, 151 U. S. 238, 38 L. ed. 145.

¹⁸ *Clark v. Roller*, 199 U. S. 541, 50 L. ed. 300. See *Dangerfield v. Caldwell, C. C. A.*, 151 Fed. 554.

¹⁹ *Buckingham v. McLean*, 13 How. 150, 14 L. ed. 90.

²⁰ *Iowa v. Illinois*, 151 U. S. 238, 38 L. ed. 145; *infra*, § 443.

join from acting under or otherwise interfere with the interlocutory decree of another court, and that the proper remedy is an application to the court which made the decree for a modification of the same,²¹ at least when such decree is not a contempt of the Federal court.

§ 398. **Decrees in personam.** Decrees are either *in personam* or *in rem*. Decrees *in personam* are those which contain a command to one of the parties to a suit in equity. Decrees *in rem* are such as, without containing a command to either of the parties, transfer the title to property. Decrees *in personam* may direct the performance of, or the abstention from, an act or acts. The ordinary decree of a court of equity is a decree *in personam*. Such a decree may be made even though it directs the performance of or abstention from an act, or directs a transfer, or otherwise affects the title to property beyond the jurisdiction of the court,¹ or grants an injunction against an act in one State; such as in interference with a water flow, which injuriously affects lands in another State.² Where in order to obtain the relief sought it would be necessary for the court to take possession by its officers of land beyond its territorial jurisdiction, it has been said that such a decree should not be granted.³ Thus, it seems that the court would not decree a partition of land beyond the jurisdiction, since no commission appointed by it could have authority to act there;⁴ and it cannot adjudge that a deed of land in another State is void;⁵ but where the defendant is within its jurisdiction it may decree specific performance of a contract,⁶ or the administration of a trust,⁷ or the cancellation of a conveyance.⁸ It has

²¹ *Furnald v. Glenn*, C. C. A., 64 Fed. 49.

§ 398. ¹ See § 132, *supra*.

² *Morris v. Bean*, 146 Fed. 423; § 6, *supra*. See *Brady v. Smith Shore Traction Co.*, 197 Fed. 669.

³ *Muller v. Dows*, 94 U. S. 444, 449, 24 L. ed. 207, 209; *Macgregor v. Macgregor*, 9 Iowa 65; *Glen v. Gibson*, 9 Barb. (N. Y.) 634; *Story's Eq. Jur.*, § 1292; ² *Spence* 8, n. (d); *Smith's Eq. 30*; *Bispham's Eq.*, § 7.

⁴ *2 Spence* 8, n. (d); *Story's Eq. Jur.*, § 1292; *Smith's Eq. 30*; *Bispham's Eq.*, § 47.

⁵ *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640.

⁶ *Western Union Tel. Co. v. Pittsburgh, C. & St. L. Ry. Co.*, 137 Fed. 435; *Roblin v. Long*, 60 How. Pr. (N. Y.) 200.

⁷ *Memphis Sav. Bank v. Houchens*, C. C. A., 115 Fed. 96, 108, affecting land situated outside the jurisdiction; *Dunlap v. Byers*, 110 Mich.

been said that a court cannot foreclose a mortgage or other lien upon land outside the jurisdiction,⁹ except where it consists of a railroad or other property, which cannot be sold in parts without destroying its value.¹⁰ It seems that it cannot direct a sale in another State.¹¹ It has been held in England that the court will make no decree in a suit between two foreigners not residents of the country concerning a contract made or land situated elsewhere.¹² And a Georgia case holds that a court of equity will not compel a corporation to perform a contract to open ditches and keep fences in repair in a State where it has no corporate existence.¹³ It often happens, however, that the court can do a thing itself more easily and effectively than it can compel it to be done by the party concerned, as, for example, when it wishes to sell property or to cancel an instrument in writing, and it then will perform that duty by means of a master or receiver,¹⁴ or by the clerk.¹⁵ When all the defendants are within the jurisdiction, such a decree is usually accompanied by a command to them to confirm the sale or other action of the court, or to assist in the transportation directed by the decree. When a defendant is beyond the jurisdiction, the court sometimes acts by a decree *in rem*. The equity rules provide: "If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestra-

109, a decree directing the conveyance of land upon the winding up of a corporation.

⁸ Jones v. Byrne, 149 Fed. 457, 469.

⁹ Jones v. Byrne, 149 Fed. 457, 469. See Penn. v. Lord Baltimore, 1 Ves. Sen. 444; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181.

¹⁰ Muller v. Dowd, 94 U. S. 444, 24 L. ed. 207; McElrath v. Pittsburg & S. R. Co., 5 Pa. St. 189; Jones v. Byrne, 149 Fed. 457, 469.

¹¹ Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. 993; Farmers' L. & Tr. Co. v. Postal Tel. Co., 55 Conn. 334; s. c., 11 Atl. 184; Carpenter

v. Strange, 141 U. S. 87, 106, 35 L. ed. 640, 647; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Re Anderson, 94 Fed. 487; York County, Sav. Bank v. Abbot, 139 Fed. 988; *supra*, § 394, *infra*, § 441.

¹² Matthaei v. Galitzin, L. R. 18 Eq. 340; Blake v. Blake, 18 W. 944.

¹³ Port Royal R. Co. v. Hammond, 58 Ga. 523.

¹⁴ Deck v. Whitman, 96 Fed. 873; Langdell's Eq. Pl., § 44. See *infra*, § 441.

¹⁵ General Chemical Co. v. Blackmore, N. Y. L. J., November, 1907. See s. c., 156 Fed. 968

tion, may by order direct that the act required to be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him."¹⁶ It has been held that, in the absence of statutory authority, a decree in a suit *in personam* against the heirs of a decedent without a statement of their names in the complaint or a warning order, is void.¹⁷

§ 399. **Decrees in rem.** A decree *in rem* in a court of equity is one that determines the title to or an interest in real or personal property within the territorial jurisdiction of the court, without having any other effect upon a defendant who dwells beyond that jurisdiction and has not been served with process within it. Such an equitable decree must be distinguished from the decrees *in rem* of a court of admiralty, which establishes a title conclusively against all the world: whereas it is only binding upon the parties to the action in which it is rendered. Such decrees were formerly very rare.¹ In the Federal courts of equity they are purely statutory, and the power of those courts to make them depends entirely upon a strict compliance with the provisions of the statute.² Whether or not, under this statute or otherwise, a decree can be made and enforced which requires the specific performance of a contract for the conveyance of property within the court's jurisdiction against a person not served there with process, has never been decided.³ Where the State statute authorized such a decree it was followed by the Federal court.⁴

§ 400. **Absolute and conditional decrees.** Decrees are either absolute, conditional, *nisi*, or in the nature of decrees *nisi*. An absolute decree is one that takes effect immediately upon its entry and is dependent for its enforcement upon no condition, and is not subject to be defeated by the occurrence of

¹⁶ Eq. Rule 8.

¹⁷ *Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley*, C. C. A., 164 Fed. 963.

§ 399. ¹ But see *Anon.*, 1 Atk. 18.

² U. S. R. S., § 738; Act of March 3, 1875, ch. 137, § 8 (18 St. at L. 472). See *Grove v. Grove*, 93 Fed. 855; *supra*, § 166.

³ See *Ward v. Arredondo*, Hopk. Ch. (N. Y.) 213; *Anon.*, 1 Atk. 18; *Rourke v. McLaughlin*, 38 Cal. 196; *Matteson v. Scofield*, 27 Wis. 671; *Story's Eq. Jr.*, § 744, n. 3.

⁴ *Single v. Scott P. Mfg. Co.*, 155 Fed. 553.

any subsequent event. A conditional decree is one that by its terms is not to take effect unless something shall be done by the party to whom relief is given by it, or which provides that it shall be void if something is done by one of the parties within a time therein specified.¹ Under the present state of the authorities, it would be rash to attempt to lay down a rule as to when a conditional decree will be granted, and when the plaintiff will be denied relief unless he has made a specific offer or waiver in his bill.² The following are a few of the cases where a conditional decree has been granted. An express company has been granted a decree compelling a railroad company to carry freight for it, upon condition that it should give the latter a bond to pay such charges as the court should subsequently consider reasonable.³ A decree for the redemption of a mortgage is upon condition that the plaintiff pay the balance reported due from him within six months, which it seems must be lunar not calendar months, after the report, in default whereof the plaintiff's bill against the defendant is from thence forth to stand dismissed out of court with costs.⁴ Upon default, a final order, which will be granted as of course, is necessary to dismiss the bill.⁵ A decree allowing a junior incumbrancer to redeem may be upon condition that he pay off a prior incumbrance, and repay to its holder money paid by him in discharging still prior incumbrances, and for taxes, repairs, and insurance upon the mortgaged premises.⁶ Similarly, a decree upon a bill by a purchaser for the specific performance of an agreement for the sale of an estate may appoint a

§ 400. ¹Moore Printing Type-writer Co. v. National Sav. & Tr. Co., 218 U. S. 422, 427, 54 L. ed. 1093, 1095, note.

²See Moore v. Crawford, 130 U. S. 122, 140, 32 L. ed. 878, 884; *supra*, §§ 153, 364.

³Southern Exp. Co. v. St. Louis, I. M. & S. R. Co., 10 Fed. 210; reversed Express Cases, 117 U. S. 1, 29 L. ed. 791.

⁴Seton on Decrees, 140; Waller v. Harris, 7 Paige (N. Y.) 167. The holder of bonds accrued by a railway mortgage has no right to re-

deem from a foreclosure sale. Provident Life & Tr. Co. v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854.

⁵Seton on Decrees, 178. A decree for the cancellation of a conveyance made by an Indian in violation of a statutory prohibition, may be conditioned upon the return of the consideration. Heckman v. U. S., 224 U. S. 413, 56 L. ed. 820.

⁶McCormick v. Knox, 105 U. S. 122, 26 L. ed. 940. See Farmers' L. & Tr. Co. v. Denver, L. & G. R. Co., C. C. A., 126 Fed. 46; Lynch v. Burt, C. C. A., 132 Fed. 417.

time and place for the payment of the purchase-money, with interest if any be due, and direct that in default of payment the bill be dismissed with costs.⁷ A decree dismissing a cross-bill to set aside a compromise required the defendant to the same to comply with the agreement within a specified time after the filing by the cross-complainant of notice of her assent thereto.⁸ A decree for an accounting should always contain a submission by the plaintiff to account.⁹ A decree for an injunction against the collection of an illegal tax may be conditioned upon the payment of the taxes, to which the complainant would legally be subjected, with interest at six per cent., upon the amount thereof.¹⁰ It has been made a condition precedent to the entry of a decree to enjoin the infringement of a patent, that the complainant first file in the Patent Office a disclaimer of those of the claims in the patent to which he is not entitled.¹¹ For conditions of sale in suits to foreclose railway mortgages see the preceding section on Judicial Sales.¹²

§ 401. *Decrees nisi.* A decree *nisi* is one giving a defendant a certain specified time within which to show cause against a decree or to perform some other act in relation thereto, in default whereof it shall be absolute against him. Such a decree is made against an infant or a mortgagor, or the latter's assigns. According to the English rule, every decree against an infant defendant which requires some act to be performed by him,¹ or which directs a conveyance or a foreclosure of his interest in any real estate, must contain a clause giving him an opportunity to show cause against it after he has come of age.²

⁷ *Lowther v. Andover*, 1 Bro. C. C. 396.

⁸ *Bunel v. O'Day*, 125 Fed. 303, 316.

⁹ *Fowler v. Wyatt*, 24 Beav. 232; *Seton on Decrees* (4th ed.), 775.

¹⁰ *Central R. Co. of New Jersey v. Jersey City*, 199 Fed. 237, 246. See § 194, *supra*.

¹¹ *Sessions v. Romadka*, 21 Fed. 124, 133; *Hake v. Brown*, 37 Fed. 783; *Electrical Acc. Co. v. Julien El. Co.*, 38 Fed. 117.

¹² *Supra*, § 394.

§ 401. ¹ *Walsh v. Trevannion*, 16 Simons, 178; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 102; *Sheffield v. Duchess of Buckingham*, 1 West. 682; *Thoroton v. Blackborne*, 2 W. Kel. 7; *Seton on Decrees* (4th ed.), 712, 713.

² *Williamson v. Gordon*, 19 Ves. 114; *Mallack v. Galton*, 3 P. Wms. 352; *Newbury v. Marten*, 15 Jur. 166; *Mills v. Dennis*, 3 J. Ch. (N. Y.) 367; *Seton on Decrees* (4th ed.), 714. But see *Croxon v. Lever*, 12 W. R. 237.

Where a sale of land is directed by such a decree, it usually contains a direction that, in the mean time, a purchaser under the sale shall hold and enjoy the estate against the infant until he attains full age;³ and the court so far protects a purchaser that it will not permit his title to be affected by a mere irregularity in the decree.⁴ Where a decree directed a conveyance by both adult and infant parties, as in a partition suit, by the English practice it would not direct a conveyance by any till the infant was of age and had had an opportunity to show cause against the decree, and, in the mean time, the decree would only extend so far as to give possession in accordance with the court's decision, and to order enjoyment accordingly until effectual conveyances could be made.⁵ It seems that in no other instances will a decree *nisi* be entered against an infant defendant, although there is some doubt upon this point.⁶ In a few exceptional cases, when an infant plaintiff in his bill exercised an election between two conflicting claims, the court has allowed him a day after he became of age in which to show cause against it.⁷ The usual form of the *nisi* clause in such a decree is as follows: "And this decree is to be binding on the defendant, the infant, unless on being served, after he shall have attained the age of twenty-one years, with subpoena to show cause against this decree, he shall within six months from the service of such subpoena show unto this court good cause to the contrary."⁸ Such a clause should be inserted in the order for making a decree of foreclosure absolute, as well as in the decree.⁹ The omission of a similar clause in such a decree is error.¹⁰ The six months after the service of process

³ Powell v. Powell, Mad. & Geld. 53.

⁴ Bennett v. Hamill, 2 Sch. & Lef. 566.

⁵ Agar v. Fairfax, 17 Ves. 533, 554; Atty. Gen. v. Hamilton, 1 Madd. 214.

⁶ Seton on Decrees (4th ed.), 714; Eyre v. Countess of Shaftsbury, 2 P. Wms. 102; Sheffield v. Duchess of Buckingham, 1 West, 682. See Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047.

⁷ Gregory v. Molesworth, 3 Atk. 626; Sir John Napier v. Lady Effingham, 2 P. Wms. 401; Lord Broek v. Lord Hertford, 2 P. Wms. 518; Taylor v. Philips, 2 Ves. Sen. 23.

⁸ Seton on Decrees (4th ed.), 711.

⁹ Williamson v. Gordon, 19 Ves. 114.

¹⁰ Coffin v. Heatta, 6 Met. (Mass.) 76.

within which cause must be shown must be, it seems, lunar not calendar months.¹¹ At the expiration of them and upon proof of the requisite facts, an order making the original decree absolute should be entered.¹² A decree for a foreclosure should also be *nisi*, providing for either a strict foreclosure or a foreclosure sale, unless the whole amount due shall be paid within a reasonable time, usually six lunar months, from the time of the conclusion of the accounting and the certificate of what is due under the mortgage.¹³ An omission of such clause is error.¹⁴ At the expiration of the allotted time, if the debt be still unpaid, the plaintiff should obtain an order confirming the foreclosure or directing the sale.¹⁵ The time for payment may always, even after a peremptory order for a sale,¹⁶ be enlarged upon terms, which usually are that the defendant give good security to pay the amount due, with interest and costs in full.¹⁷ A decree of foreclosure absolute may also be reopened;¹⁸ but it has been said that this can only be done when it has been obtained by fraud or under circumstances of oppression.¹⁹ The Supreme Court has held that "what is indispensable to such a decree is, that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant

¹¹ Seton on Decrees (4th ed.), 711.

¹² Ibid.

¹³ Clark v. Reyburn, 8 Wall. 318, 19 L. ed. 354; Howell v. Western R. Co., 94 U. S. 463, 24 L. ed. 254; Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47; Perine v. Dunn, 4 J. Ch. (N. Y.) 140. Twenty days has been held insufficient. Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47. In one case it was held that eighteen months should be allowed. American L. & Tr. Co. v. Union Depot Co., 80 Fed. 36. In another, four months was held to be sufficient. Columbia F. & Tr. Co. v. Kentucky Union Ry. Co., C. C. A., 60 Fed. 794.

¹⁴ Clark v. Reyburn, 8 Wall. 318, 19 L. ed. 354.

¹⁵ Seton on Decrees (4th ed.),

1091; Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47, 55; Sheriff v. Sparks, West, 130; Senhouse v. Earl, 2 Ves. Sen. 450; Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33.

¹⁶ Edwards v. Cunliffe, 1 Madd. 287; Seton on Decrees (4th ed.), 1088.

¹⁷ Monkhouse v. Corp. of Bedford, 17 Ves. 380; Geldard v. Hornby, 1 Hare, 251; Holford v. Yate, 1 K. & J. 677; Coombe v. Stewart, 13 Beav. 11.

¹⁸ Campbell v. Holyland, L. R. 7 Ch. D. 166; Seton on Decrees (4th ed.), 1088.

¹⁹ Patch v. Ward, L. R. 3 Ch. 203, 212; Seton on Decrees (4th ed.), 1098.

in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing, and having become due, according to the terms of the security, the mortgagor is required to pay within a reasonable time, to be fixed by the court, and which if not paid, a sale of the mortgaged premises is directed.²⁰ By rule, "in suits in equity for the foreclosure of mortgages or for the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8, when the decree is solely for the payment of money."²¹ A deficiency decree is not essential, after a foreclosure sale, to entitle the mortgagee to the payments of the balance due him from the earnings of the receivership;²² even when the trustee has, in his possession, a fund deposited to secure the payment of interest, and the stockholders of the mortgagor are liable for unpaid instalments of their subscriptions.²³ It has been held that this rule obviates the necessity of a prayer in the bill for such relief, although it is the better practice to pray for it specifically.²⁴ The rule does not

²⁰ Chicago & V. R. Co. v. Fostick, 106 U. S. 47, 70, 27 L. ed. 47, 55; per Mathews, J. But see Grape C. C. Co. v. Farmers' L. & Tr. Co., 63 Fed. 893, 886; *supra*, § 394, note 4.

²¹ Equity Rule 10, condensing Eq. Rule 92 of 1842; Northwestern M. L. I. Co. v. Keith, C. C. A., 77 Fed. 374.

²² Boyce v. Continental Wire Co., 125 Fed. 740.

²³ Land Title & Trust Co. v. Asphalt Co., C. C. A., 127 Fed. 12.

²⁴ Seattle, L. S. & E. Ry. Co. v. Union Tr. Co., C. C. A., 79 Fed. 179. The court may, however, where the mortgage does not provide that the principal shall become due upon a default in interest, direct that the property be sold as an entirety and that the principal as well as the interest be paid out of the proceeds.

In such a case it is a fatal error to declare in the decree of foreclosure that the whole debt is due. The power to treat the principal as due upon a default in interest is not implied by a provision giving the trustee the right to take possession upon such a default, to apply the income on account of principal after payment of overdue interest, and to cause the property to be sold as an entirety; where the mortgage also provides for the surrender by the trustee of possession upon payment of arrears of interest, costs and expenses at any time before the sale. Grape C. C. Co. v. Farmer's L. & Tr. Co., C. C. A., 63 Fed. 891. A mortgage and the bonds, secured thereby are to be construed together, and a provision in a mortgage concerning the method of distribution in case of a foreclosure, which is not

authorize the entry of a decree for the balance of principal not due²⁵ on the foreclosure of a mortgage for the failure to pay interest, unless the mortgage so provides. A State statute giving mortgagors a right of redemption within a certain time after a mortgage sale, will in all cases be followed by the Federal courts, since it establishes a rule of property.²⁶ In the absence of such a statute there is no right of redemption after the sale under a decree of foreclosure has been confirmed.²⁷

§ 402. **Decrees in the nature of decrees nisi.** Decrees in the nature of decrees *nisi* are decrees taking a bill against a defendant as confessed, and decrees under the statute affecting property within, and against a defendant without, the jurisdiction of the court. Decrees taking bills as confessed are described in chapter VIII. The cases where a decree against a defendant not served with process can be entered under the

contained in the bonds, will control. *Low v. Blackford*, C. C. A., 87 Fed. 392. It has been said that if the trustee improvidently declares the principal due, the court may set that declaration aside. *Mercantile T. Co. v. Baltimore & O. R. Co.*, 89 Fed. 606, 610. A decree directing that the surplus upon a foreclosure sale after payment of preferential claims should be divided equally among the bondholders was held not to deprive the coupon holders of a preference given them in the mortgage. *Burke v. Short*, 79 Fed. 6. A provision that the mortgagor shall remain in possession for six months after default in interest was held not to preclude the trustee from bringing a foreclosure suit immediately upon the default. *Farmers' L. & Tr. Co. v. Winona S. W. Ry. Co.*, 59 Fed. 957. Such and similar provisions are usually construed as cumulative to the ordinary remedy of a foreclosure suit upon a breach of the condition of the trust deed or mortgage. *Central Tr. Co. v. Worcester C. Mfg.*

Co., C. C. A., 93 Fed. 712; *Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co.*, 61 Fed. 543; *Mercantile Tr. Co. v. Chicago, P. & St. L. Ry. Co.*, 61 Fed. 372; *Pennsylvania Co. for Ins., etc. v. Philadelphia & R. R. Co.*, 69 Fed. 482. It has been held that the acceptance by the mortgagee of interest paid by the receiver of the property appointed in his suit for foreclosure is not a waiver of his right to continue the suit when other installments of interest remain due and unpaid. *American L. & Tr. Co. v. Union Depot Co.*, 80 Fed. 36.

²⁵ *Ohio Cent. R. Co. v. Central Tr. Co.*, 133 U. S. 83, 33 L. ed. 561.

²⁶ *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. ed. 858; *Orvis v. Powell*, 98 U. S. 176, 25 L. ed. 238; *Hammock v. Farmers' L. & Tr. Co.*, 105 U. S. 77, 26 L. ed. 1111; *Mason v. N. W. Ins. Co.*, 106 U. S. 163, 27 L. ed. 129; *Conn. Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648.

²⁷ *Parker v. Dacres*, 130 U. S. 43, 32 L. ed. 848.

act of March 3, 1875, have been already described.¹ Any defendant or defendants to such a statutory decree, "not actually personally notified" of the suit, in accordance with the provisions of the statute, may, at any time within one year after final decree, enter his appearance in said suit, and thereupon the court must make an order setting aside the decree therein, and permitting such defendant to plead on payment of such costs as the court shall deem just; and thereupon the suit is proceeded with to final judgment according to law.²

§ 403. **Time of entry of decree.** A decree can regularly be entered only during a term of the court.¹ The court has power to allow a decree to be entered even in vacation as of a previous term, *nunc pro tunc*.² Such leave will always be granted when the delay was caused by the action of the court.³

§ 404. **Frame of decree.** Decrees originally always consisted of three, and sometimes of four, parts. These were: the date and title; the recitals; the declaratory part, if that were required; and the ordering part.¹ A decree usually begins with a recital of the day of the month and year when it was pronounced,² and of the title of the cause, in which the parties should have the same designations that were given them in the bill.³ Next always followed, formerly, a recital of the pleadings, evidence, and former proceedings in the cause.⁴ The equity rules, however, provide that "in drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was

§ 402. ¹*Supra*, § 166.

² U. S. R. S., § 738; 18 St. at L. 472.

§ 403. ¹Griswold v. Hill, 1 Paine, 483.

²Gray v. Brignardello, 1 Wall. 627, 17 L. ed. 693; Griswold v. Hill, 1 Paine, 483.

³Gray v. Brignardello, 1 Wall. 627, 17 L. ed. 693.

§ 404. ¹Daniell's Ch. Pr., ch. xxv.

²Whitney v. Belden, 4 Paige (N. Y.), 140; Barclay v. Brown, 7 Paige (N. Y.), 245.

³Daniell's Ch. Pr., ch. xxv.

⁴Seton on Decrees (4th ed.), 9-19.

ordered, adjudged, and decreed as follows, viz.'"⁵ Next when a decree is entered by consent, the fact that consent was given and a recital to that effect is conclusive of the fact, unless evidence to the contrary is presented.⁶ The proper place for such a statement is ordinarily in the recitals, unless consent be only given to certain directions, when the statement of the consent should immediately precede such directions.⁷ It has been said also that it should appear affirmatively upon the face of the decree, that the defendant was properly served with process.⁸ The declaratory part of a decree, which if desired at all should be next inserted, contains a declaration of matters of fact, or of the rights of one or more of the parties to the cause, or a statement of the reason for the decree or any part thereof. This statement of reasons is not usual,⁹ although its utility has been noticed,¹⁰ and it is sometimes adopted.¹¹ Instances of declarations of matters of fact are the existence and validity of a will or other instrument,¹² and the validity of a patent.¹³ It has been said that a patent is sufficiently identified in a decree by giving its number and the patentee's name, and that the decree is not rendered void for uncertainty because the description of the invention is not given in the language of the title head of the patent.¹⁴ So, whenever there are interfering patents, and a suit is brought by any person interested in any one of them, or in the working of any one of them, to obtain relief against the interfering patentee, the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of

⁵ Rule 71.

⁶ *Loy v. Alston*, C. C. A., 172 Fed. 90.

⁷ *Seton on Decrees* (4th ed.), 1535; *Bartlett v. Wood*, 9 W. R. 817.

⁸ *Allen v. Blunt*, 1 Blatchf. C. C. 480.

⁹ *Ex parte Earl of Ilchester*, 7 Ves. 348, 373; *Seton on Decrees* (4th ed.), 19.

¹⁰ *Bax v. Whitbread*, 16 Ves. 15, 24; *Gordon v. Gordon*, 3 Swanst. 400, 478. Recitals in a decree of foreclosure of previous proceed-

ings in the suit are sufficient *prima facie* evidence of such proceedings. *Koons v. Beyson*, C. C. A., 69 Fed. 297.

¹¹ *Gordon v. Gordon*, 3 Swanst. 400, 478; *Jenour v. Jenour*, 10 Ves. 573; *Atty. Gen. v. Clapham*, 4 De G. M. & G. 591, 607; *Austin v. Austin*, 11 Jur. (N. S.) 536.

¹² *Seton on Decrees* (4th ed.), 19, 20.

¹³ *Union S. R. v. Mathiesson*, 8 Cliff. 146.

¹⁴ *Maginn v. Standard Equipment Co.*, C. C. A., 150 Fed. 139.

the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented; but no such judgment or adjudication can affect the right of any person, except the parties to the suit and those deriving title under them subsequent to the rendition of such decree.¹⁵ Where a party establishes his right to property, the direction to transfer it to him is often preceded by a declaration of his title.¹⁶ The court will not thus decide rights as between co-defendants unless a cross-bill or counter-claim has been filed for that purpose,¹⁷ or it be necessary in order to determine the rights of the plaintiff, or possibly when the evidence is clear and the case between them ripe for decision;¹⁸ and language in a decree broad enough to determine such rights will usually be construed as merely determining rights as between the plaintiff and the defendants, if no controversy between the defendants appears upon the pleadings.¹⁹ The court will not make a declaration of mere future rights,²⁰ nor as to the rights of parties upon a contingency that has not happened,²¹ nor, it was formerly held, as to mere legal rights;²² unless such a determination is indispensable to the declaration of the present equities of the parties. A declaration, that a deed to property beyond the jurisdiction of the court is fraudulent and void, is of no effect unless accompanied by a direction that a party to the suit execute a reconveyance or deliver up the deed for cancellation, and compliance is

¹⁵ U. S. R. S., § 4918. See *Foster v. Lindsay*, 3 Dill. 126; *Pentlarge v. Pentlarge*, 19 Fed. 817; s. c., 22 Fed. 412.

¹⁶ *Jenour v. Jenour*, 10 Ves. 562; *Seton on Decrees* (4th ed.), 20.

¹⁷ *Thomas v. Lloyd*, 25 Beav. 620; *Graham v. Railroad Co.*, 3 Wall. 704; *Seton on Decrees* (4th ed.), 20. See § 200.

¹⁸ *Jolly v. Arbuthnot*, 4 De G. & J. 224, 245; *Gresley v. Mousley*, 4 De G. & J. 78, 99; *Cottingham v. Earl of Shrewsbury*, 3 Hare, 627; *Seton on Decrees* (4th ed.), 20.

¹⁹ *Graham v. Railroad Co.*, 3 Wall. 704, 18 L. ed. 247.

²⁰ *Cross v. De Valle*, 1 Wall. 5, 17 L. ed. 515; *Lady Langdale v. Briggs*, 4 W. R. 703; *Fletcher v. Bealey*, 33 W. R. 745; *City Ry. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 570, 41 L. ed. 1114, 1118; *Seton on Decrees* (4th ed.), 20.

²¹ *Dowling v. Dowling*, L. R. 1 Ch. 612; *Seton on Decrees* (4th ed.), 20.

²² *Birkenhead Docks v. Laird*, 4 De G. M. & G. 732; *Webb v. Byng*, 8 De G. M. & G. 633; *Seton on Decrees* (4th ed.), 20.

made with such direction.²³ It seems that the court should not make a declaration of the rights of the parties in a hearing.²⁴ The conclusion of a decree is its ordering or mandatory part, which contains the specific directions of the court upon the matter before it.²⁵ As these directions vary according to the nature of the case before the court, it would be impossible to lay down any definite rule concerning them. Nothing is more elastic and less arbitrary than this part of a decree in equity. The directions to the different parties may be separate, reciprocal, direct, or inverted, as long as they are not inconsistent.²⁶ If there be several plaintiffs suing jointly, the decree may be joint or several, in conformity with their respective rights, as finally determined; and if a number of defendants, a single direction may be given to all, or a separate direction, or even a separate decree against each.²⁷ Certain general rules governing particular kinds of decrees may, however be stated. If the decree be for the performance of any specific act except the payment of money, as, for example, for the execution of a conveyance of land or the delivery of deeds or other documents, the decree must prescribe the time within which the act must be done.²⁸ Decrees for an account should always specify the time from which the account is to be taken.²⁹ By the further rules, "Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct."³⁰ The old form of a decree to set aside a forged instrument was that the document "be cut, damned, and canceled."³¹ It is now usual to direct that the instrument be

²³ *Carpenter v. Strange*, 141 U. S. 87, 106, 35 L. ed. 640, 648; *supra*, § 398.

²⁴ *Jennings v. Simpson*, 1 Keen, 404.

²⁵ *Daniell's Ch. Pr.*, ch. xxv.

²⁶ *Lingan v. Henderson*, 1 Bland (Md.), 236, 275; *Hodges v. Mullikin*, 1 Bland (Md.), 503, 507; *Owings' Case*, 1 Bland (Md.), 370, 404, 17 Am. Dec. 311.

²⁷ *Lingan v. Henderson*, 1 Bland (Md.), 236, 256; *Hodges v. Mullikin*, 1 Bland (Md.), 503, 507; *Quarles v. Quarles*, 2 Mumford (Va.), 321; *Elliott v. Pell*, 1 Paige (N. Y.), 263.

²⁸ Eq. Rule 8.

²⁹ *Cummings v. Adams*, 2 Irish Eq. 393.

³⁰ Eq. Rule 73 of 1842.

³¹ *Bishop of Winchester v. Four-*

delivered to the clerk of the court for cancellation.³² By statute, when a Federal court of equity awards an injunction against the infringement of a patent³³ or trade mark,³⁴ it may assess the damages the complainant has sustained by the injunction, as well as compel an account of the profits,³⁵ and it has the power to award treble damages, but not to award treble profits.³⁶ It has been held that, in a suit in equity for the infringement of a copyright, there can be no recovery, by way of damages, beyond the profits made by the defendant.³⁷ In suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due to the complaint over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is provided in the eighth equity rule.³⁸ Upon the foreclosure of a railroad mortgage in a Federal court it is customary to insert in the decree a direction that the purchaser pay all valid claims against the receiver and such indebtedness of the mortgagor as has a preference over the mortgage debt.³⁹ It has been held that such claims cannot be enforced by the State courts against the purchaser,⁴⁰ but that suits upon them must be prosecuted in the Federal court upon the common-law or equity side, as the nature of the case requires;⁴¹ and that, after their adjudication,

nier, 2 Ves. Sen. 445; *Fitton v. Earl of Macclesfield*, 1 Ves. 287, 292; *Seton on Decrees* (4th ed.), 1346.

³² *General Chemical Co. v. Blackmore*, N. Y. L. J., November, 1907; s. c., 156 Fed. 968.

³³ U. S. R. S., § 4921, as amended 29 St. at L. 692, § 6, 5 Fed. St. Ann. 577, *Pierce Fed. Code*, § 8788.

³⁴ Act of February 4, 1887, 24 St. at L. 387, 5 Fed. St. Ann. 603, *Comp. St.* 3398, *Pierce Fed. Code*, § 8785.

³⁵ *Ibid.*, U. S. R. S., §§ 4917, 4921; *Livingston v. Woodworth*, 15 How. 546, 14 L. ed. 809; *Zive v. Peck*, 13 Fed. 475; *Lyon v. Donaldson*, 34 Fed. 789; *Welling v. La Bau*, 35 Fed. 302; *Guyon v. Serrell*, 1 Blatchf. 244; *Peck v. Frame*, 9 Blatchf. 194; *Saunders v. Logan*, 2

Fish, 167; *Schwanzel v. Holensshade*, 3 *Fish*, 196; *Brodie v. Ophir Silver Mining Co.*, 4 *Fish*, 37.

³⁶ *Covert v. Sargent*, 42 Fed. 298; *Campbell v. James*, 5 Fed. 807.

³⁷ *Social Register Ass'n v. Murphy*, 129 Fed. 148.

³⁸ Equity Rule 10; *Northwestern M. L. I. Co. Keith, O. C. A.*, 77 Fed. 374; *supra*, § 402.

³⁹ *Jesup v. Wabash, St. L. & P. Ry. Co.*, 44 Fed. 663; *Thompson v. Northern Pac. Ry. Co.*, 93 Fed. 384, 388. *Supra*, § 394.

⁴⁰ *Jesup v. Wabash, St. L. & P. Ry. Co.*, 44 Fed. 663; *Stewart v. Wisconsin Cent. Ry. Co.*, 117 Fed. 782.

⁴¹ *Thompson v. Northern Pac. Ry. Co.*, 93 Fed. 384.

the creditor must bring his judgment into the foreclosure suit, where it will be enforced as a lien upon the property in the hands of the purchaser.⁴² Where Bradley was trustee under two deeds of trust, a decree appointing Johnson a trustee in his place "in the deed of trust," without specifying which deed of trust, was held void for uncertainty.⁴³

§ 405. Motions at the foot of a decree. It is usual where a suit involves the distribution of a fund in court, or otherwise affects the rights of numerous persons, to add a clause to the decree giving the right to the parties to apply to the court for other orders or direct "at the foot of the decree."¹ Under such a clause, the court will usually listen to no further application, except as to matters concerning which directions were contained in the first decree first entered. Thus, it has been held, that it will not, under such a clause, entertain an application to set aside a sale made under a decree.² It has been held that this gives no right to move to set aside a sale which has been confirmed; but that it is limited to applications for such orders as may be necessary in the distribution of the funds concerning which there is a dispute between different persons, both claiming under the decree or for the delivery of the possession of the property affected.³ It has been held that a similar reservation, in a decree of foreclosure and sale, does not authorize the inclusion, in the order confirming the sale, of an injunction against all parties to the suit and all persons claiming under them, and their attorneys and solicitors "from

⁴² *Thompson v. Northern Pac. Ry. Co.*, 93 Fed. 384, 388; *supra*, § 394. Where it was claimed that a fund due from a defendant had been assigned and notices of attachment had been served, it was held that the decree should provide for the payment of the fund into court, and that the defendant might protect itself by bringing in the parties claimant. *Mundy v. Louisville & N. Ry. Co.*, C. C. A., 67 Fed. 633.

⁴³ *Shepherd v. Peffer*, 133 U. S. 626, 33 L. ed. 706.

§ 405. ¹ *Wetmore v. St. Paul & P. Ry. Co.*, 3 Fed. 177. It was held

that a decree granting a perpetual injunction against the diversion of water from a stream, which allowed the defendants to apply for a vacation of the same upon establishing in other proceedings their right to the water, was erroneous as inconsistent and not determinative of the question at issue. *Pacific Live Stock Co. v. Silvies River Irr. Co.*, C. C. A., 200 Fed. 487.

² *Wetmore v. St. Paul & P. Ry. Co.*, 3 Fed. 177.

³ *Lewis v. Peck*, C. C. A., 154 Fed. 273.

setting up any pretended or alleged title against the title purchasers.”⁴ A decree foreclosing a mortgage, payable in instalments, may contain a clause authorizing the complainants on petition to have an order of sale in case of default as to any future instalment;⁵ and upon a bill compelling a specific performance of a contract for the payment of money in instalments, the decree may contain a clause providing that, in case of subsequent defaults, a motion may be made at the foot of the decree for judgments of such instalments as are then unpaid, with interest and costs.⁶

§ 406. **Enrollment of decree.** By the former chancery practice, a decree did not, strictly speaking, become a record of the court until it had been enrolled; and although the court, after it had been entered, treated it as a foundation for ulterior proceedings, it was not considered to be of a nature sufficiently permanent to be entitled in other courts to the same attention that is paid by one court of record to the records of other courts of the same nature.¹ Until the enrollment the decree was considered to be entered provisional and interlocutory, so that it could be altered by the court itself at a rehearing;² but it seems that an appeal to the House of Lords lay before the enrollment.³ A decree could be enrolled by a defendant, as well as by a plaintiff, and at any time, notwithstanding an abatement of the suit.⁴ An enrollment could be vacated for irregularity⁵ or for surprise, mistake, fraud, or excusable neglect.⁶

⁴ *Fleming v. Soultter*, 6 Wall. 747, 18 L. ed. 847.

⁵ *Libby v. Rosekrans*, 55 Barbour (N. Y.), 202, 215, 239.

⁶ In *Dancel v. Goodwear Shoe Machinery Co.*, 137 Fed. 157; s. c., C. C. A., 144 Fed. 679; *certiorari* denied 202 U. S. 619, 50 L. ed. 1174; such a decree was entered, but an objection to it upon that ground was not taken upon the appeal.

§ 406. ¹*Daniell's Ch. Pr.* (1st Am. ed.) 1220, 1221. Although a decree which had not been signed and enrolled could not be pleaded in bar, it was held in New York that it could be set up by answer.

Davoue v. Fanning, 4 J. Ch. (N. Y.) 199; *Lyon v. Talmage*, 14 J. (N. Y.), 501.

² *Daniell's Ch. Pr.* (1st Am. ed.) 1221m, 1222, 1224, criticized the *dictum* of Lord Brougham in *Parker v. Downing*, 1 M. & K. 634.

³ *Gartside v. Isherwood*, 2 Dick. 612; *Sheffield v. Duchess of Buckingham*, Amb. 586; s. c., West R. 673; *Daniell's Ch. Pr.* (1st Am. ed.) 1225.

⁴ *Barnes v. Wilson*, 1 R. & M. 486.

⁵ *Daniell's Ch. Pr.* (1st Am. ed.) 1230, 1232.

⁶ *Kemp v. Squires*, 1 Ves. Sr. 205; *Millspaugh v. McBride*, 7

After the decree had been enrolled, it could only be altered by a bill of review or an appeal to the House of Lords.⁷ The enrollment was made after the Lord Chancellor had signed the docket, by the engrossment of an exact copy upon the parchment rolls, which together with the docket were carried into the record room of the record and writ clerk's office and deposited with the record keeper for safe custody. Thereupon the enrollment was complete.⁸ In the Federal courts there is no formal enrollment such as was made in chancery; but the statute requires that a final record be made up by the clerk, and that "in equity and admiralty cases, only the process, pleadings, decrees, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings shall be entered upon the final record."⁹ By the equity rules the clerk must "keep an Equity Journal in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time."¹⁰ This record has been said to correspond in some respects to the enrollment in chancery; but what effect it has upon the rights of the parties seems never to have been decided.¹¹

Paige (N. Y.), 509, 34 Am. Dec. 360; Tripp v. Vincent, 8 Paige (N. Y.), 176; Daniell's Ch. Pr. (1st Am. ed.), 1230, 1232.

⁷ Daniell's Ch. Pr. (1st Am. ed.) 1232; Gore v. Purdon, 1 Sch. & Lef. 234. See *infra*, § 84.

⁸ Daniell's Ch. Pr. (1st Am. ed.) 1227, 1228.

⁹ U. S. R. S., § 750.

¹⁰ Eq. Rule 3.

¹¹ Consolidated Store S. Co. v. Dettenthaler, 93 Fed. 307. See *infra*, ch XXIX.

CHAPTER XXVII.

COSTS.

§ 407. **Costs in general at law.** Costs is the term given to the sum of money which is paid to the successful party to a litigation, to reimburse him for his expense and trouble in the same.¹ The costs of an action at law are governed by fixed and arbitrary rules.² In equity,³ and admiralty the award or denial of costs is always in the discretion of the court;⁴ and so very frequently is their amount when awarded.⁵ When, however, it is said, as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that courts of equity are governed by no fixed principles in their decisions relative to the costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonable definite rules, the enforcement of which is not dependent upon the caprice of the judge by whom each cause happens to be heard, but is often a ground of review by an appellate tribunal.⁶ By statute when in a District Court a plaintiff in an action at law originally brought there, or a petitioner in equity other than the United States, recovers less than the sum or value of five hundred

§ 407. ¹ An agreement between two parties to share in the payment of "the costs and expense" of a suit against one of them, includes the costs taxed against him. *Proyident Chemical Works v. Hygienic Chemical Co.*, 170 Fed. 523.

² *Hathaway v. Roach*, 2 W. & M. 63.

³ *The Starke*, 182 Fed. 498; *The Eva D. Rose*, C. C. A., 166 Fed. 101.

⁴ *Riddle v. Manderville*, 6 Cranch, 86, 3 L. ed. 161.

⁵ *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Central R. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915.

⁶ *Brooks v. Byam*, 2 Story, 553; *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Central R. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915.

dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute exclusive of costs exceed said sum or value, he shall not be allowed costs, and the court may in its discretion award costs against him.⁷ This statute applies where by the allowance of a counterclaim the amount recovered by the plaintiff is reduced to less than five hundred dollars.⁸ It does not apply to a suit removed from a State court.⁹ If the amount recovered is less than two thousand, but more than five hundred dollars, it does not apply, although the jurisdictional amount is now the former sum.¹⁰ If there was, when the suit was brought, a reasonable expectation of the recovery of more than five hundred dollars, costs will not be awarded against the plaintiff.¹¹ It has been said that the plaintiff will not be mulcted with costs under this statute, except when facts arose which would have authorized the court to dismiss the case as not properly within its jurisdiction.¹² Where a suit at law, equity or admiralty is dismissed in the court of first instance for want of jurisdiction over the person of defendant or over the subject-matter, or for a lack of the requisite difference of citizenship, no costs are allowed, provided that the complainant's plea does not allege the jurisdictional facts;¹³ but where in such a case he has averred facts which would give jurisdiction, costs are awarded against him.¹⁴ When a case removed from a State court is

⁷ U. S. R. S., § 968. For a peculiar case, see *National Steamship Co. v. Tugman*, 67 Fed. 16. This applies to cases under the Interstate Commerce Act. *Delaware, L. & W. R. Co. v. Lyne*, C. C. A., 193 Fed. 984.

⁸ *Hamilton v. Baldwin*, 41 Fed. 429.

⁹ *Field v. Schell*, 4 Blatchf. 435; *Ellis v. Jarvis*, 3 Mason, 457; *Kerager v. Judd*, 5 Fed. 27.

¹⁰ *Eastman v. Sherry*, 37 Fed. 844; *Johnson v. Watkins*, 40 Fed. 187.

¹¹ *Gibson v. Memphis, &c., R. Co.*, 31 Fed. 553; *McCarthy v. American Thread Co.*, 143 Fed. 678.

¹² *McCarthy v. American Thread Co.*, 143 Fed. 678; *supra*, § 363.

¹³ *Burnham v. Rangeley*, 2 W. & M. 417; *Pentlarge v. Kirby*, 20 Fed. 898; *Reliance Lumber Co. v. Rothschild*, 127 Fed. 745; *Int. Wireless Tel. Co. v. Fessenden*, 131 Fed. 493. But see *U. S. v. Treadwell*, 15 Fed. 532; *Cooper v. N. H. S. Co.*, 18 Fed. 588.

¹⁴ *The City of Florence*, 56 Fed. 236; *Lowe v. The Benjamin*, 1 Wall. Jr. 187; *Thomas v. White*, 12 Mass. 367; *Sawyer v. Williams*, 72 Fed. 296.

remanded for want of jurisdiction in the District Court, the right to costs is secured by the bond filed with the petition for removal.¹⁵ When cases were begun in State courts and afterwards removed, the costs accrued in the State court before the removal have been allowed.¹⁶ A Federal court cannot award costs, when it dismisses an action because the State court, from which it was removed, had no jurisdiction.¹⁷ No costs were usually granted in a case in the Circuit Court where the judges were divided.¹⁸ The English rule seems to be, that it is beneath the dignity of a sovereign to demand costs, and that, therefore, when he is successful in a suit, his counsel will waive all claim for any.¹⁹ In the Federal District Courts, however, costs are awarded to the United States in cases where an ordinary litigant would be entitled thereto, even when not specifically prayed in the bill.²⁰ The same rule prevails in the Supreme Court;²¹ and there a State may also be awarded costs,²² or directed to pay the same.²³ In suits in the Court of Claims, or District Courts to adjust claims against the United States, costs cannot be allowed unless the government puts in issue the right of the plaintiff to recover; and then only in the discretion of the court.²⁴ Costs in such a suit include only "what is actually incurred for witnesses and summoning the same, and fees paid to the clerk of the court."²⁵ No costs are allowed against the United States in admiralty²⁶ nor a suit to recover a penalty or forfeiture accruing under

¹⁵ See § 3 of Judiciary Act of 1875, as amended in 1887; 24 St. at L., ch. 373.

¹⁶ *Wolf v. Insurance Co. (D. Mich.)*, 1 Flip. 377; *Cléaver v. Traders' Ins. Co. (D. Md.)*, 40 Fed. 863. See *Central T. Co. v. Central Iowa Ry. Co.*, 38 Fed. 889. *Contra* in the Second Circuit, *Chadbourne v. German Am. Ins. Co.*, 31 Fed. 625; *Clare v. National City Bank*, 14 Blatchf. 1445.

¹⁷ *Parks Co. v. City of Decatur, C. C. A.*, 138 Fed. 550.

¹⁸ *Veazie v. Williams*, 3 Story, 611, 632.

¹⁹ *Emperor of Austria v. Day*, 2 Giff. 628; s. c., 3 De G., F. & J. 217.

²⁰ *U. S. v. Southern Pac. R. Co.*, 56 Fed. 865.

²¹ *U. S. v. Sanborn*, 135 U. S. 271, 34 L. ed. 112.

²² *Missouri v. Illinois*, 202 U. S. 598, 50 L. ed. 1160.

²³ *Ibid.*

²⁴ 24 St. at L. 508, § 15.

²⁵ 24 St. at L. 508, § 15.

²⁶ *The Antelope*, 12 Wheaton, 546, 6 L. ed. 723.

any law providing for the internal revenue, when the suit was brought by the government on information received from any person other than a collector, deputy collector, or inspector of internal revenue,²⁷ nor upon the dismissal of condemnation proceedings instituted by them.²⁸ No costs are awarded for or against the United States in the Supreme Court, or in the Circuit Courts of Appeals,²⁹ but a Circuit Court of Appeals has awarded costs of the Circuit Court against them upon an appeal from the decision of a board of appraisers.³⁰ It has been held that costs cannot be taxed against the petitioners, upon an application for the disbarment of an attorney;³¹ and that a decree for costs against a complainant may be set aside, when the attorney had no authority to appear for him.³² The Revised Statutes provide: "If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased."³³

§ 408. Costs at common law. Courts of common law invariably award costs to the successful party, except in the cases previously stated.¹ Where the State statute provided that in certain cases, if the plaintiff recovered less than a specified amount of damages his costs should not exceed his damages, it was held that the statute should be applied by the Federal Courts after a removal.²

²⁷ U. S. R. S., § 969.

²⁸ *Carlisle v. Cooper*, 64 Fed. 472.

²⁹ S. C. Rule 24; C. C. A. Rule 31.

³⁰ *U. S. v. Davis*, C. C. A., 54 Fed. 147. *Contra*, *Marine v. Lyon*, C. C. A., 62 Fed. 153.

³¹ *Re Watt & Dohan*, 154 Fed. 678.

³² *McGeorge v. Bigstone Gap Imp. Co.*, 88 Fed. 599.

³³ U. S. R. S., § 982, 2 Fed. St. Ann. 291, *Pierce Fed. Code*, § 7670. This does not authorize the allow-

ance of costs or counsel fees not authorized by other statutory provisions. See *Motion Picture Patents Co. v. Yankee Film Co.*, C. C. A., 201 Fed. 63, reversing 192 Fed. 134.

§ 408. ¹ *Hathaway v. Roach*, 2 W. & M. 63.

² *Reichter v. Magone*, 47 Fed. 192. It has been held that the State practice should be followed at Common Law; that where this awards costs to "The successful party," the denition of that phrase in the State Statute must be followed and that

§ 409. **Costs in equity.** Courts of chancery in general follow the rule of the civil law, *victus victori in expensis condemnatus est*, and decree the payment of costs by the unsuccessful to the successful parties to a suit before it.¹ It often happens, however, that they depart so far from this rule as to deny costs to the successful party, and, in certain classes of cases, they will even compel him to pay costs to those against whom he obtains a decree.² In some cases the costs may be apportioned.³ It has

where the case was dismissed, that defendant had paid a sum in full settlement of the claim, the complainant was the successful party and entitled to the costs. *Scatcherd v. Love*, C. C. A., 166 Fed. 53. For the rule under the practice at common law in Tennessee, see *Johnson v. Mississippi & T. R. Co.*, 31 Fed. 551.

§ 409. ¹*Wooster v. Handy*, 23 Fed. 49; *Am. D. R. Co. v. Sheldon*, 28 Fed. 217; *Vancouver v. Bliss*, 11 Ves. 58; *Staines v. Morris*, 1 V. & B. —; *Millington v. Fox*, 3 M. & C. 338, 358; *Hunter v. Town of Mariboro*, 2 W. & M. 168; *Hovey v. Stevens*, 3 W. & M. 17.

²*Grattan v. Appleton*, 3 Story, 755; *Brooks v. Byam*, 2 Story, 553; *Scatcherd v. Love*, C. C. A., 166 Fed. 53.

³*Farwell v. Kerr*, 28 Fed. 345; *Lippino v. Shaw C. Co.*, 34 Fed. 570; *Am. B. M. Co. v. Crosman*, 57 Fed. 1029; *Heighington v. Grant*, 1 Beav. 230; *Seton on Decrees* (4th ed.), vol. 1, p. 129; *Tefft v. Stern*, C. C. A., 74 Fed. 755; *Davis v. Parkman*, C. C. A., 71 Fed. 961; *Ecaubert v. Appleton*, C. C. A., 67 Fed. 917; *U. S. Sugar Refinery v. Providence S. & G. P. Co.*, C. C. A., 62 Fed. 375. In some cases, the successful party was allowed to recover only two-thirds of the costs. *Royal Metal Mfg. Co. v. Art Metal Works*, C. C. A., 130 Fed. 778; Fed. Prac. Vol. II.—81.

Tesla El. Co. v. Scott, 101 Fed. 524; where one out of three patents was sustained. See *Marthinson v. King*, C. C. A., 150 Fed. 48, where the Circuit Court of Appeals directed that the costs in the court, both below and above, be borne equally between the plaintiffs and the defendants, it was held that the expenses of a receivership were not included in the costs to be divided. *Kell v. Trenchard*, C. C. A., 146 Fed. 245. Where the line of a railroad company had been operated by a receiver of the corporation in possession of the same, it was held liable for a certain proportion of the costs of the receivership, although not a party to the suit in which the receiver was appointed, when it appeared simply for the purpose of contesting its liability for such costs. *Pennsylvania Co. for Insurance, etc. v. Jacksonville, T. & K. St. Ry. Co.*, C. C. A., 66 Fed. 421; *Tesla El. Co. v. Scott*, 101 Fed. 524. Where a judgment debtor had not been the cause of delay in extended supplementary proceedings before a master; it was held that the expenses of a controversy maintained by his debtors to protect their individual interests should not be taxed against him, but that he was only liable for a portion of the costs with necessary disbursements in serving papers on him; all other costs and disbursements being

been said: that under no circumstances, will a court dismiss a plaintiff's bill and award him costs against a defendant,⁴ although it might then allow the latter costs out of a fund in court.⁵ If a plaintiff begins or continues a suit after he has received formal notice of a full and unconditional offer of all that he is entitled to, he may be denied costs, not only of all the proceedings taken by him after such an offer,⁶ but also of the whole suit.⁷ This principle applies to bills for an accounting; where, although on account of the uncertain state of the account the defendant may not be liable to make a tender of the balance due from him, and so omits it, yet if he has shown a willingness to account, the court may relieve him from paying costs.⁸ If a plaintiff charge fraud which he fails to prove, although he establishes his case on other grounds,⁹ or if he

chargeable to his debtors, whose obligations the creditor sought to reach in the proceedings. *Re Shepherd*, 154 Fed. 957.

⁴ *Barnes v. O'mally*, 4 McLean, 576; *Hobbs v. McLean*, 117 U.S. 567, 29 L. ed. 940. But see *Fechheimer v. Baum*, 43 Fed. 719, 730, and *infra*, § 421. Where a bill to enjoin the infringement of a patent by a corporation and its officers was dismissed as against the officers, but sustained against the company, it was held that the individual defendants must pay their own costs and such as were incurred in bringing them into the suit, but not a docket fee. *National F. B. & P. Co. v. Dayton P. N. Co.*, 97 Fed. 331, 333. See also *Consolidated B. S. Co. v. Chicago P. & St. L. Ry. Co.*, 69 Fed. 412.

⁵ *Fechheimer v. Baum*, 43 Fed. 719, 734; *infra*, § 421. But see *Hobbs v. McLean*, 117 U.S. 567, 29 L. ed. 940.

⁶ *Millington v. Fox*, 3 M. & C. 338, 352; *Loveridge v. Larned*, 7 Fed. 294; *Calkins v. Bertrand*, 8 Fed. 755. Where the court of original jurisdiction denied the com-

plainant's application for a mandatory injunction to compel the removal of a dam, but offered him the right to prove and recover the damages, which he refused to do, he took an appeal, and upon the appeal the denial of the injunction was approved, but the decree was reversed in order that he might recover his damages; he was disallowed the costs incurred prior to the time when, after the filing of the mandate, he availed himself of this right, and he was also disallowed interest upon his damages. *Andrus v. Berkshire Power Co.*, 169 Fed. 732; s. c., 107 Fed. 1016. But see *Inhabitants of N. B. Tp. v. Halsey*, 117 U.S. 336, 29 L. ed. 904.

⁷ *Millington v. Fox*, 3 M. & C. 338, 352; *Lowell Mfg. Co. v. Whittall*, 71 Fed. 515.

⁸ *Parrot v. Treby*, *Prec. in Ch.* 254; *Bennett v. Attkins*, 1 Y. & C. 247; *Ashburnham v. Thompson*, 13 Ves. 402. But see *Daniell's Ch. Pr.* (5th Am. ed.), 1396, 1397.

⁹ *Wright v. Howard*, 1 Sim. & S. 190; *Scott v. Dunbar*, 1 Molloy, 442. See *Fisher v. Boody*, 1 Curt. 206, 223.

incurs needless expense,¹⁰ in some cases, if he claims relief more extensive than that to which he is entitled,¹¹ or if, on account of public policy or otherwise, he is allowed to obtain relief in a matter wherein he himself acted unlawfully or dishonorably,¹² or if he have been guilty of laches,¹³ which do not bar his claim entirely,—he will be denied costs. A defendant will also be denied costs when successful under similar circumstances;¹⁴ for instance, when the plaintiff's bill is clearly bad and he answers instead of demurring.¹⁵ Instances where costs have not been given to a successful party, because the situation of his adversary appealed to the sympathy of the court, were: where the decision of the case involved the decision of a difficult and doubtful question of law,¹⁶ especially in suits brought for the specific performance of contract affecting the sale of land;¹⁷ where the court enforced a contract made upon a very inadequate consideration;¹⁸ and other cases of peculiar hardship.¹⁹ A change of the law by a ruling of the Supreme Court subsequent to the filing of the bill has been held to be no ground for refusing the defendant costs.²⁰ The successful party to a suit may also be obliged to pay costs to an opponent who has not acted unconscientiously, in three classes of cases: when the successful party has acted unconscientiously

¹⁰ *Brunswick-Balke-Collender Co. v. Klump*, 131 Fed. 93; where plaintiff was denied all costs and disbursements after the time when the defendant offered to consent to a decree.

¹¹ *Baldwin v. Ely*, 9 How. 580. But see *Consol. Cal. & Va. Min. Co. v. Baker*, 131 Fed. 989.

¹² *Debenham v. Ox*, 1 Ves. Sen. 276; *Davis v. Symonds*, 1 Cox Eq. 402.

¹³ *Anon.*, 2 Atk. 14; *Lee v. Brown*, 4 Ves. 362.

¹⁴ *Atty. Gen. v. Brewers' Co.*, 1 P. Wms. 376; *Bunker v. Stevens*, 26 Fed. 245.

¹⁵ *Brooks v. Byam*, 2 Story, 553; *Harland v. Bankers' & M. Tel. Co.*, 32 Fed. 305; *Marthinson v. King*, C. C. A., 150 Fed. 48. Where a bill

filed by trustees was dismissed upon appeal for failure to plead the jurisdictional facts to which no objection had been made, it was held that the costs should be taxed against the complainants as trustees only and not against them individually. *Tug R. C. & S. Co. v. Brigel*, C. C. A., 70 Fed. 647.

¹⁶ *Grattan v. Appleton*, 3 Story, 755; *Rose v. Calland*, 5 Ves. 186.

¹⁷ *Rose v. Calland*, 5 Ves. 186; *White v. Foljambe*, 11 Ves. 337; *Wilcox v. Bellaers*, T. & R. 491.

¹⁸ *Burrowes v. Lock*, 10 Ves. 470.

¹⁹ *Lillia v. Airey*, 1 Ves. Jr. 277; *Shales v. Barrington*, 1 P. Wms. 481; *Drybutter v. Bartholomew*, 2 P. Wms. 127.

²⁰ *Fargo v. South Eastern Ry. Co.*, 28 Fed. 906.

in the suit or in the matters which gave rise to it;²¹ when a defendant has been necessarily made a party to a suit in which he has no direct personal interest,—for example, an heir-at-law, who is a passive defendant to a suit to prove a will;²² and when a bill is filed to redeem a pledge or relieve an estate from the burden of a mortgage or other incumbrance.²³ The Equity Rules provide: "Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct."²⁴ Costs for an infraction of the rules concerning the contents of transcripts upon appeals may be imposed upon the offending parties or solicitors.²⁵ In cases where the finally successful party is obliged without his fault to pay costs to one of the others, if the suit was made necessary by the misconduct of one of the defendants, the latter is obliged to repay the amount of those costs to the winner.²⁶ Thus, the costs paid out of the fund to the plaintiff in a suit of interpleader are usually decreed to be repaid by the unsuccessful defendant.²⁷

²¹ *Wright v. Howard*, 1 Sim. & S. 190; *Dowse v. Hammond*, C. C. A., 130 Fed. 103. For example, where the complainant obtains only a small part of the relief which he prayed and the greater part of the expense of the litigation was caused by his unsuccessful claims. *Thomson-Houston El. Co. v. Elmira & H. R. Co.*, 71 Fed. 886. See also *Ecaubert v. Appleton*, C. C. A., 67 Fed. 917. Where it was held that a party had improperly filed a cross-bill, but relief was given him upon the theory that his cross-bill should be considered as a petition of intervention, he was required to pay the costs upon the cross-bill in the orig-

inal court and the court of review. *Gregory v. Pyke*, 67 Fed. 837. The cost of taking testimony as to irrelevant matter may be taxed against the party who takes the same. *Terry v. Naylor*, 125 Fed. 804.

²² *Crew v. Joliff*, Prec. in Ch. 93; *Luxton v. Stephens*, 3 P. Wms. 373.

²³ *Taner v. Ivie*, 2 Ves. Sen. 466, 468.

²⁴ Eq. Rule 40.

²⁵ Eq. Rule 76.

²⁶ *Martinius v. Helmuth*, 2 V. & B. 412, note. See *Brodie v. St. Paul*, 1 Ves. Jr. 326; *Badeau v. Rogers*, 2 Paige Ch. (N. Y.) 209.

²⁷ *Martinius v. Helmuth*, 2 V. &

§ 410. **Costs in patent and trademark cases.** Costs are usually included in a decree for a perpetual injunction against the infringement of a patent,¹ or trade mark,² when the infringement was made or threatened before the suit was brought, although it was previously discontinued, or even when it was never committed;³ and in the case of a trade-mark, when no demand to cease using the same was previously made.⁴ All of several joint wrongdoers are usually mulcted, unless one of them has participated to a trivial extent only or there are equitable circumstances in his favor.⁵ When upon a reference the master reports in favor of the plaintiff for nominal damages, the award of the costs thereof is in the discretion of the court, and depends upon the peculiar circumstances of each case.⁶ In suits founded upon letters-patent for inventions, when the patentee has claimed in his specifications that he was the original inventor of more than he did first invent, he cannot recover costs unless he has filed a proper disclaimer in the Patent Office before the commencement of the suit.⁷ It

B. 412, note; *Badeau v. Rogers*, 2 Paige Ch. (N. Y.) 209. But see *Ferguson v. Dent*, 46 Fed. 88; *infra*, § 422.

§ 410. ¹*Vrooman v. Penhollow*, C. C. A., 186 Fed. 495; *Luten v. Rhoads & Knisely*, 194 Fed. 169.

²*Sawyer v. Kellogg*, 9 Fed. 601.

³*Luten v. Rhoads & Knisely*, 194 Fed. 169.

⁴*Sawyer v. Kellogg*, 9 Fed. 601.

⁵*Vrooman v. Penhollow*, C. C. A., 186 Fed. 495.

⁶*Calkins v. Bertrand*, 8 Fed. 755; *Everest v. Buffalo Lubricating Oil Co.*, 31 Fed. 742; *Hill v. Smith*, 32 Fed. 753; *Kirk v. DuBois*, 46 Fed. 486; *Ommen v. Talcott*, 175 Fed. 261. Where the master awarded to the complainant substantial damages, and the decree confirmed the award with the costs and disbursements of the accounting, but on appeal the damages were reduced to a nominal sum because they could not be computed with reasonable accu-

racy, the mandate allowing the costs of appeal, but being silent as to the costs below; the trial court in entering the decree upon the mandate refused to change its prior decree as to the costs. *Westinghouse Air Brake Co. v. New York Air Brake Co.*, 140 Fed. 144. Where the complainant is awarded only nominal damages and there are no special equities in his favor, he may be taxed with the costs of the accounting including those of the hearing upon the exceptions to the report. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. et al.*, 183 Fed. 314; *Delaware L. & W. R. Co. v. Lyne*, C. C. A., 193 Fed. 984.

⁷U. S. R. S., § 4922; *Proctor v. Brill*, 16 Fed. 791; *General Electric Co. v. Crouse-Hinds Electric Co.*, 147 Fed. 718; *Novelty Glass Mfg. Co. v. Brookfield*, C. C. A., 172 Fed. 221. The statute does not entitle the defendant to recover costs in such a case, nor does it deprive the

has been held that this statutory rule does not apply to the costs of an appeal.⁸ Where, in a suit for the infringement of letters patent, the complainant recovers on some, but not all, of several patents,⁹ or of his claims under a single patent,¹⁰ the costs may be equitably proportioned; but where the defendant succeeds upon one defense to the bill, he is not precluded from recovering costs because he has pleaded other defenses which were without merit.¹¹ In suits to compel the issue of patents, all costs must be paid by the complainant, whether the final decision is in his favor or not;¹² unless an individual opposes the suit, in which case, if the opposition is unsuccessful, costs may be taxed against such opponent.¹³

§ 411. Costs in admiralty. In admiralty causes costs are subject to the same rules as in equity causes in the Federal courts.¹ The prevailing party is usually entitled to costs;² but, in the discretion of the court, they may be allowed him, withheld from him or divided according to the equities of the case.³ Where damages are apportioned, costs are likewise apportioned, each party taxing a full bill of costs, and the party whose bill of costs is the largest, usually covering half the difference between the two bills as taxed.⁴ This is true where the libellant's vessel alone has suffered damage, as well as where both vessels have been damaged.⁵ But in such a case the libellant will be

plaintiff of his right to an account of profits and damages. *Novelty Glass Mfg. Co. v. Brookfield, C. C. C.*, 172 Fed. 221. See § 277, *supra*.

⁸ *Kahn v. Starrels, C. C. A.*, 136 Fed. 597; *Johnson v. Foos Mfg. Co., C. C. A.*, 141 Fed. 73. *Contra*, *Novelty Glass Mfg. Co. v. Brookfield, C. C. A.*, 172 Fed. 221.

⁹ *Draper Co. v. Am. Loom Co.*, 161 Fed. 728; *Roth v. Harris, C. C. A.*, 168 Fed. 279.

¹⁰ *Ide v. Trorlicht, D. & R. Carpet Co., C. C. A.*, 115 Fed. 137, 150, and citations. *Am. Bank Protection Co. v. El. P. Co.*, 181 Fed. 350. Where a complaint alleged infringement by a number of devices made by defendant, but succeeded as to one only, a division of the costs was

made proportionate to the final result. *Perkins Electric S. Mfg. Co. v. Yost E. Mfg. Co.*, 189 Fed. 625; *Gold v. Gold, C. C. A.*, 187 Fed. 273.

¹¹ *U. S. R. S.*, § 4915, 5 Fed. St. Ann. 507, *Pierces Fed. Code*, § 8780.

¹² *Butler v. Shaw*, 21 Fed. 321.

§ 411. ¹ *The Starke*, 182 Fed. 498; *The Eva D. Rose, C. C. A.*, 166 Fed. 101.

² *Ibid*.

³ *Ibid*. *The Scotland*, 118 U. S. 507, 518, 30 L. ed. 153, 155, a proceeding for the limitation of liability.

⁴ *The America*, 92 U. S. 432, 23 L. ed. 724.

⁵ *The Warren (Blatchford, J.)*, 25 Fed. 782. *Contra*, *The Hercules*,

allowed the full costs and disbursements of a reference made necessary by the act of the defendant.⁶ Where a libellant recovers a portion of his damages against one vessel and a portion against another, he recovers costs against the vessels in similar proportions.⁷ Where the claimant of a vessel libelled brought in a third party, which was held to be solely in fault, it was held that the claimant might recover its costs from the libellant.⁸ The claimant of a libelled vessel, who for his own protection brings in a third party by petition, where upon a hearing both the libel and petition are dismissed, is liable for the taxable costs and expenses of such new party in defending.⁹ In proceedings for a limitation of liability, costs are in the discretion of the court.¹⁰ The costs of a contested issue usually fall on the losing party.¹¹ Charges of a commissioner in taking proof of an uncontested claim should be paid from the fund, not by the petitioner.¹² It has been held that a petitioner is entitled to a docket fee out of the fund for each creditor who proves his claim, but that his costs are not preferred over those of such creditors,¹³ and that where a stipulation for value is given, he is entitled to a single docket fee,¹⁴ payable by the stipulators and not out of the fund.¹⁵ Where the owner gives a stipulation for value, he must pay the taxable costs incident thereto, including the expense of the appraisal.¹⁶ The expenses of administration, including the fees and other charges of the officers of the court and of the commissioner, should ordinarily be paid from the fund.¹⁷ Where a libel is dismissed for want of jurisdiction, no costs

20 Fed. 205. See also *The Pennsylvania*, 15 Fed. 814, where a different method of apportioning costs was adopted.

⁶ *The Doris Eckhoff*, 41 Fed. 156, 159.

⁷ *The Alabama and Gamecock*, 92 U. S. 695, 23 L. ed. 763.

⁸ *The Starke*, 182 Fed. 498.

⁹ *The Charles Tiberghien*, 148 Fed. 1016.

¹⁰ *The Scotland*, 118 U. S. 507, 518, 30 L. ed. 153, 155.

¹¹ *The H. F. Dimock*, C. C. A., 77 Fed. 226, 238. Such costs in-

clude proctors' fees. *The W. A. Sherman*, C. C. A., 167 Fed. 976.

¹² *The H. F. Dimock*, C. C. A., 77 Fed. 226, 238.

¹³ *Re Norwich & New York Transp. Co.*, 10 Benedict 193, 18 Fed. Cas. No. 10,361.

¹⁴ *Re Excelsior Coal Co.*, 136 Fed. 271; *aff'd* C. C. A., 142 Fed. 724, 74 C. C. A. 56.

¹⁵ *Ibid.*

¹⁶ *The H. F. Dimock*, C. C. A., 77 Fed. 226, 238.

¹⁷ *Ibid.*

are allowed.¹⁸ Where a libel is filed to enforce a maritime contract costs can be awarded upon its dismissal because there is no maritime lien.¹⁹ It seems that the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction.²⁰ In a proceeding *in rem* under section ten of the Pure Food and Drug Act, the court has power to render judgment for costs against the claimant, although no stipulation to pay costs has been made²¹ and no costs can be recovered against the United States.²² When a libellant upon his own appeal recovers less than three hundred dollars, exclusive of costs, he cannot recover costs, but, in the discretion of the court, may be adjudged to pay costs himself.²³ When both parties appeal, and the decree of the District Court is not disturbed, it is not usual to allow costs to either party.²⁴ If, the defendant offers to allow the damages to be assessed at a certain sum, and the referee's report is for no greater sum, the libellant will be denied costs of a reference.²⁵ Where the parties stipulate that a suit shall be discontinued and the libellant pay costs as taxed by the court, the court has no power to include

¹⁸ The McDonald, 4 Blatchf. 477; Wenberg v. A Cargo of Mineral Phosphate, 15 Fed. 285, 288.

¹⁹ The Francesco, 118 Fed. 112.

²⁰ Benedict's Admiralty, § 204; quoted without disapproval in Hipolite Egg Co. v. U. S., 220 U. S. 45, 59, 55 L. ed. 364, 368.

²¹ Act of June 30, 1906, c. 3915; 34 Stat. at L. 768.

²² Hipolite Egg Co. v. U. S., 220 U. S. 45, 50, 60, 55 L. ed. 364, 369.

²³ The Cassius, 41 Fed. 367; U. S. R. S., § 968, which, however, refers in terms only to the Circuit Court.

²⁴ The William Cox, 9 Fed. 672; McKeen v. Morse, 1 U. S. App. 7. A court of admiralty has no power to allow costs other than those provided for by statute, unless for an expense incurred under its order, and, there being no statutory provision for the allowance of mi-

leage to a proctor in attending on the taking of depositions, no such allowance can be taxed as costs. Pacific Mail S. S. Co. v. Iverson, C. C. A., 154 Fed. 450.

²⁵ In S. D. N. Y., Adm. Rule 30 See *infra*, § 577, a claimant who makes a tender before suit, but fails to deposit in court the amount so tendered, is liable for full interest and costs, although the libellant fails to recover a more favorable decree. The Ponce, C. C. A., 178 Fed. 76. It is not necessary in the deposit to include the docket fee or fees for depositions. The Claverburn, 148 Fed. 139. If upon the trial the offer is found to have been insufficient, the respondent is entitled to tax such fees, together with the taxable disbursements and the taking of testimony used on the trial, even if such expense was incurred before the offer. *Ibid*.

damages for the fraud of libellant in filing the libel, nor for the detention of the vessel, nor for premiums paid for a stipulation for value, nor for surveyor's fees and expenses not incurred under its order.²⁸

§ 412. **Costs in error and appeal.** In an appellate court, when a judgment or decree is reversed for want of jurisdiction in the court below, costs are usually imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant.¹ But where the objection was not raised by the defendants either in the trial court or the court of review, the judgment may be reversed without costs of the appeal; and, in the absence of an amendment in the court below, the case may be dismissed without costs there.² When an appeal or writ of error is dismissed for want of jurisdiction, costs of the motion, including at least the clerk's fee for printing and supervising the record, may be taxed.³ When both parties appeal, and the decree is in all respects affirmed, usually no costs of the appeal are allowed.⁴ In a case where the appellant succeeded only in modifying the decree, it was held that neither party should have the costs of the appeal.⁵ When neither party succeeds, the costs upon an appeal may also be apportioned.⁶ A party who by stipulation took no part in an appeal is not entitled to any costs in the appellate court.⁷ Where appellees severally interested recover costs

²⁸ *The Reliance*, 189 Fed. 416.

§ 412. ¹ *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 380; *Peper v. Fordyce*, 119 U. S. 469, 30 L. ed. 435; *Everhart v. Huntsville College*, 120 U. S. 223, 30 L. ed. 623; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 30 L. ed. 623; *Peninsula Iron Co. v. Stone*, 121 U. S. 631, 30 L. ed. 1020; *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800.

² *Newcomb v. Burbank*, C. C. A., 181 Fed. 334. Where the defect in jurisdiction was raised by the appellant for the first time upon the

appeal, it has been held that he could not recover his costs in the latter court, but that the costs below should be divided, *Tug River C. & S. Co. v. Brigel*, C. C. A., 67 Fed. 625; and in one such case the costs of the writ of error were imposed on the appellant. *Hunt v. Howes*, C. C. A., 74 Fed. 657.

³ *Bradstreet Co. v. Higgins*, 114 U. S. 262, 29 L. ed. 176; *Cir. Ct. of App. Rule 23*.

⁴ *The William Cox*, 9 Fed. 672.

⁵ *New England R. Co. v. Carnegie Steel Co.*, C. C. A., 75 Fed. 54.

⁶ *Kell v. Trenchard*, C. C. A., 146 Fed. 245.

⁷ *Pollard v. Reardon*, 65 Fed. 848.

in the Circuit Court of Appeals, separate costs are taxed for the several appellees who appear separately and file separate briefs.⁸ The fact that the decree is affirmed upon grounds not stated in the opinion of the court of first instance does not necessarily deprive the respondent of costs.⁹ Where the Supreme Court of the United States modified, with costs to the defendant, certain judgments of the State courts in favor of the plaintiff, and the State Court of Appeals remitted the case to the court of original jurisdiction, "without costs in this court," it was held that the defendant was entitled to recover only the costs in the Supreme Court of the United States, and that the plaintiff was still entitled to the costs which he was awarded by the original judgments.¹⁰ The court below has the right to construe the mandate of the court of review concerning costs,¹¹ subject to review by appeal¹² or mandamus,¹³ as the case may be.

§ 413. *Petitions for leave to sue in forma pauperis.* "The right to sue in forma pauperis originated in the statute of Hen. VII. This and the subsequent statute of Hen. VIII. are confined to actions in the courts of common law, and do not extend to defendants. The courts of equity have adopted the principle of these statutes, and, proceeding further, have extended the relief to the case of defendants."¹ "Any citizen of the United States, entitled to commence any suit or action in any civil or criminal, in any court of the United States, may upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing

⁸ *Augusta Tr. Co. v. Federal Tr. Co.*, C. C. A., 153 Fed. 157.

⁹ *Post v. Beacon V. P. & El. Co.*, 89 Fed. 1.

¹⁰ *Stevens v. Central Nat. Bank*, 168 N. Y. 560.

¹¹ *Persons v. Wirgman*, 140 Fed. 207.

¹² *Kell v. Trenchard*, C. C. A., 146 Fed. 245.

¹³ *Infra*, § 457.

§ 413. ¹ *Lord Lyndhurst in Oldfield v. Cobbett*, 1 Phil. 613, 615. See *Ferguson v. Dent*, 15 Fed. 771.

out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."² The statute applies to applications for the writ of habeas corpus³ and to proceedings in admiralty.^{3a} The writ and declaration may be filed simultaneously with the affidavit.⁴ "That the officers of the court shall issue, serve all process, and perform all duties in such cases, and the witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases."⁵ "That the court may request any attorney of the court to represent such poor person if it deems the cause worthy of trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."⁶ "That judgment may be rendered for costs at the conclusion of the suit as in other

² Act of July 20, 1892, 27 St. at L. 252; as amended June 25, 1910, 36 St. at L. 866. Before this act, the Federal courts followed the English practice in equity, *Ferguson v. Dent*, 15 Fed. 771; not at common law, *Roy v. Louisville, N. O. & T. R. Co.*, 34 Fed. 276; *contra*, *Bristol v. U. S., C. C. A.*, 129 Fed. 87, 88; nor where there was a State statute, which they followed, *Heckman v. Mackey*, 32 Fed. 57. Before the amendment it was held, that the statute did not apply to appellate proceedings, whether civil, *Bradford v. Southern Ry. Co.*, 195 U. S. 243, 251, 49 L. ed. 178, 181; *The Presto*, C. C. A., 93 Fed. 522; *In re Bradford's Petition*, C. C. A., 139 Fed. 518; *contra*, *Fuller v. Montague*, C. C. A., 53 Fed. 206; *Columb v. Webster Mfg. Co.*, 76 Fed. 198; *Reed v. Pennsylvania Co.*, C. C. A., 111 Fed. 714, 49 C. C. A. 572. See

Wickerman v. A. B. Dick Co., C. C. A., 85 Fed. 851; *Brinkley v. Louisville & N. R. Co.*, 95 Fed. 345, where there is a learned and instructive opinion by Judge Hammond upon the whole subject of this section; or criminal, *Bristol v. U. S., C. C. A.*, 129 Fed. 87. In the Second Circuit, however, the Circuit Court of Appeals has relieved from printing the record, a petitioner, for the review of an order of a District Court in Bankruptcy. This was done in *In re Friedman*, C. C. A., 161 Fed. 260, 262.

³ *In re Mills*, 135 Fed. 263.

^{3a} See *O'Flaherty v. Hamburg-American Packet Co.*, 168 Fed. 411.

⁴ *Ibid.*; *O'Connell v. Mason*, 127 Fed. 435.

⁵ 27 St. at L. 252.

⁶ 27 St. at L. 252. See *O'Connell v. Mason*, 127 Fed. 435.

cases: Provided that the United States shall not be liable for any of the costs incurred."⁷

The English practice required that such an application be made by a petition containing a short statement of his case or defense, and when filed by a complainant that it should be accompanied by a certificate signed by counsel, "that he conceives the plaintiff has just cause to be relieved touching the matter of the petition for which he has exhibited his bill;" and also in all cases by the affidavit of the party himself "that he is not worth in all the world the sum of 5£ after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted."⁸ It seems, that, under the statute of the United States, the application may be made upon a motion and affidavit without a petition or a certificate of counsel, although a prudent practitioner should not omit them. The affidavit, when filed by the plaintiff, should show that he is a citizen, and that there is no person interested who is liable to pay or secure the costs.⁹ An attorney who has contracted to bring a suit upon a contingent fee is such an interested person; and in such a case, permission to sue *in forma pauperis* is denied.¹⁰ Where the plaintiff sued in a representative capacity, it was held that he must show that those whom he represented were unable to pay the costs.¹¹ According to the English practice, a person suing or being sued in a representative capacity could not obtain an order of this character.¹² The defendant can dispute the truth of the affidavit of poverty by a motion to dismiss

⁷ St. at L. 252.

⁸ Daniell's Ch. Pr. (2d Am. ed.) 46; Wilkinson v. Belsher, 2 Brown, Ch. C. 272.

⁹ Boyle v. Great N. Ry. Co., 63 Fed. 539.

¹⁰ Boyle v. Great N. Ry. Co., 63 Fed. 539; Feil v. Wabash R. Co., 119 Fed. 490; Phillips v. Louisville & N. R. Co., 153 Fed. 795; Cahill v. Manhattan Ry. Co., 38 App. Div. (N. Y.) 314.

¹¹ Clay v. Southern Ry. Co., C. C. A., 90 Fed. 472.

¹² Oldfield v. Cobbett, 1 Phil. 613; Daniell's Ch. Pr. (2d Am. ed.) 44;

Anon., 1 Ves. Jr. 409. It was so held in North Carolina and Tennessee, of an administrator; McKeil v. Cutler (N. C. 1853) Bushce's Eq. 139; Smith v. Ry. Co., 89 Tenn. 664. In North Carolina, of an assignee in bankruptcy Osborne v. Henry, 66 N. C. 354. In New York, of the committee of a lunatic; Bechtie v. Ry. Co., 31 Abb. N. C. (N. Y.) 483. But see Thompson v. Thompson, cited in 1 T. & V. Ch. Pr. 513; Ferguson v. Dent, 15 Fed. 771; Clay v. Southern Ry. Co., C. C. A., 90 Fed. 472.

the cause;¹³ not by a motion for security for costs.¹⁴ After one affidavit of property has been adjudged insufficient, a second may be filed.¹⁵ In England, the counsel and solicitor assigned could not take any fee, profit, or reward of the pauper for the despatch of business, while the cause was pending and the party continued *in forma pauperis*, except paupers' fees, which were twopence a sheet for the labor of copying.¹⁶ Nor could any agreement be made for the payment of any recompense afterwards.¹⁷ For an offense in either of these respects, both the lawyer and the client were guilty of contempt of court; and the client was dispaupered, and forever disqualified from suing as a pauper in the same suit.¹⁸ When it was made to appear to the court that a pauper had sold or contracted for the benefit of his suit, or any part thereof, while the same was depending, his suit was dismissed absolutely.¹⁹ No fees except paupers' fees could be collected from the pauper, nor could costs be decreed against him,²⁰ except for scandal.²¹ In case of success, however, the court might allow him full costs. "For though he is at no costs, or but small expense, yet the counsel and clerks do not give their labor to the defendant, but to the pauper."²²

In the Federal courts, in case of success, the attorney is allowed a reasonable compensation out of the recovery.²³ The or-

¹³ *In re Mills*, 135 U. S. 263, 34 L. ed. 107; *Fuller v. Montague*, 53 Fed. 206.

¹⁴ *Woods v. Bailey*, 113 Fed. 390.

¹⁵ *Woods v. Bailey*, 113 Fed. 390.

¹⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 47.

¹⁷ *Ibid.* In New York such an agreement, in a case begun in a State court and afterwards removed to the District Court of Appeals, was held to be invalid. *Matter of Tyndall*, 117 App. Div. (N. Y.) 294. An attorney in such a case has no lien on the cause of action. *O'Flaherty v. Hamburg American Packet Co.*, 168 Fed. 411.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*; *Scatchmer v. Foulkard*, 1 Eq. Cas. Abr. 125.

²¹ *Ratray v. George*, 16 Ves. 232. See also *Murphy v. Oldis*, 2 Molloy, 475; *Richardson v. Richardson*, 5 Paige (N. Y.) 58.

²² *Scatchmer v. Foulkard*, 1 Eq. Cas. Abr. 125; *Ratray v. George*, 16 Ves. 232; *Daniell's Ch. Pr.* (2d Am. ed.) 49, 50.

²³ *Whelan v. Manhattan Ry. Co.*, 86 Fed. 219, 220; *Devore v. Delaware, L. & W. R. R. Co.* (U. S. C. C. Second Circuit); reported in *Matter of Tyndall*, 117 App. Div. (N. Y.) 294; where, after an infant plaintiff had recovered for \$21,855.80, his attorney having taken the case upon a contingent fee of 50 per cent and sued *in forma pauperis*, the attorney was allowed one-third of the recovery in addition to his disbursements.

der permitting a party to sue or defend *in forma pauperis* had to be served upon the opposite party as soon as possible, for the pauper was liable for all costs decreed against him before the service of the order.²⁴ A party could be dispaupered for improper or vexatious conduct in the suit.²⁵

§ 414. **Classification of costs.** Different principles regulate the amount of costs according as they are decreed to be paid by one party to another, or out of a fund in court.¹ In the former case costs are said to be taxed as between party and party, in the latter as between solicitor and client.²

§ 415. **Costs as between party and party.** Costs as between party and party are regulated by statute. They are the amount of the "bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials."¹

§ 416. **Attorney's fees.** The Revised Statutes fix the following sums to be taxed as attorney's fees in a bill of costs between party and party: "On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars, provided that in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law when the cause is discontinued, five dollars. For *scire facias* and other proceedings on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. For services rendered in cases removed from a District to a Circuit Court by writ of error or appeal, five dollars."¹ It has been held: that in actions by the United

²⁴ Ballard v. Catling, 2 Keen, 606.

²⁵ Wagner v. Mears, 3 Sim. 127.

§ 414. ¹ Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

² Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

§ 415. ¹ U. S. R. S., § 983. But see Spaulding v. Tucker, 2 Sawyer, 50.

§ 416. ¹ U. S. R. S., § 824. Besides the cases elsewhere cited, see Bashaw v. U. S., 47 Fed. 40. A State statute allowing an extra allowance in a partition suit was followed by the Federal court. Willard v. Serfell, 62 Fed. 625. The

States, if the Government is successful, a docket fee of forty dollars, which will be paid into the treasury, may be taxed.² Where a plaintiff recovers damages under the Anti-Trust act, he is entitled to judgment for threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."³ In an action for damages, caused by a violation of the Interstate Commerce Act,⁴ or to recover money which the Interstate Commerce Commission has ordered paid,⁵ or in a suit to enjoin the infringement of a copyright,⁶ a reasonable counsel or attorney's fee, to be fixed by the court, must be taxed and collected as part of the plaintiff's costs, if he is successful. It has been held that if a railroad company appeals or sues

question whether counsel fees stipulated for in a note or mortgage can be taxed, depends upon the local law of the State in both suits on the common-law side of the court, and suits in equity; so far as taxation against the defendant is concerned. *Bendey v. Townsend*, 109 U. S. 665, 27 L. ed. 1065; *Dodge v. Tolleys*, 144 U. S. 451, 36 L. ed. 501; *Gray v. Havermeyer*, 53 Fed. 174. See also *Fowler v. Equitable Tr. Co.*, 141 U. S. 384, 35 L. ed. 786; *Robinson v. Alabama & G. Mfg. Co.*, 51 Fed. 268; *American F. L. M. Co. v. Whaley*, 63 Fed. 743. For counsel fees out of the fund in equity cases, see *infra*, §§ 421, 422.

² U. S. v. *Southern Pac. Co.*, 172 Fed. 909; citing U. S. R. S., §§ 824, 837, Comp. St. pp. 632, 644; 29 St. at L. 179, § 17, Comp. St. p. 611.

³ Act of July 2, 1890, 26 St. at L. 209, § 7. Where the trial occupied about five days, and the plaintiff recovered a verdict for \$500, the court, upon evidence of the value of their services, awarded to his attorneys \$750. The judgment was affirmed upon appeal. *Montague & Co. v. Lowry*, 193 U. S. 38, 48, 48 L. ed. 608, 612. Where

the defendant settled an action in the State court for damages caused by the same acts that were the foundation of his suit in the court of the United States, it was held that this barred the latter suit and that neither the treble damages, nor the attorney's fees, could be therein recovered. *Clabaugh v. Southern Wholesale Grocers' Ass'n.*, 181 Fed. 706.

⁴ Act of February 4, 1887, 24 St. at L. 379, § 8, 3 Fed. St. Ann. 809, Comp. St. 3154, *Pierce Fed. Code*, § 6427. Such an item cannot, however, be included in the costs recovered by a shipper in an action against an initial carrier for loss on a connecting line. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 208, 31 Sup. Ct. 164, 55 L. ed. 167, 31 L.R.A. (N.S.) 7.

⁵ *Ibid.*, as amended by Act of June 29, 1906, Ch. 3591, § 5, 34 St. at L. 590, Comp. St. Supp. 1909, p. 1159; *Louisville & N. R. Co. v. Dickerson*, C. C. A., 191 Fed. 705.

⁶ Act of March 4, 1909, 35 St. at L. 1075, § 40, *Pierce Fed. Code Supp.*, § 1589. See §§ 150, 389, *supra*.

out a writ of error, an additional allowance for attorneys' fees in the court of review may be allowed.⁷ In all actions, suits or proceedings under the copyright law, except when brought by or against the United States, or any officer thereof, "full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs."⁸ Where, because of an unnecessary multiplication of proceedings, an extra allowance is made for the increase of costs thereby caused; no counsel fee can be for that reason allowed.⁹ The Equity Rules provide: that "the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer."¹⁰ In the absence of an express local rule upon the subject; it was held that the court may allow the costs for drawing pleadings, decrees and orders, in accordance with the State practice as authorized by statute.¹¹

A docket fee is taxed for a hearing upon an appeal,¹² and for a hearing upon an application for the writ of mandamus in the Supreme Court of the United States.¹³ It has been held that a docket fee can be taxed for each hearing, including a rehearing before the court after bill, answer, and replication have been filed,¹⁴ but not for a hearing upon a demurrer which is overruled, when the defendant has leave to answer and an answer is filed.¹⁵ When a demurrer is sustained, a docket fee is allowed.¹⁶ When a motion to remand is granted, a docket fee may

⁷ *Louisville & N. R. Co. v. Dickerson*, C. C. A., 191 Fed. 705, 712, where the attorney's fee upon the appeal was fixed at \$100.

⁸ Act of March 4, 1909, 35 St. at L. 1075, § 40, *Pierce Fed. Code Supp.*, § 1589.

⁹ *Motion Picture Patents Co. v. Yankee Film Co.*, C. C. A., 201 Fed. 63, reversing 192 Fed. 134; construing U. S. R. S., § 982, *Comp. St.* p. 706, *supra*, § 407.

¹⁰ Equity Rule 25.

¹¹ *Matheson v. Hanna-Schoelkopf*, 128 Fed. 162, where ten cents a

line for the first page and six cents a line for each subsequent page was allowed, in accordance with Pa. acts 1842, § 9, P. L. 433 and Pa. acts 1864, P. L. 775.

¹² *Kansas City, Ft. S. & Mo. Ry. Co. v. McDonald*, 60 Fed. 522; *John Shillito Co. v. McClung*, 66 Fed. 22.

¹³ *Ex parte Hughes*, 114 U. S. 548, 29 L. ed. 281.

¹⁴ *Am. D. R. B. Co. v. Sheldon*, 28 Fed. 217; *Peck S. & W. Co. v. Fray*, 92 Fed. 947.

¹⁵ *McLean v. Clark*, 23 Fed. 861.

¹⁶ *Price v. Coleman*, 22 Fed. 694.

be allowed.¹⁷ To constitute "a final hearing in equity or admiralty," there must be a hearing of the cause upon its merits.¹⁸ No docket fee is allowed for a hearing upon an interlocutory application by a party to the suit.¹⁹ When a bill is dismissed without a hearing no docket fee was formerly allowed.²⁰ When a bill is taken as confessed, there must be a hearing before the decree, and consequently the complainant is entitled to tax a docket fee.²¹ It has been held that no docket fee will be allowed on the dismissal of a bill for want of prosecution,²² nor when judgment is entered upon an offer of judgment before trial;²³ nor for a reference upon a motion for an interlocutory injunction;²⁴ nor for a hearing upon a petition for leave to intervene;²⁵ nor when the complainant has the bill dismissed upon his own motion before a final hearing;²⁶ nor for a trial at which the jury disagreed;²⁷ but that two docket fees are taxable in admiralty when a libel and cross-libel are tried to-

¹⁷ *Josslyn v. Phillips*, 27 Fed. 481. In *W. D. Michigan*, \$20, *Josslyn v. Phillips*, 27 Fed. 481. In *D. South Carolina*, \$10, *Riser v. Southern Ry. Co.*, 116 Fed. 1014; *Acker v. Charleston & W. C. Ry. Co.*, 190 Fed. 288. In *D. Indiana*, a docket fee was denied; and such is said to be the practice throughout the Seventh Circuit. *Smith v. Western Union Tel. Co.*, 81 Fed. 242.

¹⁸ *Wooster v. Handy*, 23 Fed. 49; *Goodyear D. V. Co. v. Osgood*, 2 B. & A. Pat. Cas. 529; *Coy v. Perkins*, 13 Fed. 111; *Yale Lock Mfg. Co. v. Colvin*, 14 Fed. 269. *Contra*, *Goodyear v. Sawyer*, 17 Fed. 2.

¹⁹ *Doughty v. West B. & C. Mfg. Co.*, 8 Blatchf. 107; *Central Tr. Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. 684.

²⁰ *Wooster v. Handy*, 23 Fed. 49; *Goodyear D. V. Co. v. Osgood*, 2 B. & A. Pat. Cas. 529; *Coy v. Perkins*, 13 Fed. 111; *Yale L. Mfg. Co. v. Colvin*, 14 Fed. 269. *Contra*, *Goodyear v. Sawyer*, 17 Fed. 2.

²¹ *Andrews v. Cole*, 20 Fed. 410. Fed. Prac. Vol. II.—82.

²² *Wooster v. Handy*, 23 Fed. 49; *Wighton v. Brainard*, 28 Fed. 29.

²³ *Swan v. Wiley, Harker & Camp Co.*, 161 Fed. 236. The prevailing party may tax the disbursements necessarily made in order to enter judgment upon the offer. *Ibid*.

²⁴ *Doughty v. W. B. & C. Mfg. Co.*, 8 Blatchf. 107.

²⁵ *Central Tr. Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 684; *Mo. Pac. Ry. Co. v. Texas & P. Ry. Co.*, 38 Fed. 775. But see *U. S. v. Payne*, 147 U. S. 687, 37 L. ed. 332. *Cf. U. S. v. King*, 147 U. S. 676, 37 L. ed. 328.

²⁶ *Coy v. Perkins*, 13 Fed. 111; *Yale Lock Mfg. Co. v. Colvin*, 14 Fed. 269; *Wooster v. Handy*, 23 Fed. 49; *Cahn v. Qung Wah Lung*, 28 Fed. 396; *Ryan v. Gould*, 32 Fed. 754; *N. Y. B. & B. Co. v. N. J. C. S. & R. Co.*, 32 Fed. 755. *Contra*, *Goodyear v. Sawyer*, 17 Fed. 2.

²⁷ *Cleaver v. Traders' Ins. Co.*, 40 Fed. 863; *Dedekam v. Vose*, 3 Blatchf. 77, 153; *Troy I. & N. Fac-*

gether.²⁸ In a suit to enforce the claims of materialmen against the surety upon a bond of a contractor,²⁹ and upon a hearing before a master of disputed claims against receivers,³⁰ each claimant who appears by a separate attorney is entitled to a docket fee. In a proceeding in admiralty for the limitation of liability, where there has been an appraisal and a stipulation for value, the petitioner is entitled to a single docket fee;³¹ and he may deduct from the fund the expenses of the administration, but not the cost of procuring the stipulation, nor the expense of the stipulation or the appraisal.³² In such proceeding, each person claiming damages and recovering the same is entitled to a separate proctor's fee, payable by the stipulators for costs, and not out of the fund³³ unless the same proctor appears for several claimants, in which case his clients can tax but one docket.³⁴ It has been held that, when the costs in admiralty are divided, the respondent must contribute to the payment of the libellant's proctor's fees; but that the libellant need not pay any part of the respondent's proctor's fees.³⁵ The docket fee, it has been said, "is taxable whenever the trial is entered upon by the swearing of a jury in a common-law case, or by the introduction of testimony or the final opening of the argument upon a final hearing in equity or admiralty. The fee is not made by the statute to depend upon a judgment or decree, but is taxable on a trial or final hearing. As the labor for which the docket fee is supposed to be a compensation is

tory v. Corning, 7 Blatchf. 16; Strafer v. Carr, 6 Fed. 466; Huntress v. Town of Epsom, 15 Fed. 732. But see Schmieder v. Barney, 19 Blatchf. 143; s. c., 7 Fed. 451; Wooster v. Handy, 23 Fed. 49. It was formerly held that in such a case a district attorney might collect the docket fee from the United States. Van Hoorebeke v. U. S., 46 Fed. 456.

²⁸ British & South A. S. N. Co. v. Delaware, L. & W. R. Co., 195 Fed. 984.

²⁹ Title Guaranty & Tr. Co. v. Crane Co., 219 U. S. 24, 55 L. ed. 72.

³⁰ Ely v. Van Kannel Revolving Door Co., 184 Fed. 459.

³¹ *Re* Excelsior Coal Co., 136 Fed. 271; aff'd. C. C. A., 112 Fed. 724, 74 C. C. A. 56. But see Norwich & N. Y. Transp. Co., 10 Benedict, 193, 18 Fed. Cas. No. 10,361.

³² *Re* Excelsior Coal Co., 136 Fed. 271; aff'd. C. C. A., 112 Fed. 724, 74 C. C. A. 56.

³³ The L. F. Munson, 127 Fed. 767; The Bendcliff, 158 Fed. 377.

³⁴ Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., C. C. A., 197 Fed. 703.

³⁵ The L. F. Munson, 127 Fed. 767.

performed on or before the trial, equitably the party ought not to lose the benefit of it by a discontinuance entered after the trial or hearing has begun."³⁶ In a case where, after an interlocutory decree requiring the defendant to account, the plaintiff moved for a dismissal of his bill, he was obliged to pay the defendant a docket fee as well as other costs.³⁷ Where several libels are consolidated for trial, but one docket fee can be taxed.³⁸ Where several suits by the same plaintiffs against different defendants were submitted and tried together before referees, a docket fee in each case was allowed.³⁹ It has been said that no docket fee should be allowed when the attorney who appeared and acted for the successful party throughout the case was not admitted to practice in the court where the case was pending nor admitted to practice in the Supreme Court of the United States before the filing of the general replication.⁴⁰ No docket fee is allowed to a party, not an attorney, who conducts his own case.⁴¹

By analogy, five dollars for a discontinuance is taxed in equity in the Second Circuit.⁴² Where, pending a jury trial, a case was settled by stipulation before its submission, the fee for discontinuance was not allowed.⁴³

The fee for taking a deposition is allowed for a deposition taken *de bene esse*,⁴⁴ or before an examiner,⁴⁵ or, according to some authorities, before a master,⁴⁶ for use on the final hearing. It has been held: that the fee cannot be taxed for the examination of a witness before a master upon a reference to compute damages and profits;⁴⁸ nor for a deposition taken for

³⁶ *The Bay City*, 3 Fed. 47, per Mr. Justice Brown. *Contra*, *Howler v. Chicago, M. & St. P. Ry. Co.*, 166 Fed. 828.

³⁷ *Goodyear v. Sawyer*, 17 Fed. 2.

³⁸ *The Stanley Dollar, C. C. A.*, 160 Fed. 911.

³⁹ *Switzer v. Home Ins. Co.*, 46 Fed. 50.

⁴⁰ *Goodyear D. V. Co. v. Osgood*, 13 Off. Gaz. 325.

⁴¹ *Gorse v. Parker*, 36 Fed. 840.

⁴² *Kaempfer v. Taylor*, 78 Fed. 795.

⁴³ *Howler v. Chicago, M. & St. P. Ry. Co.*, 166 Fed. 828.

⁴⁴ *Wooster v. Handy*, 23 Fed. 49; *Missouri v. Illinois*, 202 U. S. 598, 50 L. ed. 1160; *Ingham v. Pierce*, 37 Fed. 647.

⁴⁵ *Missouri v. Illinois*, 202 U. S. 598, 50 L. ed. 1160; *Hake v. Brown*, 44 Fed. 734.

⁴⁶ *Ferguson v. Dent*, 46 Fed. 88; *Matheson v. Hanna-Schoelkopf Co.*, 128 Fed. 162.

⁴⁸ *Re Strauss v. Meyer*, 22 Fed. 467; *Tuck v. Olds*, 29 Fed. 883; *Mo.*

use upon an interlocutory application, such as an application for leave to intervene or a hearing upon the intervenor's claim,⁴⁹ or an application for an interlocutory injunction,⁵⁰ or an application to punish a person for a contempt,⁵¹ unless it is subsequently put in evidence at the hearing of the cause upon issue joined,⁵² nor for oral testimony in court.⁵³ Where witnesses are recalled upon a subsequent day for further examination, an additional attorney's fee cannot be charged for such second deposition.⁵⁴ The authorities conflict as to whether a party can tax the costs of a deposition taken in good faith which was not offered in evidence upon the trial or hearing.⁵⁵ When the testimony of several witnesses is taken by the same officer and returned to court under the same enclosure, the testimony of each witness is considered as a separate deposition.⁵⁶ As to the taxation of the fee for taking a deposition which is admitted in evidence in several suits, the decisions are not harmonious. It seems settled that when, by stipulation, a deposition is taken once for use in several suits, in each of which it is entitled, and in each of which the witness is sworn, a deposition fee may be taxed in each suit.⁵⁷ Where, however, a deposition taken in one suit is by stipulation read in another, the rule, except in the district of Tennessee⁵⁸ and perhaps in that

Pac. Ry. Co. v. Texas & P. Ry. Co., 38 Fed. 775.

⁴⁹ *Central T. Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 684; *Mo. Pac. Ry. Co. v. Texas & P. Ry. Co.*, 38 Fed. 775.

⁵⁰ *Simpson v. Brooks*, 3 Blatchf. 456.

⁵¹ *Spill v. Celluloid M. Co.*, 28 Fed. 870.

⁵² *Indianapolis W. Co. v. American S. B. Co.*, 65 Fed. 534.

⁵³ *Troy I. & N. Factory v. Corning*, 7 Blatchf. 16; *Ericksson v. Grandfield*, 193 Fed. 296.

⁵⁴ *Keasbey & Mattison Co. v. Am. Magnesia & Covering Co.*, 149 Fed. 439.

⁵⁵ It was held that he can, in *Sloss I. & S. Co. v. South Carolina*

& G. R. Co., 75 Fed. 106; *Hunter v. International Ry. Imp. Co.*, 28 Fed. 842; *Nead v. Millersburg H. W. Co.*, 79 Fed. 129. *Contra*, *Pinson v. Atchison, T. & S. F. R. Co.*, 54 Fed. 464; *The Persiana*, 158 Fed. 912.

⁵⁶ *Broyles v. Buck*, 37 Fed. 137.

⁵⁷ *Wooster v. Handy*, 23 Fed. 49, 63; *Archer v. Hartford F. Ins. Co.*, 31 Fed. 660; *Green v. French*, 5 N. J. L. J. 228; *L. E. Waterman Co. v. Lockwood*, 128 Fed. 174; *British & South Am. Steam Nav. Co. v. Delaware, L. & W. R. Co.*, 195 Fed. 984.

⁵⁸ *Jerman v. Stewart*, 12 Fed. 271; *Archer v. Hartford F. Ins. Co.*, 31 Fed. 660.

of New Jersey,⁵⁹ would seem to be that the fee can only be taxed in the first suit.⁶⁰ The expenses of taking the deposition cannot be deducted from the attorney's fee.⁶¹ It has been held that the fee cannot be taxed in favor of a party who did not appear by an attorney at the taking of the deposition.⁶² The attorney's costs belong to the party, not to his attorney, and proceedings to collect them should be taken in the name of the party.⁶³ In the absence of a special agreement, however, the value of the attorney's services to his client will be considered as worth at least the taxable costs.⁶⁴

§ 417. Clerk's fees. The fees of the clerk of the Supreme Court are fixed by rule as follows: "For docketing a case and filing and indorsing the transcript of the record, five dollars. For entering an appearance, twenty-five cents. For entering a continuance, twenty-five cents. For filing a motion, order, or other paper, twenty-five cents. For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words. For transferring each case to a subsequent docket and indexing the same, one dollar. For entering a judgment or decree, one dollar. For every search of the records of the court, one dollar. For a certificate

⁵⁹ *Green v. French*, 5 N. J. L. J. 228.

⁶⁰ *Wooster v. Handy*, 23 Fed. 49, 58; *Am. Diamond R. B. Co. v. Sheldon*, 28 Fed. 217; *Winegar v. Cahn*, 29 Fed. 676; *Carey v. Lovell Mfg. Co.*, 39 Fed. 163; *British & South Am. Steam Nav. Co. v. Delaware, L. & W. R. Co.*, 195 Fed. 984.

⁶¹ *Broyles v. Buck*, 37 Fed. 137.

⁶² *Winegar v. Cahn*, 29 Fed. 676.

⁶³ *Broyles v. Buck*, 37 Fed. 137.

⁶⁴ *Celluloid Mfg. Co. v. Chandler*, 27 Fed. 9. By the acts of May 28, 1896 (29 St. at L. 180, 181, 186), and March 3, 1905 (33 St. at L. 1156, 1207), the compensation of all the district attorneys of the United States, except in the District of Columbia, is limited to salaries therein fixed. Formerly the district attorney for the southern District of

New York received compensation in addition to his salary in prize cases (U. S. R. S., §§ 4646, 4647; *The Anna, Blatchf. Prize Cases*, 337) and also when he appeared by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue in any suit against such officer for any act done by him, or for the recovery of any money received by him and paid into the Treasury, in the performance of his official duties (U. S. R. S., § 827); and also for services under the direction of the Secretary of the Treasury and the Commissioner of Internal Revenue in suits or proceedings to recover fines, penalties and forfeitures (U. S. R. S., § 838; *Re District Attorney*, 23 Fed. 26; *U. S. v. Bashaw*, 152 U. S. 436, 38 L. ed. 505).

and seal, two dollars. For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid. For an admission to the bar and certificate under seal, ten dollars. For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be five cents per folio. For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing. For issuing a writ of error and accompanying papers, five dollars. For a mandate or other process, five dollars. For filing briefs, five dollars for each party appearing. For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.”¹ Upon moneys paid into court the clerk is allowed a commission of one per centum.² The compensation of the clerk of the Supreme Court is limited to six thousand dollars a year. The balance of his fees and disbursements over and above his necessary clerk hire and incidental expenses, as certified by the Supreme Court or a justice thereof appointed by it for the purpose, must be paid into the Treasury.³ “1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk, for the payment of his fees, as he may require or otherwise satisfy him in that behalf. “2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, the case shall be dismissed.

§ 417. ¹ Supreme Court Rule ³ 22 St. at L. 603. See U. S. R.
24: 22 St. at L., ch. 443, p. 631. S., § 844.

² Florida v. Anderson, 91 U. S.
667, 23 L. ed. 290.

3. Upon payment by either party of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and to the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance or dismissal, with costs, the amount of the cost of printing the record, and of the clerk's fee, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, and attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees."⁴ In cases of dismissal for want of jurisdiction, such fees are taxed against the party bringing the cause into court, unless the court otherwise directs.⁵ When a party has printed the transcript of the record at his own expense, he may docket the case without giving security for the clerk's fees;⁶ but before the printed copies are delivered to the Justices or the parties for use on the final hearing, or on any motion in the progress of the cause, the clerk can require the payment of

⁴ Supreme Court Rule 10.

⁶ Supreme Court Rule 10.

⁵ *Re Amendments to Rules*, 108
U. S. 1, 4, 27 L. ed. 629, 630.

fifteen cents a folio for attending to the correctness and proper indexing of the printed copies of the record.⁷ The same practice prevails when the appellant or plaintiff in error has furnished the clerk with twenty-five copies of part of the record, which was used in the court below, State or Federal. If the clerk demand the fees in advance, they must be paid.⁸ When the clerk has no security for fees due to him from a party entitled to a mandate, he may withhold the mandate until his fees are paid, or he is otherwise satisfied in that behalf.⁹

The salaries of the clerks of the Circuit Courts of Appeals are three thousand dollars a year, payable in equal quarterly instalments.¹⁰ They must account for and pay to the United States the fees collected by them.¹¹ It has been held that they may retain for such fees five hundred dollars a year in addition to their salary.¹² Their fees have been fixed by the Supreme Court under statutory authority,¹³ as follows: "Docketing a case and filing the record, five dollars. Entering an appearance, twenty-five cents. Transferring a case to the printed calendar, one dollar. Entering a continuance, twenty-five cents. Filing a motion, order or other paper, twenty-five cents. Entering any rule or making or copying any record or other paper, for each one hundred words, twenty cents. Entering a judgment or decree, one dollar. Every search of the records of the court and certifying the same, one dollar. Affixing a certificate and a seal to any paper, one dollar. Receiving, keeping and paying money, in pursuance to any statute or order of court, one per cent. on the amount so received, kept and paid. Preparing the record for the printer, indexing same, supervising and printing and distributing the copies, for each printed page of the record and index, twenty-five cents. Making a manuscript copy of the record, when required by the rules, for each one hundred words, but nothing in addition for supervising the printing, twenty cents. Issuing a writ of error and accompanying papers or a mandate or other process, five

⁷ *Bean v. Patterson*, 110 U. S. 401, 28 L. ed. 190.

¹⁰ 26 St. at L. 826.

¹¹ *Ibid.*

⁸ *Steever v. Rickman*, 109 U. S. 74, 27 L. ed. 861.

¹² *Morton v. U. S.*, 59 Fed. 349; *U. S. v. Morton*, C. C. A., 65 Fed.

⁹ *Osborn v. U. S.*, 131 U. S. cxxxvii, 23 L. ed. 871.

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¹³ 29 St. at L. 536.

dollars. Filing briefs for each party appearing, five dollars. Copy of an opinion of the court, certified under seal, for each printed page, but not to exceed five dollars in the whole for any copy, one dollar.”¹⁴ “In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals the appellant or plaintiff in error shall cause to be ment therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: *Provided*, That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required.”¹⁵ “In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ of error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below

¹⁴ 168 U. S. 720, 150 Fed. cxxxix.

¹⁵ July 10, 1911, 36 St. at L. 901.

in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required."¹⁶ It has been held in the Seventh Circuit that this statute applies to appeals from adjudication in bankruptcy,¹⁷ and to a decree for an injunction and an accounting after a hearing,¹⁸ but not to an order or decree for a preliminary injunction granted upon motion and affidavits.¹⁹ In the same circuit it has also been held, that this abolishes the fee of the Circuit Court of Appeals, of twenty-five cents a folio for preparing an index and supervising the printing of the record.²⁰

"It is now here ordered by this court that the following table of fees to be charged in the United States Court of Customs Appeals be, and the same is hereby, adopted and approved, viz.: The fees of the clerk of the court shall be six dollars in each case. No fee shall be exacted in cases on appeal to other Federal courts and transferred to this court for final determination. There shall be paid for each certificate of admission of an attorney to practice one dollar, and for making or copying any record or other paper and certifying the same fifteen cents per folio of one hundred words. An amount sufficient to cover the cost of printing the record shall be deposited with the clerk on his demand, provided that when an appeal is

¹⁶ Ibid., § 2. See Toledo, St. L. & K. C. Ry. Co. v. Continental Tr. Co., 176 U. S. 219, 44 L. ed. 442.

¹⁷ Smith v. Farbenfabriken of Elberfeld Co., C. C. A., 197 Fed. 894.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid. It was held otherwise in the Second Circuit where the making of an index by the clerk is required and he is allowed 25 cents a folio for that labor. Colt's Patent Firearms Mfg. Co. v. N. Y. S. Goods Co., C. C. A., 186 Fed. 625.

taken by the United States no payment of fees shall be required. In all other cases fees shall be paid in advance. It is further ordered that the fees and costs to be allowed to the marshal shall be, and hereby are, fixed the same as those allowed to the marshal of the Supreme Court of the United States."²¹

The fees of the clerks of the District Courts are fixed by statute as follows: "For issuing and entering every process, commission, summons, capias, execution, warrant, attachment or other writ, except a writ of venire, or a summons or subpoena for a witness, one dollar."²² For issuing a writ of summons or subpoena, twenty-five cents.²³ For filing and entering every declaration, plea, or other paper, ten cents.²⁴ For ad-

²¹ Order of U. S. C. C., May 31, 1910, 217 U. S. 611.

²² U. S. R. S., § 828. See Goodrich v. U. S., 47 Fed. 267; Jones v. U. S., 39 Fed. 410.

²³ U. S. R. S., § 828. See Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470; U. S. v. Van Duzee, 140 U. S. 169, 176, 35 L. ed. 399, 401; Jones v. U. S., 39 Fed. 410.

²⁴ U. S. R. S., § 828. So far as the clerk's fees are concerned, no paper is considered filed unless it has the proper indorsement by the clerk; and the mere placing of a paper in the court papers is no filing. Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470, 484; Henry Amy & Co. v. Shelby County, 1 Flp. 104. But the failure of the clerk to mark as filed a paper left in his office for that purpose cannot prejudice the party who has given it to him. Phinney v. Mutual Life Ins. Co., 178 U. S. 327, 336, 44 L. ed. 1088, 1092. When it is necessary to enter on the calendar a note of such filing, an additional fee of fifteen cents is allowed. Erwin v. U. S. 2 L.R.A. 229, 37 Fed. 470, 484. The clerk is not entitled to a fee for filing vouchers attached to an ac-

count. U. S. v. Jones, 147 U. S. 672, 37 L. ed. 325; U. S. v. Payne, 147 U. S. 687, 37 L. ed. 332. See U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; U. S. v. McCandless, 147 U. S. 692, 37 L. ed. 334; U. S. v. Taylor, 147 U. S. 695, 37 L. ed. 335; Goodrich v. U. S., 47 Fed. 267; Dimmick v. U. S., 36 Fed. 82. If two or more depositions are embraced in a single paper or a series of sheets attached together they form but a single paper within the meaning of the law. U. S. v. Barber, 140 U. S. 164, 168, 35 L. ed. 396, 398, per Mr. Justice Brown. It has been held that where the statutes are silent as to what papers shall be filed, that rests in the discretion of the judge of the court of first instance and his decision will not be reviewed upon appeal. There the clerk, under the direction of the judge, filed separately 15,621 vouchers filed with the reports of receivers, and charged 10c apiece, in the aggregate \$1,562.10, for such filing. The judge overruled the objection of the parties that the vouchers should not be filed, or, if filed since they were in bundles, should be filed in a bundle as one

ministering an oath or affirmation, except to a juror, ten cents.²⁵ For taking an acknowledgment, twenty-five cents.²⁶ For taking and certifying depositions to file, twenty cents for each folio of one hundred words.²⁷ For a copy of such deposition furnished to a party on request, ten cents a folio.²⁸ A party may tax the fee paid for a copy of his own deposition, for use in printing the evidence, as required by a rule.²⁹ "For entering any return, rule, order, continuance, judgment, decree, or cognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents."³⁰ This fee is

paper. *Pennsylvania Co. for Insurance etc., v. Jacksonville, T. & K. W. Ry. Co.*, 66 Fed. 421.

²⁵ U. S. R. S., § 828. See U. S. v. Taylor, 147 U. S. 695, 37 L. ed. 335; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; Fuller v. U. S., 58 Fed. 329.

²⁶ U. S. R. S., § 828; U. S. v. Barber, 140 U. S. 17, 35 L. ed. 398.

²⁷ U. S. R. S., § 828. Where a suit is voluntarily dismissed by the complainant, without a submission or hearing, on a settlement of the case at complainant's cost, with consent of the defendant and the attorneys of both parties, the solicitor's fees for taking depositions are not allowable; but the clerk's fees are a proper charge under a decree dismissing the case at complainant's costs. *Cahn v. Qung Wah Lung*, 28 Fed. 396.

²⁸ U. S. R. S., § 828.

²⁹ *Brewster v. Shuler*, 38 Fed. 549; U. S. v. Wilson, 193 Fed. 1007.

³⁰ U. S. R. S., § 828. See *Erwin v. U. S.*, 2 L.R.A. 229, 37 Fed. 470. Where the number of words is less than one hundred, they are counted a folio; and as such entry is, in fact, a record, it was held that the departmental construction is the proper one, which gives the clerk ten cents for filing a paper,

and fifteen cents for the record entry in the calendar. *Amy v. Shelby County*, 1 Flip. 104. But see U. S. v. Kurtz, 164 U. S. 49, 41 L. ed. 346. A judgment is an order of the court within the meaning of the fee bill. *Blake v. Hawkins*, 19 Fed. 204. See *Davis v. U. S.*, 45 Fed. 162; *Goodrich v. U. S.*, 42 Fed. 392; U. S. v. Taylor, 147 U. S. 696, 37 L. ed. 336; U. S. v. Payne, 147 U. S. 687, 37 L. ed. 332; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; *Marvin v. U. S.*, 44 Fed. 405; *Erwin v. U. S.*, 2 L.R.A. 229, 37 Fed. 470; *Jones v. U. S.*, 39 Fed. 410; U. S. v. Converse, 63 Fed. 423; *Fuller v. U. S.*, 58 Fed. 329. The clerk of the United States District Court for the District of New Jersey is entitled to collect from the plaintiff, in an action at law, fees for recording the proceedings and judgments, therein in favor of plaintiff; because U. S. R. S., § 914, provides that the pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty, in the District Courts of the United States, shall conform as nearly as may be to the forms and modes of procedure in like causes in the States where such courts are held, and § 76 of the New Jersey General Statutes provides that

also given for making a return to the court of review.³¹ Upon the admission of an attorney to the bar, not more than one dollar.³² The clerk may charge fees in an equity cause, as to absent defendants, as to whom the case is continued.³³ Where a case, after being referred to an auditor, is, with the sanction of the court, settled by the parties; and entry made, "Dismissed, at defendant's costs by consent," the process and pleadings in the State court, together with the proceedings for removal sent up in the transcript, and the proceedings in the Federal court, should be entered upon the final record; and the clerk may properly charge fifteen cents per folio for each entry.³⁴ "For a copy of any entry or record, or of any paper on file, for each folio, ten cents"³⁵ For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony is given three dollars.³⁶ For making dockets and indexing, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars."³⁷ It has been held in the Ninth Circuit that the petitioner in an application for the writ of *habeas corpus* may be obliged to pay eleven dollars

when any civil action shall have been determined, the clerk of the court shall enter all the proceedings, including the judgment, in a book of records to be kept for that purpose. *Morrison v. Bernard's Tp.*, 35 Fed. 400.

³¹ *Mohrstadt v. Mutual Life Ins. Co.*, 145 Fed. 751; *Hoystradt v. Delaware, L. & W. R. R.*, 192 Fed. 880. Where an appellant has filed a *supersedeas* bond, the clerk cannot, as a condition of his certifying and forwarding the transcript, require him to pay the fees which were due to him and the marshal before the appeal. *Jennings v. Johnson*, C. C. A., 148 Fed. 337.

³² 32 St. at L. 476.

³³ *Ex parte Lee*, 4 Cranch, C. C. 197.

³⁴ *Blain v. Home Ins. Co.*, 30 Fed. 667.

³⁵ U. S. R. S., § 828. The clerk is entitled to ten and not to fifteen cents per folio for transcripts of a record. A transcript is a copy. *Cavender v. Cavender*, 3 McCrary, 383. See *Erwin v. U. S.*, 2 L.R.A. 229, 37 Fed. 470, 490; *Jones v. U. S.*, 39 Fed. 410; *U. S. v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399; *U. S. v. McCandless*, 147 U. S. 692, 37 L. ed. 334; *U. S. v. Taylor*, 147 U. S. 695, 37 L. ed. 335.

³⁶ U. S. R. S., § 828. See *U. S. v. Payne*, 147 U. S. 687, 37 L. ed. 332; *U. S. v. King*, 147 U. S. 676, 37 L. ed. 328; *U. S. v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399; *U. S. v. McCandless*, 147 U. S. 692, 37 L. ed. 334; *Erwin v. U. S.*, 2 L.R.A. 229, 37 Fed. 470.

³⁷ U. S. R. S., § 828.

for all services in the proceedings; but that the court has discretion to allow no costs or fees in such a case.³⁸ "For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar."³⁹ For making dockets and taxing costs, in cases removed by writ of error, or appeal, one dollar.⁴⁰ For affixing the seal of the court to any instrument, when required, twenty cents.⁴¹ For every search for any particular mortgage, judgment, or other lien, fifteen cents.⁴² For searching the record of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made."⁴³ As the statutes do not expressly provide for compensation to the clerk searching for petitions in bankruptcy, it has been held that a reasonable compensation for such services is fifteen cents for each name against which search is made.⁴⁴ The clerk of the District Court, instead of certifying the result of a search for liens on the original requisition delivered to him, may, and perhaps should, file such requisition, and give the certificate of the result of the search, on another paper. A charge of ten cents for filing such paper is proper,⁴⁵ and so also is a charge of fifteen cents for each person against whom a search is required to be made, as compensation for making the search, and for the act of signing the certificate and

³⁸ *Re Moy Chee Kee*, 33 Fed. 377.

³⁹ U. S. R. S., § 828; U. S. v. Kurtz, 164 U. S. 49, 41 L. ed. 346; U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; *Van Duzee v. U. S.*, 41 Fed. 571.

⁴⁰ U. S. R. S., § 828. The clerk's fee of one dollar for filing the note of issue when placing an appeal in admiralty on the calendar is taxable, and the clerk may charge for including the evidence in the record on the final decree in admiralty. *The Alice Tainter*, 14 Blatchf. 225, 227.

⁴¹ U. S. R. S., § 828. See *Taylor*

v. U. S., 45 Fed. 531; *U. S. v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399; *Marvin v. U. S.*, 44 Fed. 405; *Fuller v. U. S.*, 58 Fed. 329.

⁴² U. S. R. S., § 828.

⁴³ U. S. R. S., § 828; *Re Woodbury*, 7 Fed. 705; *Marvin v. U. S.*, 44 Fed. 405. It has been held that the clerk is liable for the damages which are the proximate result of a negligent search by him. *Selover v. Sheardown*, 73 Minn. 393, 72 Am. St. Rep. 627; s. c., 76 N. W. 50.

⁴⁴ *Matter of Vermeule*, 10 Ben. 1.

⁴⁵ *Ex parte Woodbury*, 7 Fed. 705.

certifying the result.⁴⁶ A compensation of fifteen cents per folio for making the certificate is proper; but not a charge for affixing the seal of the court to such certificate, unless required.⁴⁷ "For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid."⁴⁸ For traveling from the office of clerk where he is required to reside to the place of holding any court as required by law to be held, five cents a mile for going, and five cents a mile for returning, and five

⁴⁶ *Ibid*.

⁴⁷ *Ex parte* Woodbury, 7 Fed. 705; *U. S. v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399.

⁴⁸ U. S. R. S., § 828. In California two per centum. U. S. R. S., § 840; *U. S. v. Walters*, 51 Fed. 896. It has been held that these commissions, when due out of a fund in the hands of a public officer, must be paid in the first instance into the treasury. *U. S. v. Wolters*, 51 Fed. 896. *Contra*, *U. S. v. Cigars*, 2 Fed. 494. This charge has been held to include money collected by the marshal on executions. *Fagan v. Cullen*, 28 Fed. 843. Where an assignee in bankruptcy files a bill in the Circuit Court to settle conflicting claims to the proceeds of a sale, it is not his duty to pay the proceeds into the registry of the court; and consequently the clerk is not entitled to commissions on such money. *Leach v. Kay*, 2 Flip. C. C. 590. The clerk is not entitled to commissions upon money paid into the registry of the court, under a stipulation in a prize cause, instead of being deposited with the assistant treasurer as provided by U. S. R. S., § 4626. *The Adula*, 127 Fed. 849. It has been held that the fact that the money is subject to the decree of the court, it not be-

ing in the court's registry, is not enough to give the clerk a right to commissions. *Ex parte* Plitt, 2 Wall. Jr. 453. But a subsequent decision holds that money deposited in a bank, under a decree of the court, and subject to its order, is within the meaning of chapter 20 of the acts of 1793, which provides that the clerk shall be entitled to a percentage on "all money deposited in court." *Ex parte* Prescott, 2 Gall. 146. He is not entitled to this commission upon a fund paid by a master into a United States depository, subject to the order of the court. *Michigan Cent. R. Co. v. Harsha*, C. C. A., 134 Fed. 217. Nor upon funds paid to and disbursed by court commissioners; *S. Morgan Smith Co. v. Rockingham Power Co.*, 173 Fed. 923; or by receivers who have deposited the same subject to the order of the court in a bank which is not a United States depository. *Edwards v. Bay State Gas Co.*, 177 Fed. 573. Railroad bonds deposited in a Circuit Court as collateral security by its order, and kept in a bank vault to which the clerk kept the key, are not "money," and the clerk is not entitled to a commission thereon, under Rev. St. § 828 (*U. S. Comp. St.* 1901, p. 635), when by order of the court he takes them

dollars a day for his attendance on the court while actually in session."⁴⁹

In bankruptcy proceedings clerks shall respectively receive as full compensation for their service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.⁵⁰ They also receive for certificates of search for petitions and discharges in bankruptcy the same fees as for certificates for judgments.⁵¹ It has been held that the taxable costs earned by clerks, marshals and commissioners are their individual property, not that of the parties to the cause,⁵² and that the parties cannot by an agreement as to set-off, or otherwise, deprive the clerk or other creditors of any lien or right to collect their paid fees.⁵³ It has been said: that the legal title to costs, including the fees of clerks and other officers, is in the successful party; but that he holds

from the bank and surrenders them to the depositor; nor is there any authority outside of the statute for the allowance of such a commission. *Ibid.* The money must either actually or constructively pass through the clerk's hands. *Leech v. Kay*, 4 Fed. 72. Money received by a master in chancery in payment for property sold upon the foreclosure of a mortgage, may, in pursuance of section 995 of the Revised Statutes, be deposited with a designated depository of the United States, and the clerk is then entitled to his commissions thereon. *Thomas v. Chicago & C. S. Ry. Co.*, 37 Fed. 548. But money paid by a bidder at such a sale as security for his compliance with his bid may by order of the court be paid in a certified check on a bank, and deposited in a trust company, and then the clerk is not entitled to a commission thereon. *Easton v. H. & T. C. Ry. Co.*, 44 Fed. 718. So a clerk who receives, keeps, and pays out money under a judgment is entitled to a commission of one per cent. on the amount

so received the same to be paid by the defendant as a part of the costs. *Blake v. Hawkins*, 19 Fed. 204. The court may allow the clerk extra compensation to the amount of one-half of one per cent, for transferring a large fund from the depository of the mint to a trust company. *The Advance*, 60 Fed. 422.

⁴⁹ U. S. R. S., § 828. But see 24 St. at L. 253, 541; *Erwin v. U. S.* 2 L.R.A. 229, 37 Fed. 470; *Morrow v. U. S.*, 44 Fed. 405; *U. S. v. Pitman*, 147 U. S. 669, 37 L. ed. 324; *Goodrich v. U. S.*, 35 Fed. 193; *Pleasants v. U. S.*, 35 Fed. 770; *Jones v. U. S.*, 21 Ct. Cl. 1; *U. S. v. King*, 147 U. S. 676, 37 L. ed. 328. See also *U. S. R. S.*, §§ 839, 846; 18 St. at L. 333; *U. S. v. Hill*, 120 U. S. 169, 30 L. ed. 627.

⁵⁰ 30 St. at L. 544, 559, § 52.

⁵¹ 32 St. at L. 419, 476.

⁵² *Aiken v. Smith*, C. C. A., 57 Fed. 423, 425; *Hoysradt v. Delaware, L. & W. R. R.*, 182 Fed. 880.

⁵³ *Aiken v. Smith*, C. C. A., 57 Fed. 423, 425.

the same as trustee, and the officers may recover them in his name;⁵⁴ and where the clerk, through a mistake, collected less than his legal fees from a party who afterwards succeeded in the case, he subsequently was allowed to collect the same from the unsuccessful party, but not from him who had originally requested the service.⁵⁵

§ 418. **Marshal's fees.** "The marshal of the Supreme Court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons, or subpoena for a witness, one dollar for each person on whom such service may be made. His fees for all other services shall be the same as are herein allowed to other marshals; but he shall pay into the Treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the Attorney-General."

The fees of the other United States marshals, which are paid by private litigants, are fixed by statute as follows: "For service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpoena for a witness, two dollars for each person on whom service is made."² The marshal has a right to demand in advance the payment of fees for the service of process,³ and may have an attachment to enforce payment against suitors in the court,⁴ or against an indorser on the writ who, by local law, is liable to respond for the costs.⁵ "For the keeping of personal property attached on mesne process, such compensation as the court, on petition setting forth the facts under oath, may allow."⁶ For

⁵⁴ *Hoystradt v. Delaware, L. & W. R.*, 182 Fed. 880.

⁵⁵ *Ibid.*

§ 418. 1 U. S. R. S., § 832.

² U. S. R. S., § 829.

³ *Ray v. Knowlton*, 11 Biss. C. C. 360; *Duy v. Knowlton*, 14 Fed. 107.

⁴ *Anonymous*, 2 Gall. 101.

⁵ *Ibid.*

⁶ U. S. R. S., § 829. The marshal's fees for the custody of goods in cases of seizure, and other proceedings *in rem*, are not discretionary, but are dependent upon the precise Fed. Prac. Vol. II.—83.

regulations of law, or, in the absence of such regulations, are to be allowed upon the principle of a *quantum meruit*, graduated by the ordinary value of similar services and dependent upon the circumstances of each particular case. Where such fees are not regulated by law, an auditor should pass upon them. *Bottomley v. U. S.*, 1 Story (Mass.), 135, 153. The marshal is entitled to be paid his fees at the time he delivers up the property to the person entitled to receive it. *The George*

holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars.⁷ For serving a writ of subpoena on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness.⁸ For serving a writ of possession, partition, execution, or any final process, the same mileage as is allowed for the service of any other writ; and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off, or otherwise according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States, respectively, in which the service is rendered.⁹

anna, 31 Fed. 405. The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody. *The Perseverance*, 22 Fed. 462.

⁷ U. S. R. S., § 829.

⁸ U. S. R. S., § 829.

⁹ U. S. R. S., § 829; *Pomeroy v. Harter*, 1 McLean (Ind.), 448. The marshal may charge for copies of libels in admiralty, service in newspapers and by posting, at the rates charged for similar service by officers of the State Courts. *Loving v. U. S.*, 117 Fed. 565. Where a marshal who levied the execution has received his half commissions, his successor will be entitled to no more than his half commissions, for collecting and paying it over. 15 Op. Atty. Gen. 346. The marshal is not entitled to fees where no property is sold nor any money received under an execution. *Irwin v. Cummings*, Hempst. 703. Otherwise where money is paid, though no sale is necessary. *Pomeroy v. Harter*, 1 McLean (Ind.), 448. The marshal cannot charge interest on his fees, although he may on his disbursements. *Re Donahue*, 8 Bankr. Reg. 453. If the State Court

compensates services similar to those performed by a marshal, although not performed there by a like officer, the marshal is entitled to the same compensation. *Pomeroy v. Harter*, 1 McLean (Ind.) 448; *The Trial*, 1 Blatchf. & H. 94. When an execution against the person was issued in the county of New York, the defendant held under arrest for some time, and the action subsequently settled by a compromise, the defendants paying a smaller sum than that specified in the execution, it was held that the marshal was entitled to poundage on the whole amount for which the execution issued; and that the rate of poundage should be that allowed the sheriffs in the different counties throughout the State, and not the special rate allowed in the county of New York. *U. S. v. Haas*, 5 Fed. 29. In the Southern District of New York, where an execution was stayed and set aside for a defect appearing upon its face, it was held that the marshal who had made a levy was entitled to his fees, but to no poundage. *Amato v. Jacobus*, C. C. A., 58 Fed. 855. When the marshal extends an execution on real estate for the government he is entitled

For each bail-bond, fifty cents.¹⁰ For summoning appraisers, fifty cents each.¹¹ For executing a deed by a party or his attorney, one dollar.¹² For drawing and executing a deed, five dollars.¹³ The marshal cannot object to the purchaser drawing his own deed if he choose.¹⁴ "For copies of writs or papers furnished at the request of any party, ten cents a folio.¹⁵ For every proclamation in admiralty, thirty cents.¹⁶ For serving an attachment *in rem* or a libel in admiralty, two dollars."¹⁷ Where process *in rem* is issued against a vessel, but before process is served the claimant, waiving service, gives a bond under section 941 of the Revised Statutes, and the case proceeds to final decree, no actual seizure having been made by the marshal, he is still entitled to his fees on the settlement of the case.¹⁸ It is not necessary that there should be a sale in order to entitle him to his fees.¹⁹

to his fees for the same, though the land is not yet sold or redeemed, nor in any way converted into money. *U. S. v. Smith*, 44 Fed. 405. The fees for services of a deputy marshal belong legally to the marshal, and he controls them, and his receipt must operate as a discharge of the fees. *Wintermute v. Smith*, 1 Bond, 210. No fee is allowed for service of a writ or warrant unless actually executed. *Ex parte Paris*, 6 W. & M. 227. Mileage is to be computed from the place where the process is returned to the place of service. The "place of return" is the place where the process is issued. *Matter of Crittenden*, 2 Flip. 212. The prevailing party cannot tax the fees of the marshal for serving subpoenas on witnesses residing without the district and more than 100 miles from the place of trial. *U. S. v. Southern Pac. Co.*, 172 Fed. 909. The marshal may charge poundage on the debt, if authorized by State laws, where an insolvent is discharged from imprisonment by the Secretary of the Treasury on payment of costs. *Townsend v. U.*

S., 1 U. S. L. J. 534b. For cases in which the marshal is entitled to poundage, see *U. S. v. Ringgold*, 8 Pet. 150; *Causin v. Chubb*, 1 Cranch, C. C. 267; *Ringgold v. Glover*, 2 Cranch, C. C. 427; *U. S. v. Smith*, 3 Cranch, C. C. 66; *Mason v. Muncaster*, 3 Cranch, C. C. 403; *Ringgold v. Lewis*, 3 Cranch, C. C. 367; *Swann v. Ringgold*, 4 Cranch, C. C. 238. Where the case was removed after the levy of an attachment, it was held that the poundage should be equally divided between the sheriff and the marshal. *Duryee v. International Mach. & Eng. Co.*, (D. C., S. D. N. Y.) January, 1912.

¹⁰ U. S. R. S., § 829.

¹¹ U. S. R. S., § 829.

¹² U. S. R. S., § 829.

¹³ U. S. R. S., § 829.

¹⁴ *The John E. Mulford*, 18 Fed. 455.

¹⁵ U. S. R. S., § 829.

¹⁶ U. S. R. S., § 829.

¹⁷ U. S. R. S., § 829.

¹⁸ *The City of Washington*, 13 Blatchf. 410.

¹⁹ *The Captain John*, 41 Fed. 147.

"For the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents a day." ²⁰ On delivering up the property the marshal may demand his fees of the person entitled to recover it. ²¹ He must take actual possession of the vessel, or he is not entitled to fees. ²² He may take such possession as to render him liable to the parties, and yet not be entitled to fees. ²³ The marshal's actual expenses for ship-keeping must, by vouchers, &c., be established to be necessary to the satisfaction of the court. ²⁴ The approval by the district attorney of the employment of extra keepers will not be sufficient to establish the right of the marshal to an allowance for the employment of such extra keepers. ²⁵ Notwithstanding the limit named in this clause, the marshal will be allowed the extra cost of dockage of a vessel seized while on a marine railway from which she could not be removed without danger of sinking. ²⁶ The libellant must get an order from the court directing the withdrawal of the keeper, if he would not be liable for keeper's fees should he lose the suit. Mere notice to the marshal is not enough. ²⁷ If the parties agree that the vessel shall be four months in the marshal's charge, the sum actually paid a watchman by him is taxable as part of the costs, even though the claimant also had a keeper on the vessel. ²⁸ Entry by the marshal into the bonded warehouse where the goods are stored, and levying of process against and affixing a notice of seizure upon such property, is an attachment upon the property within the meaning of the statute; and the custody fees of a keeper who visited the storehouse three times a day, though he did not enter, are taxable as costs. ²⁹ The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody. ³⁰ Nor will the court allow the marshal five dollars a day on the ground that two men were employed to watch,—

²⁰ U. S. R. S., § 829.

²¹ *The Georgeanna*, 31 Fed. 405.

²² *The Hibernia*, 1 Sprague, 78.

²³ *Ibid.*

²⁴ *The Free Trader*, 1 Brown, Adm. 72.

²⁵ *The Captain John*, 41 Fed. 147, 149; *The Perseverance*, 22 Fed. 462.

²⁶ *The Novelty*, 9 Ben. 195.

²⁷ *The Independent*, 9 Ben. 489.

²⁸ *The San Jacinto*, 30 Fed. 266.

²⁹ *Jorgenson v. Casks of Cement*,

40 Fed. 606.

³⁰ *The Perseverance*, 22 Fed. 462.

one by day and one by night.³¹ But two dollars and fifty cents a day is not the absolute limit, and more will be allowed in the case of danger from thieves, and in other emergencies requiring more than one man to guard the property; since the marshal is bound to protect from damage a vessel in his custody.³² But when a marshal has done work in a defective manner, and additional labor becomes necessary in consequence, no compensation for the latter should be allowed.³³ A marshal, being the party served, is not entitled to fees for serving a warrant for the delivery of a vessel to the claimant issued upon a stipulation of the parties; but he is entitled to be reimbursed for any expenses he is put to on account of having been served with such warrant.³⁴ The cost of pumping out a vessel in charge of the marshal is properly allowed against the claimants in admiralty.³⁵ If, in the estimation of the court, it was, under the circumstances, prudent for the marshal to remove and insure property in his possession, he will be allowed the expenses necessarily incurred thereby.³⁶ And he should insure it with reference to its actual market value, irrespective of its original cost.³⁷ The marshal is also entitled to be reimbursed for his expenses in hiring wharfrage for a vessel in his custody, when such a course appears to have been necessary.³⁸ If several processes are issued against one vessel, and the marshal has possession under all the processes, the *per diem* custody fees should be apportioned equally among the claimants, saving to the marshal, in case any party fails to pay his proper proportion, a remedy against the other parties for the amount.³⁹

When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars: *Provided*, that, when the value of the property is less

³¹ *Ibid*.³² *Ibid*.³³ *The Nellie Peck*, 25 Fed. 463.³⁴ *The Jeanie Landles*, 17 Fed. 91.³⁵ *The Captain John*, 41 Fed. 147.³⁶ *U. S. v. Three Hundred Barrels of Alcohol*, 1 Ben. 72.³⁷ *Ibid*.³⁸ *The Novelty (Steamboat)*, 9 Ben. 195. But see *The F. Merwin*, 10 Ben. 403.³⁹ *The Circassian*, 6 Ben. 512; *The John Walls, Jr.*, 1 Spr. 178.

than the claim, such commission shall be allowed only on the appraised value thereof."⁴⁰ The word "claim" as here used applies equally to "a claim of forfeiture to the United States, in a proceeding *in rem* against a vessel," as well as to cases where the demand or claim is personal in its nature.⁴¹ The sum paid a libellant in settlement of his claim, and not the amount claimed in the libel, is the basis upon which the marshal's commissions are to be determined.⁴² The issuing of a process and the giving of a bond under section 941 of the Revised Statutes to the marshal will entitle him to his commissions in a suit *in rem* against a vessel under this clause, although the service of the process be waived and seizure of the vessel be not actually made. If the amount of the final decree is paid before execution, that is such a settlement of the claim as will entitle the marshal to his commissions.⁴³ So if part of the goods are sold or there is a part-payment in settlement, the marshal will be entitled to his commissions *pro rata*.⁴⁴ Where a vessel is sold by a trustee under the limited liability act, the marshal is not entitled to a commission.⁴⁵

"For sale of vessels or other property under process in admiralty or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars,"⁴⁶ The marshal is not authorized by law to employ an auctioneer to make sales under process or decree in admiralty; and if he employs one, he can make no charge for the services of such auctioneer which he could not otherwise have charged. Nor can he make such charge by a notice prior to the sale, that an auctioneer's fee will be required of the purchaser in addition to his bid.⁴⁷ Where a marshal has been

⁴⁰ U. S. R. S., § 829.

⁴¹ The Captain John, 41 Fed. 147, 151.

⁴² Robinson v. Bags of Sugar, 35 Fed. 603; The Clintonia, 11 Fed. 740.

⁴³ The City of Washington, 13 Blatchf. 410. Compare Bone v. The Norma, Newb. Adm. 533. And see The Clintonia, 11 Fed. 740, citing

the Russia, 5 Ben. 84; Robinson v. Bags of Sugar, 35 Fed. 603.

⁴⁴ Swann v. Ringgold, Cranch, C. C. 246.

⁴⁵ The Vernon, 36 Fed. 113.

⁴⁶ U. S. R. S., § 829.

⁴⁷ The John C. Mulford, 18 Fed. 455; Crofut v. Brandt, 13 Abb. Pr. (N. S.) 132.

paid his fees and commissions on the sale of a vessel under decree, and a claimant files a petition on which monition is issued, asking that the balance of the proceeds be paid to him, and the court so orders, the marshal cannot claim an additional commission on the amount paid by the claimant.⁴⁸ Upon an interlocutory sale of prize property, the marshal is entitled to full commission.⁴⁹ So if the property is removed to and sold in another district.⁵⁰ The marshal's title to commissions accrues at the time of the sale, and he is entitled to deduct his fees at the time when he pays the proceeds into court.⁵¹ If, by agreement of parties, the vessel is sold outside of the territorial limits of the marshal's authority, he is, nevertheless, entitled to his fees.⁵² The marshal may be allowed compensation, in addition to his statutory fees, for services rendered in transferring a prize to another district under the order of the court.⁵³ "For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others."⁵⁴ But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit."⁵⁵ Mileage is computed upon

⁴⁸ The Colorado, 21 Fed. 592.

⁴⁹ The Avery, 2 Gall. 308.

⁵⁰ The San Jose Indiano, 2 Gall. 311.

⁵¹ The Avery, 2 Gall. 308.

⁵² The San Jose Indiano, 2 Gall. 311.

⁵³ The Adula, 127 Fed. 839. *Of* U. S. R. S., § 4629.

⁵⁴ U. S. R. S., § 829. The marshal is allowed mileage for actual travel in enabling him to make a

return of *nulla bona*. Anon., Hempst. 450.

⁵⁵ U. S. R. S., § 829. See U. S. v. Harmon, 147 U. S. 268, 37 L. ed. 164; U. S. v. Fletcher, 147 U. S. 664, 37 L. ed. 322. He is not entitled to constructive mileage, and his actual traveling expenses must be divided among the causes in his hand to serve at the same time. *Re Donahue*, 8 Bankr. 453. Should the marshal arrest the wrong per-

the ordinary railroad route, if traversed by the marshal, although there is a shorter railroad, upon which trains run much less often.⁵⁶ "In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court."⁵⁷

§ 419. **Witness fees.** A witness' fees are, "for each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning."¹ When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation are allowed for attendance.² Both are taxed in the case first disposed of, after which the *per diem* attendance fee alone is taxed in the other cases in the order in which they are disposed of.³ When a witness is detained in prison for want of security for his appearance, he is entitled, in addition to his subsistence, to a compensation of one dollar a day.⁴ A witness can be subpoenaed, and must be allowed mileage from and to his residence, in any part of a district, to attend a court held within that district,⁵ or from another district if he does not reside more than one hundred miles from the place of trial.⁶ The authori-

son, he is not entitled to fees of any kind; nor will he be allowed additional mileage for transporting a prisoner to a particular place by any other than the usual route of travel to that place. *Matter of Crittenden*, 2 Flippin, 212. He may charge actual expenses for serving a monition instead of the statutory mileage. *The Wavelet*, 25 Fed. 733. This statute applies to civil, as well as criminal, cases. *National Bank of Commerce v. Cleveland*, 156 Fed. 251.

⁵⁶ *Lovering v. U. S.*, 117 Fed. 565.

⁵⁷ U. S. R. S., § 829. Generally the marshal should not be allowed any charges that are not expressly granted by statute. *The John E.*

Mulford, 18 Fed. 455; *Croft v. Brandt*, 13 Abb. Pr. (N. S.) 132; § 419. 1 U. S. R. S., § 848. By 27 St. at L. 347, additional mileage is allowed for journeys not by railroad in some Western States.

² U. S. R. S., § 848.

³ U. S. R. S., § 848.

⁴ U. S. R. S., § 848.

⁵ *The Syracuse*, 36 Fed. 830; *Sims v. Schult*, 40 Fed. 143; *Hunter v. Russell*, 59 Fed. 964. But see *Smith v. Chicago & N. W. Ry. Co.*, 38 Fed. 321; *Holmes v. Sheridan*, 1 Dill. 421, note. See *Manufacturing Co. v. Saliers*, 6 Cent. L. J. 82.

⁶ U. S. R. S., § 876; *The Syracuse*, 36 Fed. 830.

ties conflict upon the question, whether when a witness in a civil case who resides more than one hundred miles from the place of trial voluntarily attends, his mileage for more than one hundred miles can be taxed.⁷ The mile is computed upon the shortest, most practical and ordinary route, although the witness traversed a longer distance.⁸ A witness does not lose his right to his fees merely because he was not subpoenaed, if his attendance and examination were procured in good faith.⁹ Nor if he attend, but is not examined;¹⁰ nor, it seems, if he is

⁷ According to the rulings in the First Circuit, a witness is entitled to mileage from his residence, no matter how far distant it may be, *Prouty v. Draper*, 2 Story, 199; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story, 84; *Hathaway v. Roach*, 2 W. & M. 63; *U. S. v. Sanborn*, 28 Fed. 299; *The City of Augusta, C. C. A.*, 80 Fed. 297, 303; *Davis v. Smith*, 199 Fed. 538. But see *The Gov. Ames, C. C. A.*, 187 Fed. 40, 49. Even when he has not been served with a subpoena. *U. S. v. Sanborn*, 28 Fed. 299. It was held by the District Court for South Carolina that a witness for the United States, voluntarily coming to and attending court on the verbal instructions of the district attorney, is entitled to the *per diem* and mileage fees; although his residence is out of the district, and more than one hundred miles from the place at which the court is held. *Re Williams*, 37 Fed. 325. It has been held that, when the witness lives without the district, mileage for only one hundred miles can be taxed; in the Second Circuit, *Anon.*, 5 Blatchf. 134; *Eastman v. Sherry*, 37 Fed. 844; *The Vernon*, 36 Fed. 113; *Haines v. McLaughlin*, 29 Fed. 70; *Buffalo Ins. Co. v. Prov. & Stonington S. S. Co.*, 29 Fed. 237; *Woo-ster v. Hill*, 44 Fed. 819; *The Third Circuit, The Progresso*, 48 Fed. 239;

The Fourth Circuit in a civil case, Sloss I. & S. Co. v. South Carolina & G. R. Co., 75 Fed. 106; the Sixth Circuit, *The Vernon*, 36 Fed. 113; *Burrow v. Kansas C., Ft. S. & M. R. Co.*, 54 Fed. 278; *The Seventh Circuit, where it was held that in such a case no fees or mileage could be taxed, Dreskill v. Parish*, 5 McLean, 213. See *Smith v. Chicago & N. W. Ry. Co.*, 38 Fed. 321; the Eighth Circuit, *Pinson v. Atchison, T. & S. F. R. Co.*, 54 Fed. 464; *U. S. v. Green*, 196 Fed. 255; and the Ninth Circuit, *Spaulding v. Tucker*, 2 Sawyer, 50; *Haines v. McLaughlin*, 29 Fed. 70; *U. S. v. Southern Pac. Co.*, 172 Fed. 909.

⁸ *Jennings v. Menaugh*, 118 Fed. 612; *Hunter v. Russell*, 59 Fed. 964.

⁹ *Anderson v. Moe*, 1 Abb. (U. S.) 299; *U. S. v. Sanborn*, 28 Fed. 299; *The Vernon*, 36 Fed. 113; *The Syracuse*, 36 Fed. 830; *Eastman v. Sherry*, 37 Fed. 844; *Simpkins v. Atchison T. & S. F. R. Co.*, 61 Fed. 999; *Sloss I. & S. Co. v. S. C. & G. R. Co.*, 75 Fed. 106; *Hanchett v. Humphrey*, 93 Fed. 895. *Contra, Haines v. McLaughlin*, 12 Sawyer, 126; *Lilienthal v. Southern Cal. Ry. Co.*, 61 Fed. 622.

¹⁰ *U. S. v. Williams*, 1 Cranch, C. C. 178, Fed. Cas. No. 16,709; *Prouty v. Draper*, 2 Story, 199, Fed. Cas. No. 11,447; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story, 84, Fed.

required to attend at the hearing after his deposition has been taken;¹¹ nor does he suffer any abatement of them, because he is summoned to attend at the same time to testify in several suits, when some but not all the parties are the same;¹² and even if the parties are the same, when both suits are tried together, and the witness is examined but once, he is entitled to fees in each case; provided no order consolidating the suits has been obtained.¹³ In all such cases the fees, if paid, can be taxed, provided the witnesses were in good faith asked to attend.¹⁴ When the trial is postponed because of the illness of counsel,¹⁵ or delay in the transmission of a deposition taken by the other side,¹⁶ and the witnesses are required to remain during the postponement, they must be paid for the intervening time. So, also, when the witnesses are required to remain after their examination to the end of the hearing.¹⁷ Fees for travel of a witness in going and returning can only be taxed once for each occasion of taking testimony, although each occasion embraces a number of days;¹⁸ unless his second attendance was required by an adjournment caused by the fault of the unsuccessful party, when his traveling fees may be taxed for his attendance at such adjourned day if incurred.¹⁹ Witnesses summoned and attending court are entitled to their mileage and *per diem* fees if the cause was docketed and could have been tried at the term at which the witnesses attended.²⁰ If a.

Cas. No. 17,515; *Hathaway v. Roach*, 2 Woodb. & M. 63, 73, Fed. Cas. No. 6,213; *Clark v. Am. Dock & I. Co.*, 25 Fed. 641; *U. S. v. Sanborn*, 28 Fed. 299, 301, 302; *Sloss I. & S. Co. v. S. C. & G. R. Co.*, 75 Fed. 106; *U. S. v. Bell*, 81 Fed. 830; *Hanchett v. Humphrey*, 93 Fed. 895-897; *St. Matthews Bank v. Fidelity Co.*, 105 Fed. 161. *Contra*, *Simpkins v. Atchison, T. & S. F. R. Co.*, 61 Fed. 999.

¹¹ *Beckwith v. Easton*, 4 Ben. 357; *Anderson v. Moe*, 1 Abb. (U. S.), 299.

¹² *Parker v. Bigler*, 1 Fish. 285; *The Vernon*, 36 Fed. 113; *Archer v. Hartford F. Ins. Co.*, 31 Fed. 660.

But see *Simpkins v. Atchison, T. & S. F. Ry. Co.*, 61 Fed. 999.

¹³ *L. E. Waterman Co. v. Lockwood*, 128 Fed. 174.

¹⁴ *The Vernon*, 36 Fed. 113; *Archer v. Hartford F. Ins. Co.*, 31 Fed. 660.

¹⁵ *Whipple v. Cumberland C. Mfg. Co.*, 3 Story, 84.

¹⁶ *Hunter v. Russell*, 59 Fed. 964.

¹⁷ *Whipple v. Cumberland C. Mfg. Co.*, 3 Story, 84.

¹⁸ *Spill v. Celluloid Mfg. Co.*, 28 Fed. 870.

¹⁹ *Hake v. Brown*, 44 Fed. 734.

²⁰ *Young v. Merchants' Ins. Co.*, 29 Fed. 273.

witness is subpoenaed at the place of trial on the day when the subpoena requires him to attend, he is not entitled to any mileage.²¹ Where witnesses were subpoenaed to testify to a particular point, though the opposite party admitted the point, mileage and *per diem* fees up to the time of such admission were allowed;²² and a second trial being had, and no stipulation or entry made on the record that the point would be admitted at such second trial, such *per diem* and mileage fees were allowed for attendance at that trial also.²³ But it has been held, on the other hand, that a party may not tax the fees of a witness whom he has subpoenaed, but whose testimony is either abandoned or stricken out;²⁴ nor may he tax the fees of more than three witnesses to a single fact;²⁵ nor fees and mileage for himself when he testifies in his own behalf;²⁶ nor fees which he has not paid.²⁷ It has been held that fees and mileage may be taxed for the attendance as witnesses of officers of a corporate defendant,²⁸ but not where a defendant corpora-

²¹ The Sunnyside, 5 Ben. 162.

²² Young v. Merchants' Ins. Co., 29 Fed. 273.

²³ Ibid.

²⁴ Troy I. & N. Factory v. Corning, 7 Blatchf. 16; The Persiana, 158 Fed. 912.

²⁵ Bussard v. Catalino, 2 Cranch, C. C. 521.

²⁶ Nichols v. Brunswick (D. Mass.), 3 Cliff. 88; Roundtree v. Rembert (D. S. C.), 71 Fed. 255. L. E. Waterman Co. v. Lockwood (D. Mass.), 128 Fed. 174. *Contra*, Tuck v. Olds, 29 Fed. 883, W. D. Michigan.

²⁷ Leary v. Miranda, 40 Fed. 607; O'Neil v. Kansas City S. & M. R. Co., 31 Fed. 663. A witness subpoenaed by the prevailing party to the suit cannot upon his own motion have his fees that remain unpaid taxed in the bill of costs against the losing party; and it seems that a party cannot have such fees taxed until he has paid the witness, either before or after the service has been rendered, and

before judgment for costs. O'Neil v. Kansas City S. & M. R. Co., 31 Fed. 663. But it has been held that witnesses do not lose their right to mileage and *per diem* fees by not insisting upon prepayment; nor by the fact that they were in attendance on the court in another cause between different parties, and received *per diem* and mileage fees therefor. Young v. Merchants' Ins. Co., 29 Fed. 273. It has been held that when a person has been served with a subpoena and has received money for traveling expenses, he cannot refuse to obey such subpoena because the proper amount of mileage has not been paid; and that persons subpoenaed as witnesses in the courts of the United States, if they have the means, are obliged to obey whether their fees are advanced or not. Norris v. Hassler, 23 Fed. 581; U. S. v. Durling, 4 Biss. 509, 510; Hake v. Brown, 44 Fed. 734.

²⁸ Wead v. Millersburg H. W. Co., 79 Fed. 129.

tion was ordered to account before a master in a suit for an infringement of a patent.²⁹ Only the necessary expenses of a government clerk sent away from his place of business as a witness for the government will be paid to him, and nothing can be taxed in the bill of costs for his travel or attendance.³⁰ The same rule applies to deputy-clerks, as they are also officers of the court.³¹ But clerks employed by the marshal in his office, keeping his accounts, are not officers of the court, and are entitled to fees and mileage.³² A deputy-marshal is an officer of the court; but unless he is actually engaged in attendance upon the court, he is entitled to *per diem* fees and mileage, if summoned as a witness by the government.³³ It has been held that the United States may tax the necessary expenses of an employee who attended as a Government witness at a place distant from his office, irrespective of the distance traveled by him.³⁴ Where a party has paid some witnesses more and some less than the legal fees, he cannot group together the amounts so paid and collect the legal fees for all.³⁵ Witness fees incurred, but not paid, have been taxed.³⁶

§ 420. Miscellaneous disbursements. The Revised Statutes provide that "the bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."¹ The Federal courts are not absolutely limited in the taxation of costs to such items as are specifically named in the statute.² It has been held that, as to other matters, the State practice

²⁹ *Am. Diamond Drill Co. v. Sullivan Mach. Co.*, 32 Fed. 552.

³⁰ U. S. R. S., § 850; U. S. R. S., § 849; U. S. v. Sanborn, 28 Fed. 299.

³¹ *Ex parte Burdell*, 32 Fed. 681.

³² *Ibid.*

³³ *Ibid.*

³⁴ U. S. v. National Surety Co., 168 Fed. 314.

³⁵ *Burrow v. Kansas City, F. S. & M. R. Co.*, 54 Fed. 258.

³⁶ *Primrose v. Fenno*, 113 Fed. 375.

§ 420. ¹ U. S. R. S., § 983.

² *Spaulding v. Tucker*, 2 Sawyer, 50; *Gunther v. Liverpool, L. & G. Ins. Co.*, 10 Fed. 830.

should be followed, except where that would produce injustice.³ Disbursements for printing the record, evidence, and other papers in a suit in equity in a Circuit Court, when required by rule, are, in the First⁴ and Second⁵ Circuits, District of Maryland,⁶ and any district where it is an established practice to print the same before the final hearing,⁷ but not in the District of South Carolina,⁸ taxable as costs. Disbursements for printing testimony and other papers, when not required by rule or special order or by the established practice,⁹ cannot be taxed. Thus, in the Second¹¹ and in the Third¹² Circuits, the expense of printing exhibits in the District Court cannot be taxed; although it seems that such a disbursement may be taxed for printing them in the Circuit Court of Appeals.¹³ The appellant or plaintiff in error, when allowed costs, may tax his disbursements for clerk's fees and for printing the record.¹⁴ Where, upon an appeal from a decree dismissing a bill which was affirmed with costs, the defendant had taken a cross-appeal from the dismissal of his cross-bill, which appeal was dismissed, the cross-appellant was allowed to tax the fees paid for one-half the cost of printing the record.¹⁵ Where the

³ *Primrose v. Fenno*, 113 Fed. 375, 377, where auditors' fees were apportioned. In *Whipple v. Cumberland Mfg. Co.*, 3 Story, 84; the cost of a survey was apportioned.

⁴ *Jordan v. Agawam Woollen Co.*, 3 Cliff. 239.

⁵ *Dennis v. Eddy*, 2 Blatchf. 195; *Hake v. Brown*, 44 Fed. 734. Where such costs had been taxed against the defendant, who subsequently appealed, it was held that he must pay the same to the respondent before he could be entitled to receive from the latter copies of such record for use in making up the transcript upon his appeal. *Parsons Non-Skid Co. v. E. J. Willis Co.*, 176 Fed. 176.

⁶ *Detroit Heating & Lighting Co. v. Kemp*, 182 Fed. 847.

⁷ *Detroit Heating & Lighting Co. v. Kemp*, 182 Fed. 847.

⁸ *Lee v. Simpson*, 42 Fed. 434.

⁹ *Detroit Heating & Lighting Co. v. Kemp*, 182 Fed. 847; *Atwood v. Jacques*, 63 Fed. 561; *Spaulding v. Tucker*, 2 Saw. 50.

¹¹ *Edison v. Am. Mutoscope Co.*, 117 Fed. 192.

¹² *Keasbey & Mattison Co. v. Am. Magnesia & Covering Co.*, 149 Fed. 439.

¹³ *Edison v. Am. Mutoscope Co.*, 117 Fed. 192.

¹⁴ Supreme Court Rule 10; Circuit Court of Appeals Rule 23. But the expense of printing superfluous papers will be disallowed. *B. & S. F. Co. v. Kraetze*, 150 U. S. 111, 37 L. ed. 1019; Eq. Rule 76, *E. g.*, no costs were allowed for printing the record upon a motion for a new trial. *Nederland L. I. Co. v. Hall*, 86 Fed. 741.

¹⁵ *Nichols, Shepard & Co. v. Marsh*, 131 U. S. 401.

costs of printing the record on an appeal had been paid by a receiver under an order out of the fund in his hands, the defendant, who finally succeeded was allowed to tax these disbursements,¹⁶ but not the receiver's fees and the necessary disbursements incidental to the receivership.¹⁷ Disbursements for printing objections to a petition to the Supreme Court in its original jurisdiction for a writ of mandamus are taxable.¹⁸ Disbursements for printing briefs on appeal, in error, or in original proceedings in the Supreme Court or Circuit Courts of Appeals, are not taxable,¹⁹ excepting on admiralty appeals to the Circuit Court of Appeals when in the Second Circuit they are taxed. Disbursements for printing briefs which the rules require to be printed are taxable in the District Courts in the Second Circuit,²⁰ even when the brief is printed after the argument.²¹ If copies of papers, necessarily obtained for use on the trial, are put in evidence, and no order is made rejecting them as evidence, it is the duty of the clerk to allow, on taxation, the disbursements paid for the various copies put in evidence and forming part of the record for final hearing.²² It has been held that fees paid for certified copies of a party's own muniments of title cannot be taxed, since he is presumed to have the originals in his possession, unless he proves the contrary; but that he may tax fees paid for transcripts of record of suits and other papers on which he relied to defeat his adversary's claim of title.²³ Copies of papers obtained for use on interlocutory or preliminary or incidental motions or hearings are not obtained for use on trials, and disbursements in

¹⁶ *Ferguson v. Dent*, 46 Fed. 88, 94.

¹⁷ *Ferguson v. Dent*, 46 Fed. 88, 96; *Elk F. O. & G. Co. v. Jennings*, 90 Fed. 767.

¹⁸ *Ex parte Hughes*, 114 U. S. 548, 29 L. ed. 281; *Gird v. California Oil Co.*, 60 Fed. 1011.

¹⁹ *Ibid.*

²⁰ *Hake v. Brown*, 44 Fed. 734; *Dennis v. Eddy*, 12 Blatchf. 195. Not in the Ninth Circuit, where the rules do not direct that briefs be printed. *Gird v. California Oil Co.*, 60 Fed. 1011.

²¹ *Sackett v. Smith*, 46 Fed. 39.

²² *Wooster v. Handy*, 23 Fed. 49.

²³ *Ford v. Louisville, N. O. & T. Ry. Co.*, 45 Fed. 210. The cost of copies of testimony obtained solely for the use of counsel in preparing for trial, *Tesla El. Co. v. Scott*, 101 Fed. 524; *Atwood v. Jaques*, 63 Fed. 561; or for use in preparing a bill of exceptions, *Monehan v. Godkin*, 100 Fed. 196, were held not to be taxable.

procuring them have been disallowed.²⁴ It has been held that disbursements taxable in a State court may when made be taxed in an action at common law in a Federal Court held in the same State.²⁵ The legal fees paid to masters,²⁶ commissioners,²⁷ examiners,²⁸ and auditors²⁹ can be taxed. It has been held that in taxing the fees of a referee in an action at common law, the court is not bound to follow the State statute upon the subject, but may allow a reasonable compensation for his services, in estimating which it should consider the amount involved and the benefit to both parties, as well as the time devoted to the case and the amount that could be charged a client for the same labor.³⁰ "When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript."³¹ In the First Circuit, the same rule applies to a proceeding before an auditor or referee in an action at common law, whether

²⁴ *Wooster v. Handy*, 23 Fed. 49. In the Second Circuit fees paid for copies of opinions for use in preparing orders are usually taxed. In the Sixth Circuit the notarial fees paid for affidavits on a motion are taxed, but not the expense of writing the affidavits in the form of depositions. *Atwood v. Jaques*, 63 Fed. 561.

²⁵ *Huntress v. Epsom*, 15 Fed. 732.

²⁶ *Supra*, § 392.

²⁷ *Supra*, § 417; *Tesla El. Co. v. Scott*, 101 Fed. 524.

²⁸ In the Second Circuit examiner's fees are three dollars a day, and thirty cents a folio for type-writing the testimony. *Edison El. L. Co. v. Mather Electric Co.*, 63 Fed. 559. Where witnesses were sworn in three cases, and testified only once; the master was allowed a

fee of three dollars a day for attendance, and twenty cents a folio for certifying and filing in one case, and in other cases ten cents a folio. *L. E. Waterman Co. v. Lockwood*, 128 Fed. 174, 176. Where the Federal Court appointed a stenographer a special examiner, he was allowed the fees by the State practice for similar services. *Indianapolis Water Co. v. American S. B. Co.*, 65 Fed. 534. But see *Jerman v. Stewart*, 12 Fed. 271.

²⁹ *Fenno v. Primrose, C. C. A.*, 119 Fed. 801, 807; *Houlihan v. Corporation of St. Anthony in New Bedford*, 173 Fed. 496.

³⁰ *New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach*, 179 Fed. 973, where the referee's fees were taxed at \$1,000.

³¹ *Eq. Rule 50.*

the stenographer is selected by the auditor or by the parties.³² In the Second Circuit, it is customary for the parties to divide the expense of the services of the stenographer upon a trial at common law and for the party who obtains a copy of the minutes to pay the additional charge for transcribing the same,³³ and if this is done by agreement the successful party can tax what he has advanced for this purpose.³⁴ Otherwise they cannot be taxed.³⁵ It has been said that even in the latter case, if the unsuccessful party wishes the testimony for an appeal, he must secure that for himself.³⁷ In the Southern District of New York stenographer's fees for reporting testimony in admiralty are taxable when ordered by the court.³⁸ In the Second³⁹ and Third⁴⁰ Circuits, premiums on bonds and stipulations for costs in admiralty, in the Second,⁴¹ Third,⁴² and Fifth⁴³ Circuits, but not in the Sixth Circuit,⁴⁴ nor in bankruptcy in the Fourth Circuit⁴⁵ premiums on supersedeas bonds; in the Second⁴⁶ and Ninth⁴⁷ Circuits, but not in the First Circuit,⁴⁸ premiums on bonds or stipulations given to secure the release of vessels; and in the Second Circuit the amounts paid individuals in a foreign country for giving

³² Corporation of St. Anthony in New Bedford v. Houlihan, C. C. A., 184 Fed. 252. In the Second Circuit, where the plaintiffs therein had paid for the stenographer's minutes, he was directed to report them to the court for filing, but a motion to make them a part of the judgment rule was denied unless the defendants should advance the fees therefor. Alder v. Edenborn, 198 Fed. 928.

³³ Sedlacek v. Bryan, 192 Fed. 361. Where the successful party furnished a copy of the evidence to the other, it was held that he might tax ten cents a folio for the same.

³⁴ L. E. Waterman Co. v. Lockwood, 128 Fed. 174; Sedlacek v. Bryan, 192 Fed. 361.

³⁵ Ibid.

³⁷ Ibid.

³⁸ The E. Luckenback, 19 Fed.

847; Rogers v. Brown, 136 Fed. 813. An oral order in open court is sufficient. Ibid.

³⁹ Edison v. Am. Mutoscope Co. (S. D. N. Y.), 117 Fed. 192.

⁴⁰ The Bencliff, (E. D. Pa.), 158 Fed. 377.

⁴¹ Edison v. Am. Mutoscope Co., 117 Fed. 192.

⁴² Jones v. Edward B. Smith Co., 183 Fed. 990.

⁴³ Smythe v. New Orleans Land Co., C. C. A., 184 Fed. 892.

⁴⁴ Lee Injector Mfg. Co. v. Penberthy Injector Co., C. C. A., 109 Fed. 964.

⁴⁵ Re Hoyt, 119 Fed. 987.

⁴⁶ The Volund, C. C. A., 181 Fed. 643.

⁴⁷ The Europe, C. C. A., 190 Fed. 475.

⁴⁸ The Gov. Ames, 199 Fed. 587; aff'd. C. C. A., 187 Fed. 40, 48.

such security; have been taxed.⁴⁹ Fees paid an attorney for the examination of a witness before a master or special examiner,⁵⁰ payments to an attorney for traveling expenses,⁵¹ payments to messengers,⁵² payments to witnesses for services in examining property concerning which they afterwards testified,⁵³ cannot be taxed. Disbursements for surveys and plans necessitated by an order to make a pleading more definite and certain, cannot be,⁵⁴ but the cost of maps necessarily used on a trial have been taxed.⁵⁵ In admiralty, the expense of taking photographs showing injuries to a vessel and for interpreters' fees necessary to obtain the testimony of foreign witnesses were taxed.⁵⁶ Disbursements for copies of models in the Patent Office used as evidence are taxable,⁵⁷ but not disbursements for other models.⁵⁸ It has been held that notarial fees for presentment and protest of a note, though paid before suit was brought, are considered as costs, not as damages.⁵⁹ When the defendant finally prevailed, and a decree directing him to account was set aside, he was allowed to include in his bill of costs the fees which he had been obliged to pay the master.⁶⁰ A defendant who finally prevails cannot tax the costs he has paid upon the overruling of his demurrer to the bill.⁶¹ Where a party obtains a preliminary injunction against the prosecution of an action at law, a continuance of which, upon a final hearing, is denied, it is proper to charge in the decree in equity with the costs of the action at law.⁶² In the distribution of

⁴⁹ *The Hurstdale*, 171 Fed. 607.

⁵⁰ *Strauss v. Meyer*, 22 Fed. 467.

⁵¹ *Wooster v. Handy*, 23 Fed. 49.

⁵² *Ibid.*

⁵³ *Tuck v. Olds*, 29 Fed. 883.

⁵⁴ *New Hampshire L. Co. v. Tilton*, 29 Fed. 764.

⁵⁵ *Lillienthal v. Southern Cal. Ry. Co.*, 61 Fed. 622.

⁵⁶ *The S. V. Luckenbach*, C. C. A., 197 Fed. 888.

⁵⁷ *Wooster v. Handy*, 23 Fed. 49.

⁵⁸ *Ibid.*

⁵⁹ *Baker v. Howell*, 44 Fed. 113; *supra*, § 6.

⁶⁰ *American D. D. Co. v. Sullivan M. Co.*, 32 Fed. 552.

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⁶¹ *New York B. & P. Co. v. N. J. C. S. & R. Co.*, 32 Fed. 755. For the costs of a receivership, see *Kell v. Trenchard*, C. C. A., 146 Fed. 245, *supra*, §§ 324, 407-409.

⁶² *Spring Garden Ins. Co. v. Amusement Syndicate Co.*, C. C. A., 178 Fed. 519. Where a suit was brought to enjoin actions at law upon the ground that, in equity, the plaintiff had no causes of action, with an alternative prayer for an apportionment of the damages against the several complainants in case the court should hold that the plaintiffs had a right to sue; it was held that the costs of the actions

the assets of an insolvent corporation, the costs in actions brought before the insolvency proceedings, which were allowed to continue so as to establish the claims against the assets, were taxed as part of the costs of the case in which the distribution took place.⁶³ Where a gas company, as a condition for an injunction enjoining the enforcement of a statute reducing the price of gas, deposited with the master the excess collected above the former rate and was finally unsuccessful, it was held that the interest upon this fund should be applied to the cost of the administration, thus relieving the gas company from this expense and giving to the gas payers no indemnity for their loss of interest.⁶⁴ Where a judgment was reversed, with costs to the plaintiff in error, and the defendant in error succeeded upon the second trial, he was not allowed to tax as a disbursement the amount he had paid in settlement of the judgment for the costs of error.⁶⁵

§ 421. Costs out of the fund. Costs are paid out of a fund or estate in the course of distribution by a court of equity, to trustees who have been obliged to engage in litigation for the benefit of the estate, and to persons who have been successful in suits brought by them on behalf of themselves and others similarly situated.¹ The expression "trustees" is used here in the broadest sense of the word, as including not only those appointed by a deed of trust, but also agents, receivers,² and personal representatives of a decedent.³ All of these, when under a bill for an accounting they account fairly and pay the balance due from them into court, are entitled to their costs,⁴ provided that they have not acted unconscientiously in

at law might be included in the judgment in equity against the complainants.

⁶³ *Robinson v. Mutual Reserve Life Ins. Co.*, 182 Fed. 850.

⁶⁴ *Central Tr. Co. v. New Amsterdam Gas Co.*, 167 Fed. 983.

⁶⁵ *Jennings v. Burton*, 177 Fed. 603.

§ 421. ¹ *Cowdrey v. Galveston, H. & H. R. Co.*, 93 U. S. 352, 23 L. ed. 950; *Trustees v. Greenough*, 105

U. S. 527, 26 L. ed. 1157; *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915.

² *Atty. Gen. v. City of London*, 1 Ves. Jr. 243; s. c., 3 Bro. C. C. 171; *Curteis v. Candler, Mad. & Geld.* 123; *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568.

³ *Rashleigh v. Master*, 1 Ves. Jr. 201; *Samuel v. Jones*, 2 Hare, 246.

⁴ *Atty. Gen. v. City of London*, 1 Ves. Jr. 243; s. c., 3 Bro. C. C. 171;

the suit⁵ or in the previous administration of their trust.⁶ The same is true when a suit is honestly commenced by one of them for the directions of the court concerning his trusteeship.⁷ But in suits brought by or against any of them, except possibly receivers, to which a stranger is a party, they are usually, if unsuccessful, liable personally to him for the costs as between party and party,⁸ which costs, together with the expenses of the suit, will be allowed them upon their accounting,⁹ if the suit was prosecuted or defended in good faith for the benefit of their trust.¹⁰ Costs will also be paid out of a fund under the control of a court of equity to persons who have been successful in a suit concerning it, brought by them in behalf of themselves and others similarly situated with them.¹¹

Rashleigh v. Master, 1 Ves. Jr. 201; Samuel v. Jones, 2 Hare, 246; Curteis v. Candler, Mad. & Geld, 123.

⁵ Henley v. Philips, 2 Atk. 48; Lloyd v. Spillat, 3 P. Wms. 344, 346.

⁶ Howard v. Rhodes, 1 Keen, 581; O'Callahan v. Cooper, 5 Ves. 117, 129; Hide v. Haywood, 2 Atk. 126.

⁷ Hicks v. Wrench, Mad. & Geld. 93; Henley v. Philips, 2 Atk. 48.

⁸ Edwards v. Harvey, G. Cooper, 40; Poole v. Franks, 1 Molloy, 78; Westley v. Williamson, 2 Molloy, 458. See § 313. But see Tug R. C. & S. Co. v. Brigel, C. C. A., 70 Fed. 647, cited *supra*, § 409. A trustee of a mortgage was refused compensation, out of a fund collected by him, for the expenses in defending a suit brought by a party, to whom the fund belonged. Western Union Tel. Co. v. Boston S. D. & Tr. Co., C. C. A., 112 Fed. 37.

⁹ Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950; Humphrys v. Moore, 2 Atk. 108. But it has been said that a mere depository should be allowed no costs or counsel fees beyond the expense of a watching retainer to his

attorney, which, however, should also include the expense of preparing his answer. Fullerton v. Bigelow, C. C. A., 177 Fed. 359. Counsel for a trustee are not ordinarily entitled to compensation out of the funds collected by a receiver for services rendered after the receivership was constituted. Guaranty Tr. Co. v. Chicago Rys. Co., C. C. A., 185 Fed. 411. But see Burden Central Sugar-Refining Co. v. Ferris Sugar-Mfg. Co., C. C. A., 87 Fed. 810; Haight & Freese Co. v. Weiss, C. C. A., 165 Fed. 430, 164 Fed. 688.

¹⁰ Henley v. Philips, 2 Atk. 48; Lloyd v. Spillat, 3 P. Wms. 344, 346; Central Tr. Co. v. Valley R. Co., 55 Fed. 903. The trustee is not entitled to compensation where he has acted in the interest of one of the parties to a controversy concerning a right to share in the trust funds. Pike v. Cincinnati Realty Co., C. C. A., 179 Fed. 97.

¹¹ Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; *Ex parte*, Jaffray, Re Waite & Crocker, 1 Low. 321; *Ex parte* Plitt, 2 Wall. Jr. 453; Stewart v. C. & O. C. Co., 5 Fed. 149.

Instances of this are a suit brought by a single creditor for a general administration of assets,¹² and by a single beneficiary of a trust to prevent a loss to the trust estate,¹³ and by a stockholder for the benefit of the corporation.¹⁴ Costs and a counsel fee out of the fund are usually allowed to the successful party, upon a bill of interpleader or a bill in the nature of an interpleader.¹⁵ Costs have been allowed in a similar case to a party who by his litigation had benefited the fund, although he eventually failed to collect his own claim against it.¹⁶ Such costs are, in the distribution of the fund, paid before all claims

Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435. Creditors who are allowed to intervene in such a suit are not entitled to an allowance. *Robinson v. Mutual Reserve Life Ins. Co.*, 182 Fed. 850. Disbursements paid by a part of the creditors for the investigation by an accountant of the books of an insolvent corporation, which resulted in the realization of a large sum to the receivership, were repaid out of the fund. *Sands v. E. S. Greeley & Co.*, 83 Fed. 772.

¹² *Bennett v. Going*, 1 Molloy, 527; *Hare v. Rose*, 2 Ves. Sen. 558. *Robinson v. Mutual Reserve Life Ins. Co.*, 182 Fed. 850, where the counsel for the complainant were given an allowance for services, beneficial to all the creditors, which were rendered after the appointment of the receivers. A solicitor, employed by the complainant after the suit has been brought and the receiver appointed, was not allowed a counsel fee from the fund when he had rendered no services beneficial to the same. *Barker v. Southern Bldg. & Loan Ass'n.*, 181 Fed. 638. See, however, *Mason v. Godwise*, 6 J. Ch. (N. Y.) 183.

¹³ *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Stewart v. C. & O. C. Co.*, 5 Fed. 149.

¹⁴ For allowances of attorneys fees, to minority stockholders, see *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *William Firth Co. v. Millen Cotton Mills*, 129 Fed. 141; reversed s. c., as *Lamar v. Hall & Wimberly*, C. C. A., 129 Fed. 79; *McCourt v. Singers-Bigger*, C. C. A., 145 Fed. 103, holding that a stockholder, who, by his suit, recovered a fund, was entitled to be paid his attorney's fee and the other expenses of the litigation, but that other stockholders and officers, who resisted such recovery by defending in the name of the corporation, were not; *Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 27 L.R.A. 98; *Alexander v. Atlanta, etc.*, R. R. Co., 113 Ga. 193, 54 L.R.A. 305; *Forrester v. Boston, etc. Co.*, 29 Mont. 397, 74 Pac. 1088. *Colley v. Wolcott*, C. C. A., 187 Fed. 595. See *Singers-Bigger v. Young*, C. C. A., 166 Fed. 82, 86. But see *Kinney v. Columbia Sav. & L. Ass'n*, 113 Fed. 359; *Cuyler v. Atlanta & N. C. R. Co.*, 132 Fed. 570.

¹⁵ *Dunlop v. Hubbard*, 19 Vesey, 205; *Dowson v. Hardcastle*, 2 Cox Eq. 279; *Louisiana State Lottery Co. v. Clark*, 16 Fed. 20; *Mutual Life Ins. Co. v. Lane*, 151 Fed. 276; *supra*, §§ 157 and 158.

¹⁶ *Ex parte Plitt*, 2 Wall. Jr. 453; *Fechheimer v. Baum*, 43 Fed. 719,

against it, except those of trustees who have not been guilty of misconduct.¹⁷ The same rule applies to a suit brought by a single creditor of the estate against an executor or administrator for the satisfaction of his own claim.¹⁸ In such cases the personal representative can only recover his costs from that part of the estate which remains after the complainant has been paid the full amount of his claim with costs, even though the creditor thus sweeps away the entire estate.¹⁹ Not so, however, when a bill is filed by one creditor in behalf of himself and the rest for a general administration of assets, in which case the personal representative is always entitled to his costs out of the fund unless he has forfeited them by his misconduct.²⁰ Where the laches or inaction of the trustee under a mortgage has caused a suit by a bondholder or a junior incumbrancer to preserve the mortgaged property, and the former action in the suit has been of no special value to the fund, he may be disallowed compensation from the fund until after satisfaction of the beneficiaries who appeared by their own counsel in the suit.²¹ It has been held that such costs should not be

730; *Central Tr. Co. v. Condon*, C. C. A., 67 Fed. 84, 111; *D. G. Tompkins Co. v. Chester Mills*, 90 Fed. 37. But see *Weed v. Central Ga. Ry. Co.*, 100 Fed. 162. See *U. S. v. Boyd*, 79 Fed. 858; *Jefferson Hotel Co. v. Brumbaugh*, C. C. A., 168 Fed. 867, where the fund was distributed among sub-contractors and creditors of the complainant; *Haehnlein v. Drayton*, C. C. A., 192 Fed. 300, where the first decree obtained by the attorneys was set aside for want of notice to the trustee under the mortgage, but a substituted decree was subsequently entered founded upon the pleading which they had filed. In such a case, where the order appointing the receiver was reversed, the allowance of compensation to the solicitor who procured the appointment was also set aside. *Jacksonville, T. & K. W. Ry. Co. v. American Const. Co.*, 57 Fed. 66.

Where a bill for the dissolution of a corporation was dismissed because a suit for the same purpose had been previously brought in the State where it was incorporated, it was held that the corporation was not entitled to an allowance for counsel fees. *Groom v. Mortimer Land Co.*, C. C. A., 192 Fed. 849.

¹⁷ *Bennet v. Going*, 1 Molloy, 529.

¹⁸ *Humphreys v. Moore*, 2 Atk. 108; *Davy v. Seys*, Moseley, 204.

¹⁹ *Adair v. Shaw*, 1 Sch. & Lef. 243; 280; *Uvedale v. Uvedale*, 3 Atk. 117.

²⁰ *Bennet v. Going*, 1 Molloy, 529; *Young v. Everest*, 1 R. & M. 426; *Minuse v. Cox*, 5 J. Ch. (N. Y.) 441, 9 Am. Dec. 313.

²¹ See *D. A. Tompkins Co. v. Chester Mills*, 90 Fed. 37; *Bound v. South Carolina Ry. Co.*, 59 Fed. 509.

allowed in advance of the general distribution of the assets, or until all the persons interested have an opportunity to be heard.²² An allowance may be made directly to the attorney or to his client in the discretion of the court,²³ and the court in determining the amount thereof may properly be guided by the judge's knowledge of the extent and value of the services rendered.²⁴ At least in States where the statutes give attorneys a lien upon their clients' causes of action²⁵ or property so obtained,²⁶ the courts will enforce the lien, which cannot be defeated by a settlement made by a client without his authority.²⁷ It has been held that this lien can be enforced against funds paid voluntarily to the corporation by defendants to a stockholder's suit to recover the same.²⁸ Where attorneys representing certain heirs in litigation to recover land, obtained the appointment of a guardian *ad litem* for an infant heir, who was made

²² Girard Tr. Co. v. McKinley-Lanning L. & T. Co., 135 Fed. 180.

²³ Colley v. Wolcott, C. C. A., 187 Fed. 595.

²⁴ Ibid.

²⁵ *Re Baxter & Co.*, C. C. A., 154 Fed. 22; *Bray v. Staples*, C. C. A., 180 Fed. 321. Where it was stipulated that, in consideration of the payment of a large sum of money to the receiver, the fees and expenses of the defendants' counsel should be paid out of the fund it was held that the fact that unsuccessful appeals were taken by the defendants to the Circuit Court of Appeals and to the Supreme Court of the United States did not deprive the court of original jurisdiction, of jurisdiction to make allowances out of the funds in accordance with the stipulation. *U. S. v. Stone*, C. C. A., 187 Fed. 577. In *Ryan v. Phila. & Reading Coal & Iron Co.*, (E. D. N. Y.) 189 Fed. 253, it was held that fifty per cent. of the amount collected upon a settlement made after the case had been prepared and called for trial was not excessive where the fee was

contingent upon success, although the plaintiff was an infant. That a contract for a contingent fee of fifty per cent. in an action for damages for negligence is not unreasonable is settled in the State of New York in *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492. In *Herman v. Met. St. Ry. Co.*, (S. D. N. Y.) 121 Fed. 184, the court refused to enforce a contingent fee of one-half the recovery when a settlement was made before trial. In *Muller v. Kelly*, C. C. A., 125 Fed. 212; reversing 116 Fed. 545; held that, in a similar case, the question whether such a contract was fair and not unconscionable should be submitted to the jury.

²⁶ *Colley v. Wolcott*, C. C. A., 187 Fed. 595, where no reference to such a statute was made.

²⁷ *Re Baxter & Co.*, C. C. A., 154 Fed. 22.

²⁸ *Meighan v. Am. Grass Twine Co.*, C. C. A., 154 Fed. 346. *Contra*, *Re Meighan*, 106 App. Div. (N. Y.) 599. See *Harv. Law Rev.*, XIV, 211.

the defendant, and such guardian appeared and was allowed a fee, it was held that they could not afterwards claim compensation from the minor's interest because their services inured to his benefit.²⁹ It has been held, in the Second Circuit, that where attorneys have been employed by a plaintiff under a contingent fee, the court has discretionary power, upon their disagreement with their client, to grant an order of substitution, conditional on the plaintiff's paying a reasonable compensation for their services, already rendered, and their disbursements.³⁰ It has been held, by a State court, that an attorney's lien upon a cause of action can be enforced, after the removal of the suit to a Federal court and its discontinuance there upon a settlement with the client.³¹

§ 422. Costs as between solicitor and client. Costs payable out of a fund in court are termed costs as between solicitor and client.¹ Costs as between solicitor and client include all reasonable expenses and counsel fees, and are not, like costs as between party and party, confined to the amount named in the statute.² Five per centum of the fund collected was held a

²⁹ Tull v. Nash, C. C. A., 141 Fed. 557. An agreement between a *guardian ad litem* and an attorney as to the amount of the latter's fees is not binding unless ratified by the court. Ryan v. Phila. & Reading Coal & Iron Co., (E. D. N. Y.) 189 Fed. 253. See § 90, *supra*.

³⁰ Du Bois v. Mayor, etc., of City of New York, C. C. A., 134 Fed. 570.

³¹ Oishei v. Pennsylvania R. R. Co., 117 App. Div. (N. Y.) 110.

§ 422. ¹ Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

² Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Cowdrey v. G. H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950; *Ex parte Jaffrey*; *Re Waite & Crocker*, 1 Low. 321; *Ex parte Plitt*, 2 Wall. Jr. 453. It has been said that, for gathering the facts and trying a bill in equity \$400 is; ordinarily, a reasonable counsel fee; but that, under special

circumstances, \$500 may be allowed upon the substitution of an attorney. Morton v. La Roche (S. D. N. Y.), 116 Fed. 1022. \$1,000 was allowed for the preparation and service of a bill under which receivers of a Building Association were appointed. Miers v. Columbia Mut. Building, &c., Ass'n., (S. D. N. Y.) 166 Fed. 781. \$1,200, for instituting an action, in which receivers were appointed, and conducting the proceedings generally for the benefit of all the creditors, was allowed a firm of lawyers, although one of them also received \$4,000 for services to the receivers. Ely v. Van Kannel Revolving Door Co., (E. D. N. Y.) 184 Fed. 459. \$30,000 was allowed a firm of lawyers for filing original, amended and supplemental bills, and bringing a large amount of assets into court for administration and conservation, when

reasonable counsel fee in such a case, when the fund was large,—that is, more than seventy-five thousand dollars.³ Ten per centum of the fund collected was held a reasonable counsel fee, when the fund was less,⁴ and larger percentages have been allowed.⁵ In no case, however, will the personal expenses and compensation for the personal services of a person, not a

they were also paid \$35,000 for services to the receivers up to a certain time. *Guaranty Tr. Co. v. Chicago Rys. Co.*, C. C. A., Seventh Ct., 185 Fed. 411.

³ *Fechheimer v. Baum*, 43 Fed. 719; *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 128, 28 L. ed. 915, 919.

⁴ Where the amount collected was \$35,869.77, the plaintiff's counsel was allowed ten per cent. thereof. *Harrison v. Perea*, 168 U. S. 311, 317, 42 L. ed. 478, 480. See also *Adams v. Kepler M. Co.*, 38 Fed. 281.

⁵ For a case where an attorney was allowed \$1,000 out of a fund of \$2,500, see *Smith v. Cooper*, 120 Fed. 230. Where counsel were paid \$2,000 for disbursements and it was agreed that their compensation should be liberal in case of success, it was held that one-third of the fund collected, \$91,420, should be allowed them. *Frink v. McComb*, 60 Fed. 486. Where \$186,000 was recovered in a suit for the construction of a will, and to determine the effect of certain advancements, the Circuit Court of Appeals allowed \$57,094, increasing the allowance by the master of about 31 per cent., namely \$51,892. Of this increased amount \$20,000 was paid the counsel upon whom rested the burden of the litigation; two other attorneys received \$14,797 each; and the fourth, whose services were confined to two arguments in the Supreme

Court of the United States, only \$7,500. *Gilden v. Cowan*, C. C. A., 123 Fed. 48. The original litigation is reported as *Adams v. Cowen*, 174 U. S. 800, 43 L. ed. 1188, 177 U. S. 471, 4 L. ed. 851; *Cowen v. Adams*, C. C. A., 78 Fed. 536, 24 C. C. A. 198. In a case involving \$208,000, the court allowed \$5,000 to the leading counsel in the Circuit Court of Appeals and \$10,000, to be divided between two counsel in the Supreme Court of the United States, although the appeals were successful. *U. S. v. Stone*, C. C. A., 187 Fed. 577, 580. Twenty per cent. of \$25,000 was held to be a reasonable contingent fee when the amount was not specified in the agreement between client and attorney. *St. Louis, I. M. & S. Ry. Co. v. Clark*, 51 Fed. 483. \$1,000 was allowed for the fee of a counsel, who filed a bill of interpleader upon a life insurance policy of the face value of \$50,000. *Mutual Life Ins. Co. v. Lane*, 151 Fed. 276. \$150, when the amount was \$10,000. *McNamara v. Provident Sav. Life Assur. Soc.*, C. C. A., 114 Fed. 910, 912. See *Mutual Life Ins. Co. v. Farmers' & Mechanics' Nat. Bank*, 173 Fed. 390, 402. Where a party sued by a trustee in bankruptcy for \$500 paid the money into court upon the making of the bankrupt's wife an additional defendant, it was allowed \$25 as an attorney's fee. *Caten v. Eagle Building & Loan Ass'n.*, 177 Fed. 996. Where an attorney had asked for a payment on

trustee, who has engaged in litigation in behalf of himself and others, be included in them.⁶

§ 423. Taxation of costs. Costs as between party and party are taxed by a judge or clerk of the court, and are included in and form a portion of the judgment or decree.¹ It is the better practice to serve, upon the adverse party, notice of the taxation with a copy of the proposed bill of costs,² but costs are often taxed *ex parte*. To each bill of costs should be attached an affidavit by some person acquainted with the facts, stating that the services for which fees are charged were performed.³ Receipts may be substituted for affidavits, even; it has been held, as regards payments for the fees of witnesses.⁴ It has been said that the court will not on the taxation enforce a stipulation that disbursements not allowed by rule or statute may be included in the bill of costs.⁵ The bills when taxed must be filed with the papers in the cause.⁶ When the taxation is by the clerk, a motion for a retaxation of the costs may be made before, or on an appeal taken to, a judge of the court.⁷ A party who objects to a charge in lump should de-

account, it was held that he had not thereby waived his contract right to a liberal contingent fee. *Frink v. McComb*, 60 Fed. 486. As to the extent of an attorney's lien, see *Mass. & So. Const. Co. v. Tp. of Gill's Creek*, 48 Fed. 145; *Clafin v. Banuett*, 51 Fed. 693; *Cbe v. Western R. Co.*, 65 Fed. 16. A State statute regulating the allowances in a partition suit was followed by a Federal Court of Equity. *Willard v. Serpell*, 62 Fed. 625.

¹ *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157. See U. S. v. Stone, C. C. A., 187 Fed. 577.

² § 423. ¹ U. S. R. S., § 983.

³ For the construction of the rule of the Ninth Circuit upon this point, see *Spoor v. Riverside County*, 113 Fed. 26.

⁴ *U. S. R. S.*, § 984; *Jerman v. Stewart*, 12 Fed. 271. Fees of witnesses were disallowed where the affidavit or certificate stated the "place from which each came to attend trial," instead of the place of their respective residences. *The Gov. Ames, C. C. A.*, 187 Fed. 40, 49; and where the only affidavit as to residence was based entirely upon information, *Ibid*.

⁵ *Primrose v. Fenno*, 113 Fed. 375.

⁶ *Lee v. Simpson*, 42 Fed. 434.

⁷ U. S. R. S., § 983.

⁸ *Re Strauss v. Meyer*, 22 Fed. 467; *Tuck v. Olds*, 28 Fed. 883. Where a court rule provided that an appeal from the taxation by the clerk must be taken within ten days thereafter, an appeal taken after the specified time was dismissed, although the successful party had noticed the same for hearing. *Snyder v. McCarthy, C. C. A.*, 197 Fed. 166.

mand a specification of the items of which it is composed.⁸ Where there is a dispute as to a question of fact, material to the taxation of a bill of costs, a reference to an auditor may be made.⁹ Costs as between solicitor and client are taxed by the court, usually by means of a reference to a master.¹⁰ Costs taxed in the Circuit Court of Appeals without objection cannot be objected to for the first time in the District Court after a remand.¹¹ Where the Supreme Court affirmed a decree with costs of the court below as well as of the Supreme Court, it was held that the latter court had no power to grant costs as between solicitor and client out of the fund.¹² It was held that unpaid fees of officers need not be formally taxed as costs; but that if they are of record or entered on the proper writ, that will be sufficient to support an execution for the same; and that an error in such taxation may be corrected by the clerk subsequent to a settlement between the parties, after a reversal of the judgment.¹³

§ 424. Appeal from taxation of costs. Ordinarily, no appeal will lie to a court of review from a decree in equity,¹ or admiralty,² when the sole ground of error is the allowance of costs between party and party. A court of review may reverse a decree for an error in taxing costs as between party and party,³ and in allowing an attorney's fee,⁴ and for an error in taxing costs directed to be paid to the clerk,⁵ and also for an

⁸ *Dedekam v. Vose*, 3 Blatchf. 153.

⁹ *Bottomley v. U. S.*, 1 Story, 153.

¹⁰ *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915; *Cowdrey v. G., H. & H. R. Co.*, 93 U. S. 352, 23 L. ed. 950.

¹¹ *Fidelity & Deposit Co. v. Expanded Metal Co.*, 183 Fed. 568.

¹² *Mason v. Pewabic Mining Co.*, 153 U. S. 361, 366, 38 L. ed. 745.

¹³ *Hoystadt v. Delaware, L. & W. R. R.*, 182 Fed. 880.

§ 424. ¹ *Stuart v. Boulmare*, 133 U. S. 78, 33 L. ed. 568; *Harding v. Corn Products Mfg. Co.*, C. C. A., 198 Fed. 628.

² *The Eva D. Rose*, C. C. A., 166 Fed. 101. But see *Roberts v. N. Y. El. R. Co.*, 155 N. Y. 31.

³ *The City of Augusta*, C. C. A., 80 Fed. 297, 307, citing *O'Reilly v. Morse*, 15 How. 62, 124, 14 L. ed. 601, 628; *Burns v. Rosenstein*, 135 U. S. 449, 456, 34 L. ed. 193, 196. But see *DuBois v. Kirk*, 158 U. S. 58, 67, 39 L. ed. 895, 899; *Game-well F. A. Tel. Co. v. Municipal Signal Co.*, C. C. A., 77 Fed. 490; *Blanks v. Klein*, C. C. A., 78 Fed. 395, and cases there cited.

⁴ *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451.

⁵ *Re Michigan Cent. R. Co.*, C. C. A., 124 Fed. 727.

erroneous construction of its own decree concerning a division of the costs.⁶ An appeal lies from a decree awarding costs as between solicitor and client.⁷ Upon such an appeal, the court may reverse the decree if the costs have been awarded upon erroneous principles;⁸ or because the amount allowed is too large,⁹ or too small,¹⁰ although it rarely interferes with the discretion of the court below in these respects.¹¹

§ 425. Security for costs. A complainant who does not reside within the district may be compelled to give security for costs.¹ The matter is usually regulated by a rule of the court; but, in the absence of such a rule, a court of equity has inherent power to direct such security to be filed.² In actions at

⁶ *Kell v. Trenchard*, C. C. A., 146 Fed. 245.

⁷ *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157. Where the appeal was from an order as to costs entered at the foot of a final decree, but the transcript did not contain the decree, nor anything to show whether evidence was taken upon the application for the order; it was held that there could be no reversal unless error was manifest in the terms or subject-matter thereof, and that in the absence of proof to the contrary it would be presumed that the parties affected were before the court, there having been an apportionment between them. *Corn Products Refining Co. v. Chicago Real Estate Loan & Tr. Co.*, C. C. A., 185 Fed. 63.

⁸ *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915. Where a corporation was so insolvent that it had no interest in the fund collected by the disposition of its assets, it was held that it could not be heard upon such an appeal. *Haight & Freese Co. v. Weiss*, C. C. A., 165 Fed. 430.

⁹ *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915; *Harrison v. Perea*, 168 U. S. 311, 317, 42 L. ed. 478, 480.

¹⁰ *Glidden v. Cowen*, C. C. A., 123 Fed. 48.

¹¹ *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568; *Sloan v. Mitchell*, C. C. A., 72 Fed. 89. But see *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915; *Weiss v. Haight & Freese Co.*, C. C. A., 165 Fed. 432. But see *Bowker v. Haight & Freese Co.*, C. C. A., 165 Fed. 430.

§ 425. ¹ *Lyman V. & R. Co. v. Southard*, 12 Blatchf. 405. But see *Woodworth v. Sherman*, 3 Story, 171. The Minnesota rule requiring the plaintiff in every case to give security for costs means only the clerk's costs. *Robinson v. Honstain*, 79 Fed. 678. The Pennsylvania rule provides for the filing of security when the plaintiff removes from the district after the suit is brought. *Osborne v. Pennsylvania R. Co.*, 159 Fed. 301.

² *Karns v. W. L. Imlay Rapid Cyanide Process Co.*, 181 Fed. 751.

common law, the State statute is usually followed.³ Such security may also be required of a non-resident defendant to a bill of interpleader when he takes aggressive action.⁴ In order to obtain an order compelling such security, the defendant must move for it as soon as he ascertains the plaintiff's residence.⁵ In the absence of a court rule upon the subject, if he takes after such discovery any step in the cause before moving, it seems that he thereby waives his right to security,⁶ unless a necessity for unforeseen disbursements such as the expense of a reference, subsequently arises.⁷ Upon a failure to file security when required, the plaintiff's proceedings will be stayed.⁸ A plaintiff's proceedings may also be stayed until he pays the costs of another suit between the same parties upon the same cause of action in which he was unsuccessful, even if that other suit was in a State court,⁹ or a Federal court in another district,¹⁰ and, it has been held, when the other suit was *in forma pauperis*.¹¹ When one of several plaintiffs is a resident of the district, by the old chancery practice, no security for costs was required.¹² If the defendant does not demand security for costs within a reasonable time, that such security has not been given will not, when the cause is called for trial,

³ Winkley Co. v. Bowen Mfg. Co., 180 Fed. 624; Handy Varnish Co. v. Midland Linseed Oil Co., 191 Fed. 256. *Contra*, Stewart v. The Sun, 36 Fed. 307; O'Brien v. Hearn, 125 Fed. 95.

⁴ Gross & Phillips Mfg. Co. v. Gerhard, 8 Rep. 136.

⁵ Migliorucci v. Migliorucci, 1 Dick. 147; Foster v. Swasey, 2 W. & M. 217; Bliss v. Brooklyn, 10 Blatchf. 217; Prince v. Towns, 33 Fed. 161.

⁶ Migliorucci v. Migliorucci, 1 Dick. 147; Foster v. Swasey, 2 W. & M. 217; Bliss v. Brooklyn, 10 Blatchf. 217; Prince v. Towns, 33 Fed. 161; Karns v. W. L. Imley Rapid Cyanide Process Co., 181 Fed. 751. *Contra*, O'Brien v. Hearn, 125 Fed. 95, where a court rule existed.

But see Stewart v. The Sun, 36 Fed. 307.

⁷ Uhle v. Burnham, 46 Fed. 500.

⁸ Fox v. Blew, 5 Madd. 147.

⁹ Buckles v. C., M. & St. P. R. Co., 47 Fed. 424.

¹⁰ Kimble v. Western Union Tel. Co., 70 Fed. 888.

¹¹ *Ibid*.

¹² Winthrop v. Royal Exch. Ass. Co., 1 Dickens, 282; Walker v. Easterby, 6 Ves. 612; Gilbert v. Gilbert, 2 Paige Ch. (N. Y.) 603. But, under rule 35 of the Circuit Court, for the Southern District of New York, a non-resident plaintiff, although joined with a resident, must file security for costs. El. Vehicle Co. v. Gallagher, 145 Fed. 304.

be a ground for a continuance.¹³ Where a plaintiff has recovered judgment against a solvent defendant, and process is outstanding in the nature of an execution to collect the same, it is not proper to require the plaintiff to make a deposit to secure costs due a commissioner.¹⁴ It was held in New York, by Chancellor Kent, that a person who sued in another's right, as an executor or administrator, could not be compelled to give security for costs;¹⁵ but a receiver in bankruptcy,¹⁶ and the receiver of a national bank appointed by the Comptroller, when suing in another district, have been compelled to file security for costs.¹⁷ The United States and parties suing or defending under the direction of any Department of the Government are by statute exempted from liability to give security for costs, at least upon appeals and writs of error.¹⁸ Persons allowed to sue *in forma pauperis* are not obliged to file security for costs in the court of original jurisdiction;¹⁹ but they must do so upon an appeal or writ of error.²⁰ Where in a suit in admiralty, brought *in forma pauperis* after a decree dismissing the libel, an appeal was taken with a stipulation signed by a surety, conditioned that appellant "should answer all damages and costs," if he fail to make his plea good, upon an affirmation "with costs;" it was held that the respondent might recover against the libellant and the surety, his costs in both the Circuit

¹³ Hawkins v. Willbank, 4 Wash. 285.

¹⁴ U. S. v. St. Charles Co., 31 Fed. 442.

¹⁵ Goodrich v. Pendleton, 3 J. Ch. (N. Y.) 520. See Cathcart v. Hewson, 1 Hayes, 173.

¹⁶ Osborne v. Pennsylvania R. Co., (E. D. Pa.) 159 Fed. 301. But see The Alert, 199 Fed. 542. Cf. § 643, *infra*.

¹⁷ Platt v. Adriance, 90 Fed. 772. *Contra*, Platt v. Beach, 2 Benedict, 303, Fed. Cas. No. 11,215; Stanton v. Wilkeson, 8 Benedict, 357, Fed. Cas. No. 13,299; Pepper v. Fidelity & Casualty Co., 125 Fed. 822. It has been held that a non-resident receiver of a national bank must file security for costs, in an action

at common law, when the State practice so requires, unless he filed a certificate bringing himself within the provisions of U. S. R. S., § 1001.

¹⁸ U. S. R. S., § 1001. The costs are paid out of the contingent fund of the Department which authorized the suit, defense or appeal.

¹⁹ 27 St. at L., 252; Boyle v. Great N. Ry. Co., 63 Fed. 539; *supra*, § 413. It has been held that, upon a motion to compel security, the plaintiff may cure an omission in his original petition for leave to sue as a pauper. Donovan v. Salem & P. Nav. Co., 134 Fed. 316.

²⁰ Gallaway v. Fort Worth Bank, 186 U. S. 177, 46 L. ed. 1111; Bradford v. Southern Ry. Co., 185 U. S.

Court of Appeals and the District Court.²¹ The usual security required is a bond or undertaking with a sufficient surety for two hundred and fifty dollars,²² but the plaintiff may at any stage of the case be obliged to file additional security.²³ In one case a bond for two thousand dollars was required.²⁴ In the District of Ohio it is held that a surety to a bond is a party to the suit, and that his liability can be enforced by summary proceedings after the final decree; that the statute of limitations does not begin to run in his favor until the final decree; and that security "for costs" includes the costs of an appeal.²⁵ Where a State statute made the indorser of a writ liable for the costs, it was held that he remained liable for costs in both State and Federal courts after a removal,²⁶ but the State practice of denying an application for security for costs, when delayed until after answer, is not followed in the Southern District of New York.²⁷

243, 251, 49 L. ed. 178, 181; *supra*, § 413.

²¹ *The Joseph B. Thomas*, 158 Fed. 559.

²² *Deprez v. Thomson-Houston El. Co.*, 66 Fed. 22.

²³ *Ibid.* See *Carpenter v. Knollwood Cemetery*, 195 Fed. 96.

²⁴ *Ibid.*

²⁵ *M'Claskey v. Barr*, 79 Fed. 408.

²⁶ *Pullman's Palace Car Co. v. Washburne*, 66 Fed. 790.

²⁷ *O'Brien v. Hearn*, 125 Fed. 95.

CHAPTER XXVIII.

ENFORCEMENT OF DECREES AND ORDERS, INCLUDING EXECUTIONS AND WRITS OF POSSESSION.

§ 426. Enforcement of decrees and orders in general.

Decrees and orders are enforced in seven ways: by writ of execution,¹ by attachment for contempt,² by writ of sequestration,³ by writ of assistance,⁴ by the action of the court itself through the medium of a master⁵ or receiver⁶ or other person appointed for that purpose.⁷ The Equity Rules provide: "Every person, not being a party, in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party; and every person not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party."⁸

§ 427. Executions and proceedings supplementary thereto. A statute passed June 1, 1872, and incorporated in the Revised Statutes December 1, 1873, provides that "the party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon

§ 426. 1 § 427.

2 §§ 428, 433.

3 § 439.

4 § 440.

5 § 441.

6 Chapter XIX, *supra*.

7 § 442.

8 Eq. Rule 11, re-enacting but condensing Eq. Rule 10 of 1842.

judgments, as aforesaid, by execution or otherwise.”¹ In pursuance of this statute, the Circuit and District Courts have generally promulgated rules adopting the State practice in this respect.² “The words ‘in like causes’ were probably used because many of the States had adopted codes of practice, which abolish the distinction between common law and equity practice, and in such States there are no causes that are technically known as common law causes.”³ It has been held that the statute does not apply to criminal cases;⁴ and that the United States are not entitled to remedies, which the State statutes grant to the State, but withhold from individuals.⁵ The statute applies to remedies against the property of the judgment debtor only and not to remedies against his person;⁶ and a State statute providing for the imprisonment of a judgment debtor, in certain cases of malicious prosecution, is not followed.⁷ A State statute requiring the registration of a judgment against a municipal corporation in a certain office before its enforcement by execution was applied to the judgment of a Federal court;⁸ but a State statute forbidding the enforcement by execution of a judgment against a municipal corporation does not affect the judgment of a court of the United States.⁹ The adoption of such a rule gives the Federal court at common law power to enforce the proceedings supplementary to execution authorized by the

§ 427. ¹ U. S. R. S., § 916; 4 St. N. Y., October 11, 1878, and December 29, 1881.

at L., ch. 68, p. 281; *Lamaster v. Keeler*, 123 U. S. 376, 31 L. ed. 238.

² *McDowell, J. in Clark v. Allen*, 117 Fed. 699, 701.

The Pennsylvania statute authorizes the sale of a patent right under a special *feri facias*. *Pennsylvania Act of 1870* (P. L. 58); *Erie*

³ *Clark v. Allen*, 114 Fed. 374; *Clark v. Allen*, 117 Fed. 699.

⁴ *Clark v. Allen*, 117 Fed. 699.

⁵ *Friedly v. Giddings*, 119 Fed. 488.

⁶ *Friedly v. Giddings*, 119 Fed. 488.

⁷ *Friedly v. Giddings*, 119 Fed. 488.

⁸ *Hart v. New Orleans*, 12 Fed. 292, 293. See *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132.

⁹ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹⁰ *Hart v. New Orleans*, 12 Fed. 292, 293. See *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132.

¹¹ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹² *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹³ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹⁴ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹⁵ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹⁶ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹⁷ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹⁸ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

¹⁹ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

²⁰ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

²¹ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

²² *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

²³ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

²⁴ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

²⁵ *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3

State statutes,¹⁰ including the right to examine strangers to the suit, in order to ascertain the existence and location of the assets of the judgment debtor;¹¹ but not jurisdiction of an independent bill in equity authorized by a State statute, and not within the ordinary chancery jurisdiction;¹² nor can a Federal court of equity enforce such a State statute.¹³

Equitable assets held by the defendant to a decree in which no strangers to the suit claim any interest can be subjected to the payment of sums thereby awarded through the appointment of a receiver,¹⁴ or otherwise, upon a petition in the original cause.¹⁵ An original bill for that purpose is irregular; but it may be sustained as such a petition.¹⁶ Then no subpoena need be served, an ordinary notice being sufficient.¹⁷

The rules provide that final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the District court in suits at common law in actions of assumpsit."¹⁸ A decree for a deficiency after a sale of mortgaged property in a foreclosure suit is enforced in the same manner.¹⁹

The marshal in the courts of the United States has duties analogous to those of the sheriff in the different States.²⁰ It is his duty to attend the District Courts when sitting in district, and "to execute throughout the district all law-

Woods, 115. See *Merriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

¹⁰ *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200; *Canal & C. St. R. Co. v. Hart*, 114 U. S. 654, 661, 29 L. ed. 226, 228. See § 51.

¹¹ *Walker v. Monad Eng. Co., C. C. A.*, 196 Fed. 206.

¹² *Hudson v. Wood*, 119 Fed. 764.

¹³ *Regina Music Box Co. v. F. G. Otto & Son*, 124 Fed. 747.

¹⁴ *Dancel v. Goodyear Shoe Machinery Co.*, explained *supra*, § 302, note 25.

¹⁵ *Maitland v. Gibson*, 79 Fed. 136.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Eq. Rule 8, repeating Eq. Rule 8 of 1842.

¹⁹ Eq. Rule 10, repeating Eq. Rule 92 of 1842.

²⁰ *Re Neagle*, 135 U. S. 1, 34 L. ed. 55; s. c., 39 Fed. 833; U. S. R. S., § 788. A delivery to a sheriff

for "service" is an unlimited delivery and makes it his duty to obey the command of the writ and to do all acts necessary to realize the money which he is thereby directed to collect. *Re Tengwall Co.*, C. C. A., 201 Fed. 82.

ful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.”²¹ He has the right under the direction of the Attorney-General to protect judges of the courts of the United States while in the discharge of their official duties, and while on their way to hold court, and if necessary, to take human life in their defense.²² “The marshals and their deputies have, in each state, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State have by law, in executing the laws thereof.”²³ Under these provisions of the Revised Statutes the marshal or his deputy, if resisted when in the performance of his duty, may call to his aid a sufficient force from his district, called the *posse comitatus*, or power of his county, from the corresponding force which the sheriff or county officer has at his command,²⁴—that is, such number of men as are necessary for his assistance in the execution of the writs of the United States; and therein every person above the age of fifteen and able to travel is bound to be aiding, and if they refuse to assist, may be punished by fine and imprisonment.²⁵ It has been said, that this force by the common law included all persons, whatever might be their occupation, whether civilians or not; and including the military of all denominations,—militia, soldiers, marines,—all of whom were alike bound to obey the commands of a sheriff or marshal. “The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*.”²⁶ An act of Congress has, however, provided, that “it shall not be lawful to employ any part of the army of the United States as a *posse comitatus*, or otherwise for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized

²¹ U. S. R. S., § 787.

²² *Re Neagle*, 135 U. S. 1, 34 L. ed. 55; *si c.*, 39 Fed. 838.

²³ U. S. R. S., § 788; *Re Neagle*, 135 U. S. 1, 68, 34 L. ed. 55, 73. It has been held that this gives to the marshals the same and no more

power to arrest without a warrant than is conferred by the State statutes upon the said officers. *Re Acker*, 66 Fed. 290, 294.

²⁴ 6 Op. Atty. Gen. 466, 469.

²⁵ *Bac. Abr. Sheriff* (11).

²⁶ 6 Op. Atty. Gen. 466, 473.

by the Constitution or by act of Congress.”²⁷ Under this statute, it seems that the aid of the army cannot be obtained by a marshal unless the President shall employ it to suppress insurrection after a proclamation commanding the insurgents to disperse.²⁸ The marshal and his deputies may carry arms and use force in the execution of their official duty although a State statute forbids carrying concealed weapons;²⁹ but they may not make arrests nor carry arms outside of the districts for which they are appointed.³⁰

The Revised Statutes provide that “all writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and made returnable to, the court wherein the judgment was obtained.”³¹ In such a case, the writ may be executed, by the marshal of the district from which it was issued, in the other district without any independent writ being directed to him for that purpose.³² All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State, may run and be executed in any other State or in any Territory, but they must be issued from, and made returnable to, the court wherein the judgment was obtained.³³

At common law, at least, in cases where a writ of error may issue from the Supreme Court,³⁴ or from a Circuit Court of Appeals,³⁵ the execution cannot issue until the expiration of ten days from the entry of the judgment. The writ may, however, be previously prepared by the clerk.³⁶ It has been held that when a motion for a new trial is pending after the entry of judgment, the ten days does not begin to run till such motion is denied, and that the denial does not become effective

²⁷ Act of June 18, 1878, § 5; 20 St. at L. 145; 1 Sup. U. S. R. S. 363.

²⁸ 16 Op. Atty. Gen. 162; U. S. R. S., §§ 5298, 5300.

²⁹ U. S. ex rel. McSweeney v. Fullhart, 47 Fed. 802; Sifford's Case, 5 Am. Law Reg. 659.

³⁰ Walker v. Lea, 47 Fed. 645.

³¹ U. S. R. S., § 985.

³² Prevost v. Gorrell, 5 W. N. C. (Pa.) 151.

³³ U. S. R. S., § 986.

³⁴ U. S. R. S., § 1007.

³⁵ Danielson v. Northwestern Fuel Co., 55 Fed. 49.

³⁶ Board of Com'rs v. Gorman, 19 Wall. 661, 22 L. ed. 226.

till the order has been filed in the clerk's office;³⁷ and that Sundays must be excluded from the computation of the time.³⁸ Stays of proceedings, pending an application to the Supreme Court of the United States for a writ of *certiorari*, are often granted, when security has been given pending the review by the Circuit Court of Appeals.³⁹ A temporary stay of execution may be granted, although no writ of error is sued out, so that other lienholders may enter judgments against the judgment debtor, and thus share in the proceeds of the sale.⁴⁰ The court may compel the judgment debtor to give security as a condition of a stay of proceedings of more than ten days after entry of judgment.⁴¹ The Revised Statutes further provide that "when a Circuit Court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."⁴² Where a motion to set aside a judgment was granted, upon condition that the costs should be paid within sixty days, which payment was not made, it was held that the order did not supersede, but merely suspended, the judgment; and that the execution was properly based upon the original judgment and not upon one subsequently entered in the cause.⁴³

"In any State where judgments are liens upon the property

³⁷ *Brown v. Evans*, 18 Fed. 56; *Danielson v. Northwestern Fuel Co.*, 55 Fed. 49.

³⁸ *Danielson v. Northwestern Fuel Co.*, 55 Fed. 49.

³⁹ *Boston & M. R. Co. v. Gofkey*, 150 Fed. 686.

⁴⁰ *Eaton v. Cleveland, St. L. & L. & K. C. Ry. Co.*, 41 Fed. 421.

⁴¹ *Fisher v. Meyer*, 10 Fed. 268.

⁴² U. S. R. S. § 987; *Cambuston v. U. S.*, 95 U. S. 285, 288, 24 L. ed. 448, 450; *Emma Silver Min. Co. v. Parks*, 14 Blatchf. 411, 413; *Brown v. Evans*, 18 Fed. 56.

⁴³ *U. S. v. Nopjin*, 155 Fed. 1877.

of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term, or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."⁴⁴ It has been held that this only applies where the defendant has property, upon which the judgment of the State court would be a lien, and he, by reason of such lien, would be entitled under the State law to a stay.⁴⁵ Where a marshal takes possession of property not subject to execution which is owned by a party to the writ, the case is one which arises under the laws of the United States, and the Federal District Court has jurisdiction of a suit to recover the property.⁴⁶ So is a suit against a marshal for infringing a State statute which has been adopted by a rule of a court of the United States.⁴⁷ It has been held that, where a marshal under an execution in equity has seized the property of a person not a defendant to the writ, such third person cannot file a petition *pro interesse suo* to recover possession, but that his remedy is an original bill, or an action at law;⁴⁸ that such a suit arises under the laws of the United States, when the marshal claims that the property belongs to the defendant to the writ;⁴⁹ but that it does not when the marshal makes no such claim.⁵⁰

When it is required by the laws of any State that goods taken in execution on a writ of *feri facias* shall be appraised before they are sold, the appraisers appointed under the authority of the State may appraise goods taken in execution on such a writ issued out of a court of the United States, in the same manner as if such writ had issued out of a court of such State; and the marshal, in whose custody the goods are, shall summon the appraisers in the same manner as the sheriff is, by the laws of such State, required to summon them, and if the appraisers, after having been duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell

⁴⁴ U. S. R. S., § 988.

⁴⁵ *The Island Queen*, 152 Fed. 470.

⁴⁶ *Front St. Cable Ry. Co. v. Drake*, 65 Fed. 539.

⁴⁷ *Sowles v. Witters*, 46 Fed. 497.

⁴⁸ *Ex parte Mensing*, 55 Fed. 17.

Contra, *St. Paul, M. & M. Ry. Co.*

v. Drake, C. C. A., 72 Fed. 945; *supra*, § 258.

⁴⁹ *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 314.

⁵⁰ *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257.

such goods without an appraisement.⁵¹ When such appraisers attend, they are entitled to the like fees as in cases of appraisement under the laws of such State.⁵² When a marshal dies, or is removed from office, or his term expires, after he has taken under execution any real property and before sale or other final disposition thereof, the like process issues to the succeeding marshal, and the same proceeding is had as if his predecessor were still in office.⁵³ In such a case, when the former marshal has sold the real estate but executed no deed, the court may on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by the former marshal, order his successor to perfect the title, and execute and deliver a deed to the purchaser upon payment of the balance due.⁵⁴

Under the Revised Statutes, "interest is allowed on all judgments in civil causes recovered in a Circuit or District Court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the court of such state."⁵⁵ The interest is calculated from the date of the judgment, at such rate as is allowed by law on judgments "recovered in the courts of such State."⁵⁶ This statute does not apply to judgments against the United States.⁵⁷ It does not apply to decrees in equity, nor to judgments or decrees of the Supreme Court of the United States.⁵⁸ When a judgment against a municipal corporation was revived against its successor by *scire facias*, the order awarded execution for interest as well as principal.⁵⁹

"When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by

⁵¹ U. S. R. S., § 993; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253.

⁵² U. S. R. S., § 993.

⁵³ U. S. R. S., § 994; *Doolittle v. Bryan*, 14 How. 563, 14 L. ed. 543.

⁵⁴ U. S. R. S., § 994; *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271.

⁵⁵ U. S. R. S., § 966.

⁵⁶ *Ibid.*

⁵⁷ U. S. v. *Sherman*, 98 U. S. 565, 25 L. ed. 235.

⁵⁸ *Perkins v. Fourniquet*, 14 How. 328, 331, 14 L. ed. 441, 443.

⁵⁹ *Grantland v. Memphis*, 12 Fed. 287.

him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall upon final judgment be provided for and paid out of the proper appropriation from the Treasury."⁶⁰ It has been said: "I think this statute means: (1) Where the officer who ordered the seizures had no reasonable grounds for suspecting a violation of law, the recovery against him, if he is sued, shall be personal, and shall be collected from him. (2) Where the subordinate officer who made the seizure had no order from a superior to make it, and acted without reasonable grounds for suspecting a violation of law, the recovery shall be against him personally, and shall be collected from him. (3) But where the seizure was made under orders from a proper superior officer, or where the seizure was made on what reasonably seemed to be proper cause, the recovery may still be had against the officers; but it is, by the certificate provided for in the statute, converted into a recovery against the government. If this is not the meaning of the statute, I am at a loss to understand what it does mean. Surely Congress was not making provision to relieve revenue officials, and to provide for payment by the government, in contemplation of illegal judgments to be rendered by the courts. If the intent was not to allow recoveries in such cases as we have here, the statute would simply have forbidden recoveries where the officer acted under proper orders, or where there was reasonable ground to suppose that the seizure should be made, or, perhaps there would have been no statute enacted. The question might have been left as at common law."⁶¹ The effect of this statute is after such certifi-

⁶⁰ U. S. R. S., § 989; *Cox v. Barney*, 14 Blatchf. 289; *Andrae v. Redfield*, 12 Blatchf. 407; *Frericks v. Coster*, 22 Fed. 637; *Schell v. Cochran*, 107 U. S. 625; 27 L. ed. 543; *U. S. v. Sherman*, 98 U. S. 565; 25 L. ed. 235; *Campbell v. James*, 3

Fed. 513; *Dunnegan v. U. S.*, 17 Ct. Cl. 240, 247; *White v. Arthur*, 10 Fed. 180; *Flanders v. Seelye*, 105 U. S. 718; 26 L. ed. 1217.

⁶¹ *Haymes v. Brown*, 132 Fed. 525; 527.

cate has been given practically to convert the suit against the officer into a claim against the United States.⁶² There is no liability on the part of the government until there has been a recovery against the officer, and a certificate of probable cause has issued.⁶³ The certificate will be granted where it is affirmatively shown that the officers, who instituted the proceedings, acted in good faith and on reasonable ground of suspicion, although the verdict of the jury against them was clearly right under the evidence.⁶⁴ The court is not justified in granting such a certificate to a collector of internal revenue who acted at the request of a revenue agent whose only authority was an instruction from the chief clerk of the supervisor.⁶⁵

A certificate may be granted by a judge who did not try the case.⁶⁶ If, however, that judge has denied the application, another judge will rarely, if ever, grant it.⁶⁷ A certificate may be granted before or after an execution is issued.⁶⁸ A certificate cannot be granted before trial.⁶⁹ In case of appeal or writ of error, no money will be paid out of the Treasury upon the judgment until an affirmance by the appellate court and entry of judgment below in accordance with its mandate.⁷⁰ The postmasters are not included within the statute.⁷¹ It has been held that after judgment neither the government nor the collector is liable for interest.⁷² The Supreme Court of the United States, upon affirming a judgment in such a case, will allow interest on it, which will be included by the court below in its judgment of affirmance.⁷³ It has been held that when the government has had no notice, actual or constructive, and no opportunity to defend, it is not concluded by the certificate of probable cause.⁷⁴

A similar statute regulates an action against a person "for or on account of any thing done by him while an officer of either

⁶² U. S. v. Sherman, 98 U. S. 565, 25 L. ed. 235.

⁶³ Ibid.; Cox v. Barney, 14 Blatchf. 289.

⁶⁴ U. S. v. 83 Sacks of Wool and 5,974 Sheepskins, 147 Fed. 747.

⁶⁵ Frerichs v. Coster, 22 Fed. 637.

⁶⁶ Cox v. Barney, 14 Blatchf. 289.

⁶⁷ Frerichs v. Coster, 22 Fed. 637.

⁶⁸ Cox v. Barney, 14 Blatchf. 289.

⁶⁹ Andrae v. Redfield, 12 Blatchf. 407.

⁷⁰ Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543.

⁷¹ Campbell v. James, 3 Fed. 513.

⁷² White v. Arthur, 10 Fed. 80.

⁷³ Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543.

⁷⁴ Dunnegan v. U. S., 17 Ct. Cl. 247.

House of Congress in the discharge of his official duty.”⁷⁵ The Revised Statutes further provide: “When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.”⁷⁶ It has been held that this is not inconsistent with the statute previously quoted; and that in no case can there be a recovery against a revenue officer for a wrongful seizure upon probable cause, when the goods are returned intact; the remedy of the complainant being limited to a claim for loss or damages to his property while in the custody of the officer, which can be collected only from the government.⁷⁷ It has been held that the right of the United States to issue execution under a judgment in a purely governmental suit, such as an action upon a bail bond, is not barred by any limitation, nor by laches in failing to issue the execution until more than ten years after the entry of the judgment.⁷⁸

§ 428. Contempts. An attachment is the proper process to compel obedience to a decree or order requiring the performance of a specific act other than the payment of money,¹ or to punish a contempt of court.² It seems, that in districts held in States where imprisonment for debt has been abolished, disobedience to a decree or order for the payment of money cannot be punished by attachment;³ unless the defaulting party is an officer of the court, as an attorney,⁴ or has bid in property at

⁷⁵ 18 St. at L., p. 371.

⁷⁶ U. S. R. S., § 970.

⁷⁷ Agnew v. Haymes, C. C. A., 141 Fed. 631.

⁷⁸ U. S. v. Noojin, 155 Fed. 377.

¹ § 428. ² Rule 8; Mallory Mfg. Co. v. Fox, 20 Fed. 409.

² U. S. R. S., § 725; *Re Chiles*, 22 Wall. 157, 22 L. ed. 819.

³ *Mallory Mfg. Co. v. Fox*, 20 Fed. 409; *Nelson Morris & Co. v. Hill*, 89 Fed. 477.

⁴ *Jeffries v. Laurie*, 27 Fed. 195;

a judicial sale;⁵ or the motion is made by a master or the clerk of the Supreme Court to compel payment of his fees.⁶ The older cases both in the English Chancery and the Federal courts hold that it is a contempt to criticise in the press the conduct of the court,⁷ and to publish anything which may create a prejudice against either party to a pending cause.⁸ A case in which punishment was inflicted by Judge Peck for a criticism published upon one of his decisions led to his impeachment trial before the Senate; and although he was acquitted, a statute was enacted which materially diminished the powers of the Federal courts to punish for contempt.⁹ The courts of the United States have power "to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other persons, to any lawful writ, process, order, rule, decree, or command of the said courts."¹⁰ Beyond this the District Courts have no such power.¹¹ The act, just quoted in terms, applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, is doubtful.¹² It

Re Pitman, 1 Curtis, 186; *Bagley v. Yates*, 3 McLean, 465; *The Laurens*, 1 Abb. Adm. 508; *Re Paschal*, 10 Wall. 483, 19 L. ed. 992; *U. S. v. Mann*, 2 Brock. 9.

⁵ *Camden v. Mayhew*, 129 U. S. 73, 32 L. ed. 608.

⁶ Equity Rule 68; S. C. Rule 10.

⁷ See the language of Lord Chancellor Hardwicke in 2 Atk. 469, 471; *Hollingsworth v. Duane*, Wall. C. C. 77-100; *U. S. v. Duane*, Wall. C. C. 102.

⁸ 2 Atk. 469.

⁹ Jud. Code § 268, 36 St. at L. 1087, re-enacting U. S. R. S., § 725.

¹⁰ U. S. R. S., § 725.

¹¹ *Ex parte Robinson*, 19 Wall. 505, 510.

¹² Field, J. in *Ex parte Robinson*, 19 Wall. 505, 510. *State v. Morrill*, 16 Ark. 384; *Little v. State*, 90 Ind. 338; *Hale v. State*, 55 Ohio St. 210; *State v. Shepherd* (S. C. Mo.), 76 S. W. 79; *Hawes v. State*, 46 Nebraska, 149; *Carter v. Commonwealth*, 96 Va. 791, 45 L.R.A. 310, 32 S. E. 780. See Constitutional Regulation of Contempt of Court, Harv. Law Rev., XIII, 615; Statutory Restriction on the Power of Courts to Punish for Contempt, Yale L. J., Dec. 1903. It was held, that a statute was unconstitutional

has been held at Circuit that a United States commissioner has no power to punish for contempt;¹³ but he may, without a previous order of the court, issue a warrant of arrest upon a complaint, which is the foundation of a criminal prosecution for a contempt in the violation of an injunction by a person not a party to the suit.¹⁴

Criticism in a newspaper of the conduct and integrity of the judge is not a contempt;¹⁵ unless it was intended to influence the jury,¹⁶ or perhaps when it is in the nature of a threat against a judge, intended to influence his action in a case still pending before him,¹⁷ or where it advises or incites disobedience

which provided, that, in all cases of indirect contempt, the party charged should be entitled to have the case tried by a different judge than the one who made the order and by a jury. *Smith v. Speed*, 11 *Oklahoma*, 95, 55 L.R.A. 402; *Re Creely*, (Cal. Ct. of App., First Dist., August 1908) 97 *Pac.* 766. That this can be done has been held in *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 *N. Y.* 245; *Re Oldham*, 89 *N. C.* 23, 45 *Am. Rep.* 673; criticised by *N. Y. L. J.*, November 28, 1908.

¹³ *Re Mason*, 43 *Fed.* 510; *Ex parte Doll*, 7 *Phila.* 595; *Ex parte Perkins*, 29 *Fed.* 900; *U. S. v. Beavers*, 125 *Fed.* 778.

¹⁴ *Castner v. Pocahontas Collieries Co.*, 117 *Fed.* 184.

¹⁵ *Cuyler v. Atlantic & N. C. R. Co.*, 131 *Fed.* 95, 98, 99; *People ex rel. Barnes v. Albany Court of Sessions*, 147 *N. Y.* 290, 297; *State v. Circuit Court*, 97 *Wisc. 1.* In *McLeod v. St. Aubyn*, (1899) *A. C.* 549, 561, the Privy Council said: "Commitments for contempt by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them." See, however,

the subsequent English case of *Regina v. Gray*, (1900), 2 *Q. B.* 36. *Contra*, *State v. Shepherd*, 177 *Mo.* 205, 99 *Am. St. Rep.* 624, 76 *S. W.* 79; criticised in *Am. Law Review*, September-October, 1903; defended in *Yale L. J.*, December, 1903. *Re Hughes* 8 *N. M.* 225, 43 *Pac.* 692.

¹⁶ *Cuyler v. Atlantic & N. C. R. Co.*, 131 *Fed.* 95, 99. See *Patterson v. Colorado*, 205 *U. S.* 454, 51 *L. ed.* 879; *Telegram Newspaper Co. v. Commonwealth*, 172 *Mass.* 294, 44 *L.R.A.* 159, 70 *Am. St. Rep.* 280; *King v. Tibbits & Windust*, (1902) 1 *K. B.* 77. See *Cooper v. People*, 13 *Colo.* 337, 6 *L.R.A.* 430.

¹⁷ It has been held in Ohio, under a similar statute, that the publication of charges of misconduct against a judge holding court, in a newspaper which the writer had reason to believe would be circulated and read in the court-room, and which was thus circulated and read, is—"misbehavior in the presence of or so near the court or judge as to obstruct the administration of court or justice." *Myers v. State*, 21 *W. L. Bull.* 404; *s. c.*, 46 *Ohio St.* 473, 15 *Am. St. Rep.* 638, 22 *N. E.* 43. *Patterson v. Colorado*, 205 *U. S.* 454, 51 *L. ed.* 879; *People v. Wilson*, 64 *Ill.* 195, 16 *Am.*

to the court's order.¹⁸ The truth of the publication is no defense in these cases.¹⁹ It has been said that a false report of a decision is, "in its essence, a common law contempt of court."²⁰ It has been held that it is a contempt to represent by words and by printed circulars, that a sale under an execution is invalid, and that any one who buys will become involved in litigation.²¹ It is a contempt for a public officer to attempt unlawfully to dispossess the court, its officers or its records from rooms in which they are located.²² Misbehavior in the presence of the court may consist in an assault,²³ or in abusive language addressed to the court,²⁴ or one of its officers,²⁵ or any person there.²⁶ Similar conduct in an ante-room of the court, or so near the court-room as to be heard therein,²⁷ or seen therefrom, or from the jury-room,²⁸ is also punishable as a contempt. So are an assault upon a trustee in bankruptcy while in the performance of his duties,²⁹ and interference with property held in an official capacity by a Federal marshal or his deputy,³⁰

Rep. 528; *Re* Hearst's Chicago American (C. C. Ill.), Chicago Legal News, November 16, 1901.

¹⁸ U. S. ex rel. Guaranty Tr. Co. v. Haggerty, 116 Fed. 510.

¹⁹ U. S. ex rel. Guaranty Tr. Co. v. Gehr, 116 Fed. 520; where a man was punished for using abusive language and opprobrious epithets, in public denouncements of the official judge, for official action in granting an injunction. This last case was criticised in N. Y. L. J., Nov. 21, 1902.

²⁰ Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879; Gorham Mfg. Co. v. Emery B. T. D. E. Co., 92 Fed. 774, 780. *Contra*, Asbestos Shingle, Slate & Sheathing Co. v. Johns-Manville Co., 189 Fed. 611.

²¹ *Re* Sowles, 41 Fed. 752.

²² *Re* Lyman, 55 Fed. 29.

²³ Sharon v. Hill, 24 Fed. 726; *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405; *Re* Terry, 36 Fed. 419; U. S. v. Patterson, 26 Fed. 509; U. S. v. Barrett, 187 Fed. 378.

²⁴ *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405; *Re* Terry, 36 Fed. 419.

²⁵ *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405; *Re* Terry, 36 Fed. 419; such as a judge, or an attorney, U. S. v. Barrett, 187 Fed. 378.

²⁶ U. S. v. Emerson, 4 Cranch, C. C. 188; U. S. v. Carter, 3 Cranch, C. C. 423.

²⁷ U. S. v. Emerson, 4 Cranch, C. C. 188.

²⁸ U. S. v. Barrett, 187 Fed. 378.

²⁹ Writ of error dismissed, O'Neal v. U. S., 190 U. S. 36, 47 L. ed. 945; writ of habeas corpus denied; *Ex parte* O'Neal, 125 Fed. 967. This commitment was one of the grounds for the impeachment of Judge Swayne, who was acquitted by the Senate of the United States.

³⁰ A seizure by a sheriff, under State process, of property in the custody of a deputy marshal after its sale by the marshal, but before its delivery to the buyer, is a contempt of the Federal Court. Sabin

or by a Federal receiver.³¹ It is not a contempt to institute a suit in a State court, to enjoin a receiver appointed by a court of the United States, from executing the order of the latter court,³² although an attempt to enforce such a mandate of the State court would be.³³ The filing of a brief containing a scandalous and insulting attack on the conduct of the judge, from whose decision an appeal was taken, was held to be a ground for suspending the attorneys indefinitely from practice before the Circuit Court of Appeals, where such brief was filed,³⁴ but not to be a ground for disbaring them from practice in a Circuit Court of the United States in another Circuit.³⁵ It was held that the fact that a marshal knew a talesman, whom he subpoenaed under an open venire, to be a friend of the defendant in a criminal case, is not sufficient to convict him of a wilful contempt of court,³⁶ and it has been said that a bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a Federal court, is not a contempt.³⁷ It has been held to be a contempt to assault a United States commissioner, because of some past judicial action by him,³⁸ and to inflict cruel and unusual punishment upon a prisoner.³⁹ It has been said to be a contempt for an attorney to carry a pistol into court.⁴⁰ A hearing before a master in chancery or examiner, is for this purpose, treated as

v. Fogarty, 70 Fed. 482. Where a marshal who had replevied goods allowed the plaintiff's agents to put them in a car and to procure a shipping receipt and bill of lading for the same, directed to a stranger to the suit, it was held that the property had passed out of the custody of the Federal Court and that a sheriff who levied a State writ of attachment upon them was not guilty of contempt. *Animarium Co. v. Bright*, 82 Fed. 197.

³¹ *Re Tyler*, 149 U. S. 164, 37 L. ed. 689; *Royal Tr. Co. v. Washburn, B. & I. R. Co.*, C. C. A., 139 Fed. 865, *supra*, § 311.

³² *Royal Tr. Co. v. Washburn, B. & I. R. Co.*, C. C. A., 139 Fed. 865.

³³ *Ibid.*

³⁴ *Re Watt & Dohan*, C. C. A., Second Circuit, July 1, 1905, approved (C. C. E., D. Pa.), 149 Fed. 1009.

³⁵ *Re Watt & Dohan*, 149 Fed. 1009.

³⁶ *Richards v. U. S.*, C. C. A., 126 Fed. 105.

³⁷ *U. S. v. Carroll*, 147 Fed. 947.

³⁸ *Ex parte McLeod*, 120 Fed. 130.

³⁹ *Re Birdsong*, 39 Fed. 599; where the prisoner was chained by the neck so that he could neither lie nor sit and left so chained in darkness for several hours of the night.

⁴⁰ *Sharon v. Hill*, 24 Fed. 726.

a proceeding in court.⁴¹ Proceedings before a grand jury are considered to be in the presence of the court.⁴² It is a contempt for a grand juror to disclose the testimony upon which an indictment was based;⁴³ and for a petit juror to discuss a case, in violation of the court's direction to the contrary,⁴⁴ and to tamper with a juror or with a talesman before he is selected for a jury,⁴⁵ although the offense is committed at some distance from the court-house, but within the jurisdiction of the court.⁴⁶ An attempt in the hall adjoining the room where a trial is in progress to bribe a witness subpoenaed to attend it, is a contempt of court.⁴⁷ Bribery of a witness in the town where the court is held has been held to be a contempt within the statute.⁴⁸ It has been held to be a contempt of court to interrupt and violently break up the testimony of a witness before an examiner by questioning, prompting and talking with the witness.⁴⁹ An attorney has been punished for contempt in instituting an unfounded suit in a State court against a Federal judge, for the purpose of disqualifying the latter from hearing a pending cause.⁵⁰ It has been said that it might be a contempt to ask relief which might obstruct, delay or embarrass the court in proceeding under the mandate of a court of review.⁵¹ A State District Attorney may be punished for contempt in applying to a State court for a mandamus, to compel a Federal receiver to disobey an order of the Federal court.⁵² It was held to be

⁴¹ *Sharon v. Hill*, 24 Fed. 726; *U. S. v. Anonymous*, 21 Fed. 761.

⁴² *Heard v. Pierce*, 8 Cushing (Mass.) 338, 341, 54 Am. Dec. 757; cited *Re Savin*, 131 U. S. 267, 277, 33 L. ed. 150, 153.

⁴³ *Re Atwell*, 140 Fed. 368.

⁴⁴ *Re May*, 1 Fed. 737; *U. S. v. Devaughan*, 3 Cranch, C. C. 84.

⁴⁵ *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154; *Kirk v. U. S.*, C. C. A., 192 Fed. 273.

⁴⁶ *U. S. v. Carroll*, 147 Fed. 947; *Kirk v. U. S.*, C. C. A., 192 Fed. 273.

⁴⁷ *Savin*, Petitioner, 131 U. S. 267, 33 L. ed. 150.

⁴⁸ *Re Brule*, 71 Fed. 943; *U. S.*

v. Carroll, 147 Fed. 947. See *Cuddy*, Petitioner, 131 U. S. 280, 33 L. ed. 154.

⁴⁹ *U. S. v. Anonymous*, 21 Fed. 761.

⁵⁰ *Ex parte Davis*, 112 Fed. 139. Application for writ of prohibition denied, *Re Paquet*, C. C. A., 114 Fed. 437. This commitment was one of the grounds for the impeachment of Judge Swayne, who was acquitted by the Senate of the United States.

⁵¹ *Coram v. Davis*, 174 Fed. 664, 665.

⁵² *Royal Tr. Co. v. Washburn, B. & T. R. Ry. Co.*, 112 Fed. 531: *supra*, § 311.

a contempt of court to sue in a court of another State a party while there for the purpose of attending the taking of a deposition; and a fine of the expenses of such suit, including the counsel fees therein, was imposed upon the party who brought it.⁵³ It is not a contempt for an attorney to call the attention of the State court to certain facts, which result in an order that invades the Federal jurisdiction, when such order is entered upon the court's own motion;⁵⁴ nor for an attorney to advise his client that an order is void, when he does not advise the client to disobey the same.⁵⁵ It has been said to be a contempt of court to bring before it a collusive suit.⁵⁶ The Federal court cannot punish for contempt, a person who is not its officer, nor a suitor therein, upon the charge of using, or of an attempt to use, its process, to obstruct the administration of justice in a State court.⁵⁷ It has been held not to be a contempt to take in another State and file and publish within the jurisdiction, the deposition in a case there pending, for the purpose of deceiving the court, when the paper has not been offered in evidence,⁵⁸ nor to conspire to commit a contempt of court.⁵⁹ It is a contempt for any person, even a judge, to disobey a writ of supersedeas,⁶⁰ although the payment or decree below has been affirmed when no mandate has been issued.⁶¹ To lynch a prisoner, who is in the custody of a State jailer, pending a supersedeas from a court of the United States which prevents his execution until an appeal from an order denying an appli-

⁵³ *Bridges v. Sheldon*, 7 Fed. 17, 45-47; *supra*, § 167. But see *Blight v. Fisher*, Pet. C. C. 41.

⁵⁴ *Re Watts & Sachs*, 190 U. S. 1, 47 L. ed. 933. But see *Re Fortunato*, 123 Fed. 622.

⁵⁵ *Re Noyes*, C. C. A., 121 Fed. 209, 226.

⁵⁶ *Lord v. Veazie*, 8 How. 251, 12 L. ed. 1067.

⁵⁷ *Re Riggsbee*, 151 Fed. 701; *Cleveland v. Chamberlain*, 1 Black, 419, 17 L. ed. 93.

⁵⁸ *Doniphan v. Lehman*, 179 Fed. 173.

⁵⁹ *Ibid*.

⁶⁰ *Re Noyes*, C. C. A., 121 Fed. 209, 225; where the judge was fined \$1,000. The disobedience consisted in letters to the marshal, directing him to "hold things in *statu quo*" and to guard gold dust, which by the writ of receiver had been directed to return to the defendants to the suit, and in a letter to the military commander asking him to render the marshal such assistance as was required.

⁶¹ *Merrimack River Sav. Bank v. City of Clay Center*, 219 U. S. 527, 55 L. ed. 320.

cation for the writ of *habeas corpus* has been decided.⁶² It has been said to be a contempt of an appellate court to destroy property pending an appeal from a decree denying a prayer for an injunction against such destruction,⁶³ and that the issue by the court of first instance of an injunction against such destruction pending the appeal does not deprive the appellate court of jurisdiction to punish the act.⁶⁴ It is a contempt to part with money pending an application to compel the payment of the same into court.⁶⁵ Advice to disobey a writ, when given by a United States District Attorney and by a representative of the Department of Justice to a marshal, is a contempt of court.⁶⁶ It has been held that perjury by a bankrupt upon an examination to ascertain the amount and location of his assets,⁶⁷ or by a witness⁶⁸ upon an examination before a referee in bankruptcy, or by an affiant when the affidavit is submitted to the court,⁶⁹ otherwise it has been held not,⁷⁰ should be punished as a contempt of court. It has been held that it is a contempt for a person duly subpoenaed to refuse to attend, no matter how immaterial his evidence may be and irrespective of the sufficiency of the pleadings in the suit;⁷¹ and for a person to refuse to attend and produce documents, when he has been duly served with a subpoena *duces tecum* requiring the production of the same, although they are immaterial to the suit,⁷² and al-

⁶² U. S. v. Shipp, 203 U. S. 563, 51 L. ed. 319.

⁶³ Merrimack River Sav. Bank v. City of Clay Center, 219 U. S. 527, 55 L. ed. 320.

⁶⁴ Ibid.

⁶⁵ Wartman v. Wartman, Taney, 362, 29 Fed. Cas., p. 303, No. 17, 210.

⁶⁶ Re Noyes, C. C. A., 121 Fed. 209, 228, 231.

⁶⁷ Re Fellerman (S. D. N. Y.), 149 Fed. 244. This case was settled pending an application for a writ of habeas corpus to review the commitment. It was subsequently approved in *Ex parte Bick* (C. C. S. D. N. Y.), 155 Fed. 908; *Re Gor-*

don, 167 Fed. 239; *Re Singer*, 174 Fed. 208; *Re Smith*, 185 Fed. 983; *Re Shear*, 188 Fed. 677. But see *Re Bronstein*, 182 Fed. 349; *Re Wiesebrock*, 188 Fed. 757.

⁶⁸ The contempt proceedings can be instituted before the conclusion of the testimony and before the party has been cross-examined. *Re Schulman*, C. C. A., 177 Fed. 191.

⁶⁹ *Re Steiner*, 195 Fed. 299.

⁷⁰ *Doniphan v. Lehman*, 179 Fed. 173.

⁷¹ *Nelson v. U. S.*, 201 U. S. 92, 114, 50 L. ed. 673, 685; *Fairfield v. U. S.*, C. C. A., 146 Fed. 508.

⁷² *Fairfield v. U. S.*, C. C. A., 146 Fed. 508.

though they may tend to criminate him.⁷³ In the latter case, it is his duty to raise the objection after he has produced the documents in court.⁷⁴ It was held that a man was guilty of contempt for failing to attend in obedience to a subpoena and to present to the court the facts which excused him from attendance,⁷⁵ and to evade service of an order⁹⁵ although he may evade service of process in the suit.⁷⁷ It has been held that a court has no jurisdiction to punish as a contempt a violation of an oral stipulation made in open court.⁷⁸ Disobedience to a subpoena directing the attendance of a witness to take his testimony for use in another jurisdiction, is punishable by the court that issues the subpoena.⁷⁹

An officer of the court may be punished by attachment for his misbehavior in office after his term of office has expired by resignation or otherwise.⁸⁰ An attorney⁸¹ or other officer⁸² of the court may be thus compelled to pay to a person named in the order money received by him in his official capacity. Where, however, there is room for a reasonable doubt as to how much is due from the officer, the court will usually refuse to proceed against him summarily, and require the complaining party to begin a suit.⁸³ It is a contempt of court for a person to assist another, whether acting as the latter's agent or otherwise, in committing an act which has been forbidden to himself in an injunction issued against him individually.⁸⁴

⁷³ U. S. v. Collins, 146 Fed. 553; U. S. v. Terminal R. Ass'n, 148 Fed. 486.

⁷⁴ U. S. v. Collins, 146 Fed. 553; U. S. v. Terminal R. Ass'n, 148 Fed. 486.

⁷⁵ Carman v. Emerson, C. C. A., 71 Fed. 264.

⁷⁶ *Re* Rice, 181 Fed. 217.

⁷⁷ *Ibid*.

⁷⁸ *Ex parte* Buskirk, C. C. A., 72 Fed. 14, 20.

⁷⁹ *Re* Allis, 44 Fed. 216. But see *Re* Kingsley, 185 Fed. 1005.

⁸⁰ *The Laurens*, 1 Abb. Adm. 508. It was held that the acts of a customs inspector and an inspector of the Department of Commerce and Fed. Prac. Vol. II.—86.

Labor, pursuant to a search warrant issued by a United States Commissioner, were not committed as officers of a court of the United States and therefore could not be punished as contempts. *Re* Chin K. Shue, 199 Fed. 282.

⁸¹ *Re* Paschal, 10 Wall. 483, 19 L. ed. 992; *Jeffries v. Laurie*, 27 Fed. 195.

⁸² *Re* Pitman, 1 Curt. 186; *Bagley v. Yates*, 3 McLean, 465; *The Laurens*, 1 Abb. Adm. 508.

⁸³ See *Re* Paschall, 10 Wall. 483, 19 L. ed. 992; *U. S. v. Mann*, 2 Brock. 9.

⁸⁴ *Dadirrian v. Gullian*, 79 Fed. 784; *Diamond Drill & Mach. Co. v.*

But an employee of the defendant is not guilty of contempt for committing an act forbidden by a decree or order to the defendant and his employees when he had subsequently severed his connection with the latter and is acting for himself at the time of such commission.⁸⁵ A person not a party to the suit may be punished for a violation of an injunction against a corporation when he is a controlling member of the same and controlled part of the litigation for the defense.⁸⁶ Officers of a corporation, who are not parties to the suit, may be punished for contempt in refusing to make the company comply with an order of the court, when they have the power to require such compliance.⁸⁷ An officer of a corporation may be punished for contempt because, after the issue of an injunction against his company, he continued the infringement under another name, although he had resigned his office.⁸⁸ It is a contempt for persons, who have been enjoined from the infringement of a patent, to organize a corporation, which commits the acts of

Kelley Bros. & Spielman, 130 Fed. 893; *Re Rice*, 181 Fed. 217, an attorney. A person enjoined from the infringement of a patent was held to commit a contempt by contributing to a fund to defray the expenses of another who was contesting the validity of a patent. *Bate Ref. Co. v. Gillett*, 30 Fed. 683. It has been held: that a defendant corporation which, when enjoined from selling a certain cordial in certain bottles with a particular label, sold its entire stock of cordials with such bottles and labels to a third person, under an arrangement that he would fill all orders for the cordial which the defendant should receive, was guilty of contempt; although it did not share in the profits of such sales, and although it acted under advice of counsel. *Société Anonyme v. Western Distilling Co.*, 42 Fed. 96. It was held that a defendant had violated an injunction against his "making, using or vending for use" certain

specified articles, where, after the injunction, he sold such an article previously manufactured. *A. R. Dick Co. v. Wickelman*, 89 Fed. 95; and that an injunction against the sale of certain articles was not violated by the sale of articles of that character which had been bought from the plaintiff. *Re Rubin*, 193 Fed. 425. Parties were held guilty of contempt when they had paid the expenses of an act prohibited in an injunction against them, which was committed by an applicant to them for employment. *Motion Picture Patents Co. v. Laemmle*, 186 Fed. 641.

⁸⁵ *Donaldson v. Roksament Stone Co.*, 178 Fed. 103.

⁸⁶ *Stahl v. Ertel*, 62 Fed. 920; *American Const. Co. v. Jacksonville, T. & K. Ry. Co.*, 52 Fed. 937; *Heinze v. Butte & B. Consol. Min. Co., C. C. A.*, 129 Fed. 274.

⁸⁷ *Heinze v. Butte & B. Consol. Min. Co., C. C. A.*, 129 Fed. 274.

⁸⁸ *Janney v. Pancoast Interna-*

infringement.⁸⁹ A person not a party to the suit who assists a party in violating an injunction may be punished for a contempt.⁹⁰ It has been said that, to bind a stranger to the suit, full knowledge of the scope and effect of the injunction must be shown.⁹¹ In one case, where the court had enjoined the defendants to the suit, "and all persons whomsoever," from a wilful trespass upon private property; it was held that a stranger to the suit, who was in no way connected with any of the parties thereto, might be punished for contempt for committing an independent trespass when he had knowledge of the decree.⁹²

A domestic or foreign corporation, as well as an individual, may be fined for a contempt.⁹³ It has been held that a trade union in Michigan cannot be punished for contempt.⁹⁴ It is no defense to a proceeding for the punishment of a defendant for the violation of an injunction against the infringement of a patent, by himself or his employees, that he had instructed them to obey the injunction and that the violation was made without his knowledge.⁹⁵

No person can be punished for contempt by a violation of an order or decree, unless he has knowledge or notice of the same. A party who has actual knowledge of the issue of an injunction may be punished for disobedience to the same, although he has not been served with a copy of the writ or order.⁹⁶ The

tional Ventilator Co., 124 Fed. 972; Campbell v. Magnet Light Co., 175 Fed. 117.

⁸⁹ Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 130 Fed. 893; Bernard v. Frank, C. C. A., 179 Fed. 516. But see Cantrell & Cochrane v. Wittemann, 180 Fed. 794.

⁹⁰ *Ex parte* Lennon, 64 Fed. 320; s. c., 166 U. S. 548, 41 L. ed. 1110; Employers' Teaming Co. v. Teamsters' Joint Council, 141 Fed. 679; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155, 185.

⁹¹ W. B. Conkey Co. v. Russell, 111 Fed. 417, 422.

⁹² Chisolm v. Caines, 121 Fed. 397. But see *supra*, § 295. An as-

sault upon a servant of the complainant while he is in the custody of the police after his arrest, is not a violation of an injunction forbidding interference with persons in the conduct of the complainant's business. Garrigan v. U. S., C. C. A., 163 Fed. 16.

⁹³ U. S. v. Memphis & L. R. R. Co., 6 Fed. 237.

⁹⁴ Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155.

⁹⁵ Gillette Safety Razor Co. v. Wolf, 180 Fed. 776.

⁹⁶ *Ex parte* Lennon, 64 Fed. 320; s. c., 166 U. S. 548, 41 L. ed. 1110; *Re* Krinsky, 112 Fed. 972; *Re* Wilk, 155 Fed. 943; *Re* Rice, 181 Fed. 217.

misspelling of a defendant's first name in the pleadings, decree and injunction order, will not relieve him from liability for contempt for a violation of the injunction, where he was served with process and appeared, and he could not have been misled as to the person intended.⁹⁷ The equity rules provide that if a decree be for the performance of a specific act, other than the payment of money, it must prescribe the time within which the act shall be done, "of which the defendant shall be bound without further service to take notice;"⁹⁸ and that, "neither the noting of an order in the Equity Docket nor its entry in the order-book is in itself notice thereof to the parties to the suit."⁹⁹ It is, however, the safer practice to make personal service of a certified copy of a decree or order, disobedience to which it is desired to punish by an attachment.¹⁰⁰ If the party is beyond the district service by registered mail and upon his solicitor or counsel is proper.¹⁰¹

§ 429. Practice in contempt proceedings. In general. "There is no settled practice in contempt proceedings."¹ The hearing is, in general, before the court against which the contempt was committed.² Where the contempt was a violation of a supersedeas, it is punished by the appellate tribunal.³ Where a mandate from an appellate court directing the entry of a decree for an injunction has been filed in the court below, the latter, and not the former, has jurisdiction to punish its violation as a contempt.⁴ The violation of an injunction to restrain the infringement of a copyright,⁵ or trade-mark,⁶ may be punished as a contempt by any court or judge of the United States having jurisdiction of the defendants. It is the duty

⁹⁷ *Aaron v. U. S., C. C. A.*, 155 Fed. 833.

⁹⁸ Eq. Rule 8.

⁹⁹ Eq. Rule 4.

¹⁰⁰ *Atlantic G. P. Co. v. Dittman P. Mfg. Co.*, 9 Fed. 316; *Ulman v. Ritter*, 72 Fed. 1000; *Westinghouse El. & Mfg. Co. v. Sangamo El. Co.*, 128 Fed. 747.

¹⁰¹ *Ulman v. Ritter*, 72 Fed. 1000.

§ 429. ¹ *U. S. v. Sweeney*, 95 Fed. 434, 446.

² *Re Spofford*, 62 Fed. 443; *Mer-*

chants' Stock & Grain Co. v. Board of Trade, C. C. A., 201 Fed. 20, 27.

³ *U. S. v. Shipp*, 203 U. S. 563, 51 L. ed. 319; *Re McKenzie*, 180 U. S. 536, 45 L. ed. 657; *Re McKenzie*, 142 Fed. 383; *Tornanses v. Melsing, C. C. A.*, 106 Fed. 775.

⁴ *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 124 Fed. 736.

⁵ Act of Mar. 4, 1909, 35 St. at L. 1075, § 36, *Pierce Fed. Code Supp.* § 1589.

⁶ Act of Mar. 2, 1907, 34 St. at

of the clerk of the court or the judge that grants the injunction, whenever required so to do by the court hearing an application to enforce the same, to transmit without delay thereto a certified copy of all the papers in the cause that are on file at his office.⁷ Disobedience to a subpoena, issued by a court of one district, ordering a witness to appear and testify before a master appointed therein by the court of another district, is punishable by the court which issued the subpoena.⁸ A court has no jurisdiction to punish for contempt an act not forbidden at the time of its commission; nor can it accomplish such a result by the entry of an order *nunc pro tunc* as of a date prior to the commission of the act,⁹ except in a case where the judge has announced orally from the bench a decision that an injunction issue, when the order may be entered as of the date of such decision, and a subsequent act may be punished accordingly, even if committed before the formal entry of the order.¹⁰ Where a person was under bail to appear and answer indictments in the State courts for the embezzlement of money; it was held that, until such indictments were disposed of, there should be no hearing upon an application to commit him for contempt in failing to obey an order to pay over the same to a trustee in bankruptcy.¹¹ In case of disobedience to a decree for the performance of a specific act, other than the payment of money, the rules direct the issue of an attachment *ex parte* by the clerk, upon the filing of an affidavit that the act has not been performed within the required time.¹² It is, however, the usual practice to give notice to the delinquent, of an application for an attachment, either by an order to show cause or otherwise.¹³ An attachment may

L. 1251, § 20, Pierce Fed. Code, § 8826.

⁷ Act of Mar. 2, 1907, 34 St. at L. 1251, § 20, Pierce Fed. Code, § 8826; Act of Mar. 4, 1909, 35 St. at L. 1075, § 37, Pierce Fed. Code Supp., § 1589.

⁸ *Re Allis*, 44 Fed. 216; *supra*, § 343.

⁹ *Ex parte* Buskirk, C. C. A., 72 Fed. 14.

¹⁰ *Ibid.*; *Kimpton v. Eve*, 2 Ves.

& B. 349; *Anon.*, 3 Atk. 567; *James v. Downs*, 18 Ves. 522; *Vansandan v. Rose*, 2 Jac. & W. 264; *Koehler v. Farmers' & D. Nat. Bank*, 6 N. Y. Supp. 470.

¹¹ *Re* Hooks Smelting Co., 146 Fed. 336.

¹² Eq. Rule 8. See *In re Steiner*, 195 Fed. 299.

¹³ *Worcester v. Truman*, 1 McLean, 483; *Fischer v. Hayes*, 6 Fed. 63. Six days' notice has been held

be issued at the request of a person not a party to the cause, in whose favor an order has been made, or against a person not a party to the cause, against whom obedience to an order can be enforced.¹⁴ Notice of the application, when required, should be served personally upon the person thereby affected.¹⁵ If a party conceals himself to avoid personal service of the notice, perhaps notice may be served upon an attorney who has appeared for him in the proceeding in which the contempt was committed.¹⁶ In the case of a foreign corporation, it is sufficient to serve notice upon the person, whom it advertises as its manager for the State and upon its solicitor, or perhaps upon its counsel in the original suit.¹⁷ It is the safer practice to serve notice upon the person, whom it has authorized to accept service of process against it within the State.¹⁸ There can be no punishment for a contempt, disclosed in the evidence, which was not charged in the information, order to show cause, or affidavits before the hearing.¹⁹ Where it is a doubtful question of law whether the acts, of which complaint is made, constitute a violation of the injunction, a motion to punish the same for contempt will be denied. The court will not try in such a proceeding a difficult question as to the infringement of a patent.²⁰ It is better practice for the order committing a per-

to be reasonable. *American Const. Co. v. Jacksonville, T. & K. Ry. Co.*, 52 Fed. 937. Where the notice named a defendant corporation "and its officers" as the objects of the contempt proceedings, without specifying the individual officers, it was held that any officer served with the notice might be attached. *American Const. Co. v. Jacksonville, T. & K. Ry. Co.*, 52 Fed. 937.

¹⁴ Equity Rule 10. See *King v. McLean Asylum of M. G. Hospital*, C. C. A., 64 Fed. 325. *Supra*, § 428.

¹⁵ *Gray v. Chicago, I. & N. R. Co.*, 1 Woolw. 63; *Hollingsworth v. Duane*, Wall. C. C. 141.

¹⁶ *Eureka L. & Y. C. Co. v. Superior Ct. of Yuba County*, 116 U. S. 410, 418, 29 L. ed. 671.

¹⁷ *Westinghouse Air Brake Co. v. Christensen Eng. Co.*, 130 Fed. 735.

¹⁸ See § 213, *supra*.

¹⁹ *Re Reese*, C. C. A., 107 Fed. 942; *Huttig Sash & Door Co. v. Fuelle*, 143 Fed. 363, 374.

²⁰ *California Paving Co. v. Moltor*, 113 U. S. 609, 618, 28 L. ed. 1106, 1109; *Liddle v. Cory*, 7 Blatchf. 1; *Welling v. Trimming Co.*, 2 Ban. & A. 1; *Buerk v. Imhaeuser*, 2 Bann. & A. 465; Fed. Cas. No. 2,108; *Onderdonk v. Fanning*, 2 Fed. 568; *Smith v. Halkyard*, 19 Fed. 602; *Wirt v. Brown*, 30 Fed. 187; *Temple Pump Co. v. Mfg. Co.*, 31 Fed. 292; *Howard v. Mast*, 33 Fed. 867; *Lilienthal v. Wallach*, 37 Fed. 241; *Pa. Diamond Co. v. Simpson*, 39 Fed. 284; *Truax*

son for contempt to recite the offense charged, although it seems that this is not necessary if it describes the same by reference to other proceedings.²¹ It has been said "The record should show that an issue had been made in some way on the question of contempt, and that the person adjudged guilty thereof had had an opportunity to be heard in reference thereto."²² It has been said that an order committing a person for contempt cannot be altered at a subsequent term of the court;²³ that the court cannot subsequently discharge the party committed upon proof of his inability to comply with the order, his remedy being an application to the President for a pardon;²⁴ and that such an order is void if it does not express or limit the term of imprisonment.²⁵ When the contempt consisted in disobedience to a subpoena to appear and produce documents before a grand jury, and an order directed that the delinquent be imprisoned "until he shall be willing to obey the command of said subpoena and of this order," it was held: that, upon the discharge of the grand jury, the term of imprisonment thus imposed expired; but that he was not purged of his contempt, and a new term of imprisonment was consequently imposed upon him.²⁶ A prisoner summarily committed for a contempt of court is not entitled to any credit for good behavior.²⁷ It has been said that the President has no power, by pardon, to relieve a person from punishment for a civil, as distinguished from a criminal, contempt.²⁸ The court refused to

v. Detweiler, 46 Fed. 117, 118; Enterprise Mfg. Co. v. Sargent, 48 Fed. 453; Mack v. Levy, 49 Fed. 857; Accumulator Co. v. Consol. Elect. Storage Co., 53 Fed. 793, 795; Bonsack Mach. Co. v. National Cigarette Co., 64 Fed. 858; International Register Co. v. Recording Fare Register Co., 125 Fed. 790. For a case where the construction put upon the patent by another court was followed, see Accumulator Co. v. Consol. El. Storage Co., 53 Fed. 793.

²¹ Fischer v. Hayes, 6 Fed. 63.

²² *Re* Cole, C. C. A., 23 L.R.A. (N.S.) 255, 163 Fed. 180, 183.

²³ Fischer v. Hayes, 6 Fed. 63. A term of a court in bankruptcy is never closed. *Re* Henschel, 114 Fed. 968.

²⁴ *Re* Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911. *Contra*, *Re* Nevitt, C. C. A., 117 Fed. 448, 461.

²⁵ *Matter of* Marsh, MacA. & M. (D. C.) 32. *Contra*, *Re* Nevitt, C. C. A., 117 Fed. 448, 461.

²⁶ U. S. v. Collins, 146 Fed. 553.

²⁷ *Re* Terry, 37 Fed. 649.

²⁸ *Re* Nevitt, C. C. A., 117 Fed. 448, 456. *Contra*, *Re* Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911. Attorney General Gilpin expressed the opinion: that the president

stay proceedings under a commitment, until the persons committed for contempt could apply to the President for pardon.²⁹

§ 430. Criminal proceedings to punish for contempt.

Summary proceedings to punish for a contempt of court may be either civil or criminal.¹ In civil contempt proceedings, the punishment is remedial for the benefit of the complainant.² In those which are criminal in their nature, the sentence is punitive to vindicate the authority of the court.³ A party to a proceeding may be punished, either civilly or criminally, for disobedience to an order therein made;⁴ but it seems that when the contempt was committed by a person not a party, nor in privity with a party, to the original suit, the proceedings must be criminal in their nature.⁵ Such criminal proceedings must be separate and distinct from the action or suit in which the contempt was committed.⁶ They must be entitled not in the original suit, but with a title of their own appropriate to indicate their character.⁷ The better practice is to entitle them in the name of the United States against the person charged.⁸ It has been said that they should be entitled in the name of the United States on the relation of the complaining party.⁹ It has been held that two parties to a proceeding in bankruptcy can be joined in a single application to punish them for con-

might relieve a person of a fine imposed upon him for an affray in the presence of the court, 3 Op. Atty. G. 622; and Attorney General Mason: that he might relieve defaulting jurors from the payment of fines, 4 Op. Atty. G. 458.

²⁹ *Re Nevitt*, C. C. A., 117 Fed. 448, 453.

§ 430. ¹ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874. Where the act is one that evinces a deliberate purpose to contemn the authority of the court, it may be punished as a criminal contempt. *Re Rice*, 181 Fed. 217. See *Clay v. Waters*, C. C. A., 178 Fed. 385, 21 Ann. Cas. 897.

² *Ibid.* 221 U. S. 418, 441, 55 L. ed. 797, 805, 34 L.R.A.(N.S.) 874.

But see *Puget Sound Traction, Light & Power Co. v. Lawrey*, 202 Fed. 263.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997; *Garrigan v. U. S.*, C. C. A., 23 L.R.A.(N.S.) 1295, 163 Fed. 16.

⁶ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 55 L. ed. 797; *S. Anargyros v. Anargyros & Co.*, 191 Fed. 208.

⁷ *Ibid.*

⁸ *Fischer v. Hayes*, 6 Fed. 63.

⁹ *Ibid.* In the Second Circuit the rule seems that they must be prosecuted by the United States attorney. *Re Kahn*, C. C. A., April, 1913.

tempt in several perjuries, therein committed.¹⁰ The motion papers must clearly specify the acts for which punishment is sought, although the nicety and precision of an indictment are not required.¹¹ Although no pleading on behalf of the respondent is necessary, it is the safer practice for him to set forth his defense in an affidavit or formal answer, in such a way that the issues raised may be clearly shown.¹² When the contempt is a criminal offense, the accused may be reached under criminal process by an order for his removal, made by a judge in any district where he may be found, the proceedings being based upon the writ of attachment, issued by the court of the district where the offense was committed.¹³ A person arrested in criminal proceedings to punish for a contempt is entitled to an examination before a magistrate, if so entitled by the State practice.¹⁴ When the contempt is committed in the presence of the court, no notice nor trial of any disputed question of fact is necessary.¹⁵ The old doctrine, that where an attachment had been issued a person charged with contempt might demand that interrogatories be filed concerning the facts which were the basis of the charge and that if he denied the

¹⁰ *Re Fellerman*, 149 Fed. 244, in which the writer was counsel.

¹¹ *S. Anargyros v. Anargyros & Co.*, 191 Fed. 208; *Aaron v. U. S.*, C. C. A., 155 Fed. 833. It has been held: that a petition for the violation of an injunction against strikers, charged to have been committed by a person not a party to the suit, is insufficient to charge him with knowledge of the injunction when it alleges in the alternative that he knew, or by the exercise of ordinary intelligence might have known, that it had been issued. *Garrigan v. U. S.*, C. C. A., 23 L.R.A.(N.S.) 1295, 163 Fed. 16; and that allegations that the acts of which complaint is made have interfered with the complainant's exclusive right to the good will of a business, to his irreparable injury, although appropriate to a civil pro-

ceeding, are inappropriate in a proceeding to punish for a criminal contempt (*S. Anargyros v. Anargyros & Co.*, 191 Fed. 208). A petition or motion for the attachment of a defendant for contempt in violating an injunction, which is entitled as in the original suit, and refers to the order of injunction granted therein by its date, and sets out in detail the alleged acts of violation, is sufficient. It need not set out the order in terms. *Aaron v. U. S.*, C. C. A., 155 Fed. 833.

¹² *Re Goodrich*, C. C. A., 184 Fed. 5.

¹³ *Re Manning*, 44 Fed. 275, where the writer was counsel.

¹⁴ *Re Acker*, 66 Fed. 290.

¹⁵ *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405; *Re Terry*, 36 Fed. 419.

same under oath he could not be punished for contempt, the only remedy being an indictment against him for perjury,¹⁶ has been abrogated,¹⁷ except, perhaps, when the decision depends upon the intent of an ambiguous act.¹⁸ It seems that this was never the rule in equity.¹⁹ The accused cannot be compelled to answer interrogatories.²⁰ When, at the argument of the motion for an attachment, the party accused of disobedience denies the charge, the practice has been for the court either to determine the disputed questions of fact upon such affidavits as were then presented or to refer the question.²¹

¹⁶ U. S. v. Dodge, 2 Gall. 313; Hollingsworth v. Duane, Wall. C. C. 77. See U. S. v. Duane, Wall. C. C. 103.

¹⁷ Savin, Petitioner, 131 U. S. 267, 33 L. ed. 150; U. S. v. Shipp, 203 U. S. 563, 51 L. ed. 319, 8 Ann. Cas. 265; U. S. v. Carroll, 147 Fed. 947, 951; Kirk v. U. S., C. C. A., 192 Fed. 273. See *Ex parte* McCown, 139 N. C. 95; 51 S. E. 957, 2 L.R.A. (N.S.) 603; *Ex parte* Summers, 27 N. C. 169.

¹⁸ U. S. v. Shipp, 203 U. S. 563, 574, 51 L. ed. 319, 324, 8 Ann. Cas. 265.

¹⁹ U. S. v. Anon., 11 Fed. 701. See U. S. v. Debs, 64 Fed. 724.

²⁰ Hollingsworth v. Duane, Wall. C. C. 77. See U. S. v. Duane, Wall. C. C. 102.

²¹ Where affidavits were used, it was held that the facts to authorize a conviction must be clearly established. Garrigan v. U. S., C. C. A., 163 Fed. 16. It has been held, that affidavits containing allegations upon information, without stating the source thereof, and also mere conclusions of law, are insufficient to support a violation of an injunction. Westinghouse Air-Brake Co. v. Christensen Eng. Co., 128 Fed. 749. An objection that a contempt proceeding was based on a rule is-

sued on a complaint made on information and belief supported by an affidavit of the same character was held to be too late, when not raised until after the alleged contemnor had admitted the act charged and had stated in defense, that the act was done in ignorance of the order. *Re Rice*, 181 Fed. 217. Where a party charged with contempt appears and goes to trial without objection by appropriate motion the sufficiency of the information and affidavits, such objection is waived. *Aaron v. U. S.*, C. C. A., 155 Fed. 833. It has been said that where the facts appear on the record or by testimony already taken in another proceeding in the suit, to which the respondent was a party, no affidavits are required. *Oster v. People*, 192 Ill. 473, 56 L.R.A. 462. Where, at the appointed time for the hearing of a motion to punish for contempt, *ex parte* affidavits in support thereof were suppressed on the defendant's motion and the hearing continued for the taking of testimony; it was held that the defendant was not thereby put in jeopardy and that such proceedings did not constitute a bar to a subsequent hearing. *New Jersey Patent Co. v. Martin*, 186 Fed. 513. A letter written by an

Whether the Sixth Amendment applies to a proceeding for a criminal contempt and the party must be confronted with the witnesses against him, has not yet been decided by the Supreme Court of the United States.²² It is the better practice not to try the case upon affidavits, but to take oral testimony before a master or examiner.²³ The accused has no right to a trial by jury,²⁴ nor to have the witnesses examined before the judge.²⁵ He has no right to a change of venue.²⁶ The respondent cannot be obliged to testify against himself.²⁷ In the absence of a denial, machines or articles sold under the same name as those the sale of which was enjoined will be presumed to be of the same character.²⁸ Upon an application to punish a bankrupt for contempt for disobedience to an order by a referee, the court should receive all material evidence relating to what preceded as well as to what followed the referee's report, although it may show that the same was erroneous.²⁹ The respondent is presumed to be innocent and he must be proved to be guilty beyond a reasonable doubt.³⁰ "Strong impressions" are not

attorney to his client, advising him of the terms of an injunction, in a suit in which the attorney is employed, is not a privileged communication, and it is admissible in evidence to prove knowledge of the injunction. *Aaron v. U. S., C. C. A.*, 155 Fed. 833; *Fischer v. Hayes*, 6 Fed. 63; *U. S. v. Debs*, 64 Fed. 724. See *Woodruff v. North Bl. G. M. Co.*, 45 Fed. 129. For a collection of authorities on the right to try the question of affidavits, see *Re Cole, C. C. A.*, 163 Fed. 180, 185; *Merchants' S. & G. Co. v. Board of Trade of Chicago, C. C. A.*, 201 Fed. 19, 28.

²² In *Re Cole, C. C. A.*, 23 L.R.A. (N.S.) 255, 163 Fed. 180, 184, it was held that it did not; but that case might reasonably be considered to be a strictly contempt proceeding.

²³ *Merchants' S. & G. Co. v. Board of Trade of Chicago, C. C. A.*, 201 Fed. 9.

²⁴ *N. J. Patent Co. v. Martin*, 166 Fed. 1010. *Merchants' S. & G. Co. v. Board of Trade of Chicago, C. C. A.*, 201 Fed. 19, 26.

²⁵ *Ibid.*, 201 Fed. 19, 28.

²⁶ *Ibid.*, 201 Fed. 19, 27.

²⁷ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 444, 55 L. ed. 797, 807, 34 L.R.A. (N.S.) 874. But see *Merchants' S. & G. Co. v. Board of Trade, C. C. A.*, 201 Fed. 19, 27, and citations.

²⁸ *Stahl v. Ertel*, 62 Fed. 920.

²⁹ *Re Goodrich, C. C. A.*, 184 Fed. 5.

³⁰ *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. ed. 354; *King v. Ohio & M. Ry. Co.*, Fed. Cas. No. 7,800; *Re Judson*, 3 Blatchf. 148, Fed. Cas. No. 7,563; *Birdsall v. Hagerstown Agricultural Imp. Co.*, 1 Ban. & A. 426; *Re Pitman*, 1 Curtis, 186; *Allis v. Stowell*, 19 Off. Gaz. 727,

sufficient against a sworn denial.³¹ It has been held that a mere preponderance of evidence is insufficient.³² It has been held, that in the case of a violation of an injunction, the civil and criminal proceedings can be combined;³³ and said, that an indictment and summary criminal proceedings to punish for contempt may be concurrent and that neither will bar the other.³⁴ The settlement and discontinuance of a suit is no de-

728; *Fischer v. Hayes*, 6 Fed. 63; *Woodruff v. North Bloomfield Gravel Mine Co.*, 18 Fed. 753; *Re Manning*, 44 Fed. 275; *Accumulator Co. v. Cons. El. Storage Co.*, 53 Fed. 796; *U. S. v. Jose*, 63 Fed. 951; *Re Aker*, 66 Fed. 290; *General El. Co. v. McLaren*, 140 Fed. 876; *U. S. v. Carroll*, 147 Fed. 947; *Standard Typewriter Co. v. Standard Folding Typewriter Sales Co.*, 187 Fed. 596; *Armstrong v. Belding Bros. & Co.*, 181 Fed. 173; *Victor Talking Mach. Co. v. Sonora Phonograph Co.*, 191 Fed. 988; *Re Buckley*, 69 Cal. 1; *Harris v. Clark*, 10 How. Pr. (N. Y.) 415; *Potter v. Low*, 16 How. Pr. N. S. 549.

³¹ *Cimiotti Unhairing Co. v. Frölloehr*, 121 Fed. 561.

³² *Re Buckley*, 69 Cal. 1. The defendant will not, in the absence of evidence, be presumed to have notice of the issue of a mandate from an appellate court, directing a decree for an injunction, when no such decree has been entered. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 124 Fed. 736. But, where the contempt charged was the violation of an order to produce books and papers for inspection, which was made after a hearing, at which the defendant failed to deny that the books and papers were not under their control, it was held, in the contempt proceedings, that the burden was upon them to show facts excusing their default; and proof

offered by them tending to show that the books and papers had been through accident or mistake lost or destroyed, before the hearing of the application for their inspection, was insufficient to relieve them from punishment. *London Guarantee & Accident Co., Limited v. Doyle & Doak*, 134 Fed. 125. See *Re Iron Clad Mfg. Co.*, C. C. A., 201 Fed. 66. Where officers of a corporation, in response to a rule upon the condition for the production of books and papers, answered in its name that they had been destroyed, and, upon examination, said that this was alleged upon information received from their subordinates, who had custody of the same, it was held that they were not in contempt of court because they failed to answer of their own personal knowledge. *Despeaux v. Pennsylvania R. Co.*, 149 Fed. 798. On a motion for a commitment for contempt when served with a subpoena, it was held that two witnesses must be produced to prove contemptuous words, but that one was sufficient to prove a battery upon the process-server. *Anon.*, 3 Atkyns, 219.

³³ *Kreplik v. Couch Patents Co.*, C. C. A., 190 Fed. 565, citing *Re Chiles*, 22 Wall. 157, 158, 22 L. ed. 819; *Hendryx v. Fitzpatrick*, 19 Fed. 810.

³⁴ *Merchants' S. & G. Co. v. Board of Trade*, C. C. A., 201 Fed. 20, 30.

fense to a criminal proceeding for the violation of an order therein previously made.³⁵ It is no defense to criminal proceedings to punish for contempt, that the respondent ultimately succeeded in the suit in which the contempt was committed.³⁶ Where an injunction against the infringement of a patent had been granted and no appeal had been taken from the same, it was held that the validity of the patent for want of invention and anticipation was not open for review on a motion to punish the defendant for contempt in its violation.³⁷ Where an injunction order has been reversed as improvident, that fact can be taken into consideration when determining the penalty for its violation,³⁸ and no compensatory fine can be imposed.³⁹ A party cannot be punished for contempt when the order which he violated is void for want of jurisdiction;⁴⁰ even, it has been held, when the order is set aside because the plaintiff has an adequate remedy at law.⁴¹ A person is not relieved from punishment for contempt because he acted in good faith under the advice of counsel that he was not infringing the court's order.⁴² A violation of an order may be punished when it was the result of negligence, but not wilful disobedience.⁴³ The fact that the contempt was committed under the advice of counsel,⁴⁴ or through negligence,⁴⁵ or has been purged by obedience to the order and undoing the wrong,⁴⁶ are mitigating circumstances which will be considered in measuring the punishment. Where

³⁵ *Re Steiner*, 195 Fed. 299, where the contempt consisted in presenting false affidavits.

³⁶ *Campbell v. Magnet Light Co.*, 175 Fed. 117.

³⁷ *Westinghouse Air Brake Co. v. Christensen Eng. Co.*, 128 Fed. 749.

³⁸ *S. Anargyros v. Anargyros & Co.*, 191 Fed. 208.

³⁹ *Am. Lighting Co. v. Public Service Corporation*, 134 Fed. 129. But see *U. S. v. Shipp*, 203 U. S. 563, 51 L. ed. 319.

⁴⁰ *Ibid.*

⁴¹ *Am. Lighting Co. v. Public Service Corporation*, 134 Fed. 129.

⁴² *Atlantic G. P. Co. v. Dittman P. Mfg. Co.*, 9 Fed. 316; *Ulman v.*

Ritter, 72 Fed. 1000; *Westinghouse El. & Mfg. Co. v. Sangamo El. Co.* 128 Fed. 747.

⁴³ *Indianapolis Water Co. v. Am. Strawboard Co.*, 75 Fed. 972; *Robinson v. S. & B. Lederer Co.*, 146 Fed. 993.

⁴⁴ *Ullman v. Ritter*, 72 Fed. 1000.

⁴⁵ *Indianapolis Water Co. v. Am. Strawboard Co.*, 75 Fed. 972; *Robinson v. S. & B. Lederer Co.*, 146 Fed. 993. No punishment was imposed where a party had refused to produce papers under the belief that they would disclose Government secrets. *Re Grove*, C. C. A., 180 Fed. 62.

⁴⁶ *Re Wiesebrock*, 188 Fed. 757.

an order was disobeyed after a party, through his counsel, had promised to obey the same, it was held that he must be punished by imprisonment.⁴⁷ It has been said that a sentence of both fine and imprisonment may be imposed.⁴⁸ It seems that the imprisonment imposed must be for a definite period of time.⁴⁹ Where a fine is imposed, that must be made payable to the United States;⁵⁰ but it has been held, that, in a patent case, a fine may also be imposed payable to the party injured and for the purpose of his indemnification.⁵¹ Costs, if awarded, are paid to the Government.⁵² Where the court has found that a party was guilty of several independent contemptuous acts and imposed a single punishment, the judgment must be reversed if it appears that some of those acts were not contemptuous.⁵³ Criminal proceedings to punish contempts are to a certain extent, like other criminal proceedings, assimilated by statute to those under the State practice.⁵⁴ It has been said that such an offense is not a felony, but more in the nature of a misdemeanor.⁵⁵ Otherwise, the practice in criminal and civil proceedings to punish for contempt is substantially the same.

⁴⁷ *Missouri, K. & T. Ry. Co. v. McCrary*, 182 Fed. 401.

⁴⁸ *U. S. v. Collins*, 146 Fed. 553, 555. *Contra, Ex parte Davis*, 112 Fed. 139, which held that where this was done, the delinquent was not entitled to discharge, but had either to serve his term or imprisonment or pay the fine.

⁴⁹ *Matter of Marsh, McArthur & M.* (S. C. D. C.) 32, where it was held that otherwise such an order was void; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 442, 55 L. ed. 797, 806, 34 L.R.A.(N.S.) 874. But see *Re Nevitt, C. C. A.*, 117 Fed. 448, 461.

⁵⁰ *Re Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072; *Besette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997; *Gompers v. Bucks Stove & Range Co.*, 321 U. S. 418, 31

Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A.(N.S.) 874.

⁵¹ *Kreplik v. Couch Patents Co.*, C. C. A., 190 Fed. 565, citing *Re Chiles*, 22 Wall. 157, 168, 22 L. ed. 819; *Hendryx v. Fitzpatrick*, 19 Fed. 810, 813.

⁵² *Durant v. Washington County*, 4 Woolw. 297; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 447, 55 L. ed. 797, 808, 34 L.R.A.(N.S.) 874.

⁵³ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 447, 55 L. ed. 797, 808, 34 L.R.A.(N.S.) 874.

^{53a} *Ibid.* 221 U. S. 418, 446, 55 L. ed. 797, 807, 34 L.R.A.(N.S.) 874.

⁵⁴ *Re Acker*, 66 Fed. 290, 203. See *U. S. v. Block*, 4 Sawyer 211, Fed. Cas. No. 14609.

⁵⁵ *Re Acker*, 66 Fed. 290.

§ 431. **Civil contempt proceedings.** It has been held that the respondent may be compelled to furnish evidence against himself in a civil contempt proceeding taken for the protection of a party to the suit.¹ In the absence of a denial, machines or articles sold under the same name as those the sale of which was enjoined, will be presumed to be of the same character.² The court cannot punish a contempt by striking out an answer or by refusing a hearing upon the merits.³ The court may make a preliminary order directing a fine, determining the principles with regard to which its amount should be estimated, and directing either a reference to a master to determine the amount or a submission of affidavits upon that point to the court.⁴ In a civil proceeding, the court orders the fine to be paid to the party injured,⁵ and may direct the offender "to stand committed till paid."⁶ In a civil proceeding, imprisonment for a specified term cannot be imposed.⁷ The only proper punishment is a fine measured by the pecuniary injuries sustained⁸ and imprisonment until that fine is paid.⁹ When an injunction against the infringement of a patent has been violated, the fine may include the profits made by the defendant through his contemptuous acts.¹⁰ Where no profits or damages are shown, the amount of the fine is usually limited to the counsel fees of the defendant in the contempt proceeding.¹¹

§ 431. 1 *Patterson v. Wyoming Valley District Council*, 31 Pa. Superior Ct. 112, (appeal dismissed by Supreme Court).

2 *Stahl v. Ertel*, 62 Fed. 920; *Stebbins v. Duncan*, 108 U. S. 32, 48, 27 L. ed. 641, 647; *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277.

3 *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, *supra*, § 251.

4 *Fisher v. Hayes*, 6 Fed. 63.

5 *Searles v. Worden*, 13 Fed. 716; s. c., as *Worden v. Searles*, 121 U. S. 14, 30 L. ed. 853; *Re Mullee*, 7 Blathf. 23; *Doubleday v. Sherman*, 8 Blathf. 45; *Bridges v. Sheldon*, 7 Fed. 747.

6 *Fischer v. Hayes*, 6 Fed. 63; U. S. R. S., § 725.

7 *Gompers v. Bucks Stove & Range*

Co., 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874.

8 *Ibid.*

9 *Ibid.* *Fischer v. Hayes*, 6 Fed. 63; *New Jersey Patent Co. v. Martin*, 186 Fed. 513.

10 *Ibid.* But where, after the institution of contempt proceedings for violation of a preliminary injunction, a decree was entered by consent in favor of the complainants upon their waiver of all damages and costs; it was held that the counsel fees and disbursements included in the fine should not exceed those necessitated by the contempt proceedings. *New Jersey Patent Co. v. Martin*, 186 Fed. 513, 517.

11 *Cheatham Electric Switching Device Co. v. Transit Development*

A reasonable counsel fee for the civil contempt proceedings is almost always included in the fine imposed.¹² The complainant, if successful, is entitled to costs.¹³ Upon the hearing of an application to punish a defendant for contempt in violating an injunction against infringement, the court ordered the marshal to take the infringing machines into his possession and retain them until the final determination of the suit.¹⁴ When the contempt consisted in building a railroad, in violation of an injunction, the marshal was ordered to take up the railroad at the expense of the guilty party.¹⁵ It seems, that on the reversal of the order that has been violated, civil proceedings for contempt cannot be maintained.¹⁶ But where there has been no appeal, the validity of the patent for want of invention and for anticipation cannot be considered in the contempt proceedings.¹⁷ The settlement and discontinuance of a suit in which an injunction has been granted is a defense to civil proceedings to punish for contempt a violation of an injunction therein granted.¹⁸ A State statute regulating the practice in contempt proceedings does not affect the practice in the Federal courts, far as civil proceedings are concerned.¹⁹

§ 432. Writ of attachment against the person. An attachment against the person is a writ directed to the marshal of the court, sealed and bearing *teste* in the same manner as a writ of subpoena,¹ directing him to attach the body of the person named therein, and to safely keep the same, so that he can produce the person or persons thus attached in court at a

Co., 197 Fed. 563. But see *Victor Talking Mach. Co. v. Senora Phonograph Co.*, 191 Fed. 988. Where, in such a case, no punishment was imposed when the contempt consisted in the institution of a suit; the fine should include the expenses of the defense of such suit, including reasonable counsel fees to be paid to the party against whom the suit was brought. *Bridges v. Sheldon*, 7 Fed. 17.

¹² *Stahl v. Ertel*, 62 Fed. 920; *Re DeForest Wireless Tel. Co.*, 154 Fed. 81.

¹³ *Underwood Typewriter Co. v.*

Elliott-Fischer Co., 156 Fed. 588.

¹⁴ *Indianapolis & N. W. Traction Co. v. Consolidated Traction Co.*, 125 Fed. 247, 250.

¹⁵ *S. Anargyros v. Anargyros & Co.*, 191 Fed. 208.

¹⁶ *Campbell v. Magnet Light Co.*, 175 Fed. 117.

¹⁷ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874. But see *N. J. Patent Co. v. Martin*, 186 Fed. 513.

¹⁸ *Searles v. Worden*, 13 Fed. 716.

¹⁹ *Searles v. Worden*, 13 Fed. 716. § 432. ¹ See U. S. R. S., § 911.

certain day termed the return day of the writ, or until the further order of the court.² The writ must be indorsed with the special reason for which it is issued, and also with the name and address of the solicitor of the party issuing it.³ The writ may be issued either in vacation or in term; and may be returnable immediately; provided, at least, that the party against whom it is issued then dwells or is within twenty miles of the place of holding the court. Otherwise, a period of fifteen days between the *teste* and the return might be required.⁴ The writ of attachment cannot be addressed to any marshal beyond the territorial jurisdiction of the court or in another district in a different State,⁵ unless it directs the arrest of a witness who lives within one hundred miles of the place of trial and has disobeyed a subpoena. In the latter case it should be directed to the marshal of the district where the witness resides.⁶

§ 433. Execution of writ of attachment. The first thing to be done after the writ has been issued is to deliver it to the marshal to whom it is directed, or to one of his deputies authorized by him to receive such writs.¹ Although the writ is always directed to the marshal of the judicial district within which it is to be executed,² it is usually executed by one of his deputies. The marshal and his deputy can only execute the writ within the district for which he has been appointed;³ and not then against a person who has been brought there by force or fraud, or under such circumstances as would make it improper to serve a subpoena upon him;⁴ and probably not upon Sunday,⁵ nor usually in the court-room,⁶ except for an offense

² Braithwaite's Pr. 159-161.

³ Braithwaite's Pr. 159.

⁴ Acts of 11 Geo. IV. and 1 Wm. IV., ch. 36, § 15, note 3.

⁵ *Re Manning*, 44 Fed. 275, in which the author was counsel; *U. S. v. Jacobi*, 4 Am. Law. T. R., 148, 151.

⁶ *Voss v. Luke*, 1 Cranch, C. C. 331; *Sommerville v. French*, 1 Cranch, C. C. 474.

§ 433. ¹ U. S. R. S., § 787.

² U. S. R. S., § 787.

³ U. S. R. S., § 787; In the Matter Fed. Prac. Vol. II.—87.

of Allen, 13 Blatchf. 271; *Voss v. Luke*, 1 Cranch, C. C. 331; *Sommerville v. French*, 1 Cranch, C. C. 474.

⁴ In the Matter of Allen, 13 Blatchf. 271. And see authorities cited under §§ 98, 277. *Cf. Wroe v. Clayton*, 16 Simons, 183.

⁵ 29 Car. II. ch. 12, § 6. And see authorities cited under § 84.

⁶ *U. S. v. Scholfield*, 1 Cranch, C. C. 130; *Davis v. Sherron*, 1 Cranch, C. C. 287.

committed in the presence of the court.⁷ In the case of a recalcitrant witness who resides out of the district but within one hundred miles of the place of trial, it was held that he might be arrested under a writ issued by the trial court addressed to the marshal of the district of the residence of the witness.⁸ It has been held: that in other cases this cannot be done;⁹ but that, on presentation of a certified copy of the contempt proceedings and of the writ of attachment, the district attorney of the district where the delinquent is, may obtain from a commissioner of that district a warrant for the arrest of the party in contempt, who is then entitled to an examination, pending which he may be discharged on bail; and that if the commissioner decides to hold the accused the judge of that district may issue a warrant for his removal as in other criminal cases.¹⁰ If the delinquent be already in custody, either upon criminal sentence or civil process, no further arrest is necessary; but the marshal should give notice of the attachment, which notice is called a detainer, to the keeper or jailer in whose custody he is.¹¹ If a return day be appointed in a writ, and it be issued to enforce obedience to an interlocutory order, the marshal may, but is not obliged to, allow the delinquent to go at large with or without security for his surrender to him upon the return day.¹² If the delinquent do not then surrender himself to the marshal's custody, the latter and his bondsmen are responsible for all damages which the court shall determine have resulted therefrom to the party at whose instance the writ was issued.¹³ It seems, however, that this cannot be done when the writ is issued for a refusal to perform a specific act in obedience to a decree.¹⁴ According to an old writer, it seems that when the marshal "has taken up the body he has paid obedience to the writ, though he does not actually bring him up to the court; because the contempt only induces a commitment, which is

⁷ Ibid. Cf. § 428, *supra*.

⁸ Voss v. Luke, 1 Cranch, C. C. 331. But see Henry v. Ricketts, 1 Cranch, C. C. 580.

⁹ *Ex parte* Graham, 3 Wash. C. C. 456, 462; *Re* Manning, 44 Fed. 275.

¹⁰ U. S. v. Jacobi, 4 Am. L. T. R. 148, 151, 152; *Re* Manning, 44 Fed. 275.

¹¹ Trotter v. Trotter, Jacob, 533.

¹² Morris v. Hayward, 6 Taunt. 569; Studd v. Action, 1 H. Blackstone, 468.

¹³ Moore v. Moore, 25 Beav. 8; U. S. R. S., §§ 783-786.

¹⁴ Rule 8; Cowdry v. Cross, 24 Beav. 445.

satisfied by imprisonment in the county gaol.”¹⁵ If, however, he be specially ordered to bring the condemned before the court, he must obey. Upon the return day of the writ the marshal should make a return thereto. He cannot detain the party named in the writ after the return day, unless by the court's order.¹⁶ There are three ordinary returns upon a writ of attachment: *First* if the delinquent cannot be arrested, the marshal returns, “The within-named John Stiles is not found in my bailiwick,”—this is termed a *non est inventus*, and upon it further process of contempt is grounded; *second*, if the delinquent has been arrested, but the marshal has either accepted bail for his appearance or keeps him in his own custody, the return is, “I have attached the within-named John Stiles, as within I am commanded, whose body I have ready,”—this is called *accepi corpus*; *third*, if the marshal has arrested the delinquent and lodged him in jail, or, finding him there, has lodged a detainer against him, the marshal returns, “I have attached the within named John Stiles, whose body remains in [naming the jail or prison] in my custody.”¹⁷ Although the return is regularly made by the marshal, no matter by whom the writ has been executed, it will not be void if made by his deputy.¹⁸ If the marshal refuse to make any return he may be compelled to do so, by means of an order to show cause followed by an attachment against him.¹⁹ When the marshal or his deputy is a party to a cause, or probably when a writ of attachment is issued against either of them, the writs and precepts therein must be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.²⁰ In such a case the person serving the process should make affidavit thereof.²¹

§ 434. Review of commitments for contempt. In general. A commitment for contempt may be reviewed by *habeas corpus*, which is usually accompanied by the writ of *certiorari*; ¹

¹⁵ Gilbert's Ch. 83.

¹⁶ *Ex parte* Burford, 1 Cranch, C. C. 456.

¹⁷ Braithwaite's Pr. 272, 281.

¹⁸ Spafford v. Goodell, 3 McLean.

¹⁹ U. S. v. Scroggins, 3 Woods, 529; Daniell's Ch. Pr. 470.

²⁰ U. S. R. S., § 923; Eq. Rule 15.

²¹ Eq. Rule 15.

§ 434. ¹ *Infra*, §§ 435, 461.

in an extraordinary case, by the writ of *certiorari* alone;² by writ of error³ or appeal;⁴ and, in bankruptcy, possibly by a petition of review.⁵ The validity or propriety of any part of the order cannot be reviewed upon a mandamus to compel the Circuit Court of Appeals to review the same.⁶ A Circuit Court of Appeals has refused to issue a writ of prohibition to stay contempt proceedings in a Circuit Court, in a case where its appellate jurisdiction had not been invoked by appeal or writ of error.⁷

§ 435. Review by habeas corpus of commitment for contempt. If a commitment for contempt is void, the prisoner may be discharged by the writ of *habeas corpus*;¹ but not for irregularities,² nor for the erroneous construction of a statute,³ when the court had jurisdiction to grant the order. A person was discharged, upon a writ of *habeas corpus*, from a commitment, because of a criticism of a court in a newspaper, since that offense was not included within the statute.⁴ When the court has no jurisdiction of the subject-matter of the suit, in which the decree or order violated was made, a commitment for violation of an injunction therein is void, and the prisoner will be discharged upon a writ of *habeas corpus*.⁵ It was so held where the order of the court was an unjustifiable inter-

² *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782. There the Supreme Court allowed a writ of *certiorari* unaccompanied by the writ of *habeas corpus*, to bring up the record, so that an order might be revised and annulled, which adjudged a party to a suit and his attorney guilty of contempt, and directed them to dismiss one writ of error and to refrain from prosecuting another.

³ *Infra*, § 436.

⁴ *Infra*, § 437.

⁵ *Re Cole*, C. C. A., 163 Fed. 180, 183, 90 C. C. A. 50, 53, 23 L.R.A. (N.S.) 255; *Re Goodrich*, C. C. A., 184 Fed. 5, 7; *infra*, § 438.

⁶ *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 56 L. ed. 584.

⁷ *Re Paquet*, C. C. A., 114 Fed. 437.

§ 435. ¹ *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405. See §§ 461-467, *infra*.

² *Savin*, Petitioner, 131 U. S. 267, 279, 33 L. ed. 150, 154; *Stevens v. Fuller*, 136 U. S. 468, 478, 34 L. ed. 461, 463; *U. S. v. Pridgeon*, 153 U. S. 48, 62, 38 L. ed. 631, 636; *Ex parte Davis*, 112 Fed. 139; *Ex parte O'Neal*, 125 Fed. 967. See § 461, *infra*.

³ *Re Tyler*, 149 U. S. 164, 37 L. ed. 689; *Ex parte O'Neal*, 125 Fed. 967.

⁴ *Cuyler v. Atl. & N. C. R. Co.*, 131 Fed. 95.

⁵ *Ex parte Robinson*, C. C. A., 144 Fed. 835.

ference with the administration of a decedent's estate.⁶ A party was discharged from a commitment for disobedience to an order for his examination before trial which was authorized by the State but not by a Federal statute.⁷ This cannot be done, however, on the ground that the court had no jurisdiction of the suit, because there was no difference of citizenship nor Federal question involved;⁸ nor because process upon the original bill had not been served.⁹ Where the disobedience occurred after an acquiescence for over two years in the order attacked, the punishment was a small fine, with imprisonment only until the fine was paid, and it was admitted at the argument that the proceeding was adopted in order to obtain a summary disposition of the cause by the Supreme Court; it was held that the writ of *habeas corpus* should not be allowed.¹¹ Where the court erroneously imposed both fine and imprisonment as a punishment, it was held that there could be no discharge by *habeas corpus*, until either the fine had been paid or the term of imprisonment had been served.¹² The petition for the writ may allege, and the petitioner may prove, any facts not in contradiction of the record, which show that the court had no jurisdiction.¹³ Ordinarily, a Circuit Judge will not, upon the return of the writ of *habeas corpus*, discharge a person committed by another Circuit Judge;¹⁴ but he will thus review a commitment by a District Judge.¹⁵ The facts upon which a commitment is based can be brought before an appellate tribunal for review by *habeas corpus*, accompanied by a writ of *certiorari*.¹⁶

⁶ *Ex parte Robinson*, C. C. A., 144 Fed. 835. The previous proceedings are reported as *Carrau v. O'Calligan*, C. C. A., 125 Fed. 657, 60 C. C. A., 347; *Farrell v. O'Brien*, 199 U. S. 89; 25 Sup. Ct., 727, 50 L. Ed. 101.

⁷ *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117.

⁸ *In re Lennon*, 166 U. S. 548, 41 L. ed. Conkey Co. v. Russell, 111 Fed. 417; *Ex parte Richards*, 117 Fed. 658.

⁹ *Ex parte Richards*, 117 Fed. 658.

¹⁰ *Fairchild v. U. S.*, C. C. A., 146 Fed. 508. But see *supra*, §§ 343, 352.

¹¹ *Ex parte Simon*, 208 U. S. 144, 52 L. ed. 429.

¹² *Ex parte Davis*, 112 Fed. 139.

¹³ *Cuddy Petitioner*, 131 U. S. 280, 33 L. ed. 154; *Ex parte Mayfield*, 141 U. S. 107, 116, 35 L. ed. 635, 638.

¹⁴ *Re Hale*, 139 Fed. 496.

¹⁵ *Cuyler v. Atlantic & N. C. R. Co.*, 131 Fed. 95.

¹⁶ *Re Watts & Sachs*, 190 U. S. 1, 47 L. ed. 933; *infra*, § 466.

§ 436. Review by writ of error of commitment for contempt. A writ of error is the only method of reviewing an order of punishment in criminal contempt proceedings.¹ This is so whenever any part of the fine is payable to the United States;² so far, at least, as that portion is concerned.³ Where a constitutional question⁴ or a jurisdictional question is at issue,⁵ the question can be reviewed immediately by the Supreme Court of the United States. Otherwise, the writ of error is returnable to the Circuit Court of Appeals.⁶ No constitutional question is involved in an order committing a district attorney for contempt in refusing to comply with a prior order for the return of books and papers which were held to have been seized by him in violation of the constitutional rights of the owner.⁷ Where the party in contempt consented to the order which he disobeyed, the point, that if resisted it would have been a violation of his constitutional rights, cannot be raised upon writ of error.⁸ Where the objection to the commitment for the commission of an assault on an officer of a court for the purpose of preventing the discharge of his duties, was that, on the facts, no case of contempt was made out; it was held that the contention was addressed to the merits of the case, not to the jurisdiction of the court, and that a writ of error immediately from the Supreme Court to the District Court

§ 436. ¹Matter of Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874; *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 56 L. ed. 584, setting aside *Merchants' Stock & Grain Co. v. Board of Trade*, C. C. A., 187 Fed. 398; *Sessions v. Gould*, 63 Fed. 1001; *Board of Councilmen v. Deposit Bank*, C. C. A., 127 Fed. 812; *Garrigan v. U. S.*, C. C. A., 163 Fed. 16.

² Matter of Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 56 L. ed. 584, setting

aside *Merchants' Stock & Grain Co. v. Board of Trade*, C. C. A., 187 Fed. 398.

³ Ibid. See *Worden v. Searls*, 121 U. S. 14, 26, 30 L. ed. 853, 857.

⁴ *Nelson v. U. S.*, 201 U. S. 92, 50 L. ed. 673, where a witness was committed for refusing to incriminate himself.

⁵ Jud. Code, § 250, 36 St. at L. 1087. See chapter on "Writs of Error and Appeals," *infra*.

⁶ Ibid.

⁷ *Wise v. Mills*, 220 U. S. 549, 55 L. ed. 579.

⁸ *Brown v. U. S.*, C. C. A., 196 Fed. 351.

of the United States would not lie.⁹ A writ of error will not issue to review an interlocutory order punishing a party for contempt, although it is followed by a judgment in the contempt proceedings, when no final judgment in the action has been entered.¹⁰ Upon a writ of error only questions of law can be considered,¹¹ and those only which are presented upon an assignment of error.¹² The evidence cannot be considered unless a bill of exceptions is filed and allowed.¹³ It has been held that the court of review will not consider any question that was not raised below.¹⁴ The payment of a fine imposed in criminal contempt proceedings does not deprive the defendant of the right to review the legality of his conviction.¹⁵ The Supreme Court of the United States has refused to review by writ of error the judgment of a State court denying an application to punish a party for contempt, where it was claimed that the obligation of a contract was impaired by such denial.¹⁶

§ 437. Review by appeal of commitment for contempt.

A commitment in civil contempt proceedings can only be reviewed by an appeal.¹ This is the case whenever the punishment is a fine wholly payable to a party to the suit; even if accompanied by imprisonment, not for a fixed term, but until the fine is paid.² It was formerly held, that where part of the fine was payable to the United States and the remainder to a party to the suit, so much of the proceedings as imposed the

⁹ *O'Neal v. U. S.*, 190 U. S. 36, 47 L. ed. 945; *International Paper Co. v. Chaloux*, C. C. A., 165 Fed. 436.

¹⁰ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 440, 55 L. ed. 797, 805, 34 L.R.A. (N.S.) 874.

¹¹ *Re Grove*, C. C. A., 180 Fed. 62.

¹² *Ibid.* Assignments that the court erred in entering the order below and erred in refusing to deny the same, were held to be sufficient to justify the inspection of the record by the court of review to ascertain whether there was any apparent error. *Ibid.*

¹³ *Brown v. Detroit Tr. Co.*, C. C. A., 193 Fed. 622.

¹⁴ *Fairfield v. U. S.*, C. C. A., 146 Fed. 508.

¹⁵ *Ibid.*

¹⁶ *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259.

§ 437. ¹ *Matter of Christensen Eng. Co.*, 194 U. S. 458, 48 L. ed. 1072; *Doyle v. London Guarantee & Accident Co.*, 204 U. S. 599, 51 L. ed. 641; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874.

² *Clay v. Waters*, C. C. A., 178 Fed. 385, 21 Ann. Cas. 897.

latter might be reviewed by appeal.³ It has been said that an order punishing a party for a civil contempt, committed after the final decree, is reviewable by appeal.⁴ It cannot be reviewed by writ of error.⁵ No appeal can be taken from an order in an action at law punishing a party for contempt.⁶ An order will not be reversed upon the facts when the evidence is not contained in the transcript and the findings made by a judge or master below are sufficient to sustain the commitment.⁷ The Circuit Court of Appeals for the Eighth Circuit has taken jurisdiction of an appeal from an order, discharging a rule to show cause why a party should not be punished for contempt of a final decree of injunction against the infringement of a trade-mark.⁸

§ 438. Review by revisory petitions of commitments for contempt in bankruptcy proceedings. Although the point is doubtful, in two cases in the First Circuit commitments in contempt proceedings were reviewed by revisory petitions,¹ but when part of the punishment is a fine, payable to the United States, a writ of error is the proper remedy.²

§ 439. Sequestration. The process of sequestration is a writ or commission issuing under the seal of the court, directed either to the marshal or to certain persons of the plaintiff's nomination empowering him or them to enter upon and sequester the real and personal estate of a defendant (or some

³ *Matter of Christensen Eng. Co.*, 194 U. S. 458, 48 L. ed. 1072; *Doyle v. London Guarantee & Accident Co.*, 204 U. S. 599, 51 L. ed. 641; *Worden v. Searls*, 121 U. S. 14, 26, 30 L. ed. 853, 857; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874.

⁴ *Worden v. Searls*, 121 U. S. 14, 26, 30 L. ed. 853, 857; *Wilson v. Calangraph Co.*, C. C. A., 153 Fed. 961, 963; *Clay v. Waters*, C. C. A., 178 Fed. 385, 21 Ann. Cas. 897.

⁵ *Ibid.*

⁶ *International Paper Co. v. Chaloux*, C. C. A., 165 Fed. 436.

⁷ *Frank v. Bernard*, C. C. A., 185 Fed. 812.

⁸ *Enoch Morgan's Sons Co. v. Gibson*, C. C. A., 122 Fed. 420.

§ 438. ¹ *Re Goodrich*, C. C. A., 184 Fed. 5, 7; *Re Cole*, C. C. A., 163 Fed. 180, 183, 90 C. C. A. 50, 53, 23 L.R.A.(N.S.) 255. Where an order directed that a trustee in bankruptcy be committed to jail unless he filed an account on or before a certain date, a petition for a revision of the order which was permitted to be filed prior to the expiration of the time was dismissed as premature. *O'Connor v. Sunseri*, C. C. A., 184 Fed. 712.

² *Brown v. Detroit Tr. Co.*, C. C. A., 193 Fed. 622.

particular parcel of his lands), and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the court shall in its discretion appoint, until such defendant shall have performed some matter, previously ordered by the court, in the process specifically mentioned, for not doing whereof he is in contempt.¹ This is one of the oldest writs of the court of chancery, and has been the cause of many conflicts between the English chancellors and the courts of common law.² Much curious history and learning upon the subject invite the attention of the antiquarian; but, as the writ is now rarely used, little space will be devoted to it in this work. By the Equity Rules, whenever the marshal has returned *non est inventus* under a writ of attachment, a writ of sequestration may issue to compel obedience to a decree or order of the court.³ The writ, when not issued to the marshal, appoints two or more sequestrators.⁴ The usual number is four.⁵ The sequestrators are officers of the court, and as such are subject to new directions during the discharge of their functions,⁶ may be attached for disobedience or misconduct,⁷ and, if resistance be made to them, may be aided by the court with the exercise of its process of contempt,⁸ or by a writ of assistance.⁹ Sequestrators must from time to time account for what comes into their hands, and pay into court such money as they receive.¹⁰

§ 440. Writ of assistance and writ of possession. The Equity Rules provide that "when any decree or order is for the delivery of possession, upon proof made by affidavit of a

§ 439. ¹Hinde's Ch. Pr. 127; Hoffman's Ch. Pr., ch. iii, § 10; Daniell's Ch. Pr., ch. xxv, § 7.

²Gilbert's Forum Romanum, 78; Daniell's Ch. Pr., ch. xxv, § 7.

³Rules 7 and 8. See Shainwald v. Lewis, 6 Fed. 766, 777.

⁴Hoffman's Ch. Pr., ch. iii, § 10; Daniell's Ch. Pr., ch. xxv, § 5.

⁵Daniell's Ch. Pr., ch. xxv, § 5.

⁶Hinde's Ch. Pr. 138; Daniell's Ch. Pr., ch. xxv, § 7; Hoffman's Ch. Pr., ch. iii, § 10.

⁷Lord Pelham v. Lord Harley, 3 Swanst. 291, n.

⁸Angel v. Smith, 9 Ves. 335; Lord Pelham v. Duchess of Newcastle, 3 Swanst. 293, n.; Rule 9.

⁹Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.; Rule 9.

¹⁰Howell v. Lord Coningsby, 1 Fowl. Ex. Pr. 161; Deshrow v. Grommie, Bunb. 272.

demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.”¹ This is a writ commanding the marshal to eject the defendant from the land and put the plaintiff in possession; and is executed in the same manner as a writ of *habere facias possessionem* is executed in favor of a successful plaintiff in the action of ejectment;² “in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door in the name of seisin, is sufficient execution of the writ.”³ This writ is often used to put into possession receivers⁴ and sequestrators.⁵ It is not issued without an order for that purpose.⁶ It cannot issue against any but a party to the suit, or his representative, or one who came into possession under him since the suit was begun.⁷ The grantee of the purchaser at a foreclosure sale where the court has ordered the receiver to put him in possession of the purchased property, and if the court has retained jurisdiction of the suit, may obtain a writ of possession.⁸ The writ cannot be issued to put a party in possession of land beyond the territorial jurisdiction of the court, and all acts of the marshal beyond such jurisdiction are unauthorized notwithstanding the command of the writ.⁹ After a party has been put in possession under a judgment in ejectment, the court has no power at a subsequent term to direct a restitution of the property to the persons from whom possession was taken, unless the judgment is re-

§ 440. ¹ Rule 9.

² Hunter's Suit in Equity (6th ed.), 168.

³ Bl. Com. 412.

⁴ Sharp v. Carter, 3 Wms. 375, 379, n.; Seton on Decrees (4th ed.), 441, 1563.

⁵ Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.; Seton on Decrees (4th ed.), 1562.

⁶ Seton on Decrees (4th ed.), 1562.

⁷ Terrell v. Allison, 21 Wall. 289,

22 L. ed. 634; Howard v. Railway Co., 101 U. S. 837, 849, 25 L. ed. 1081, 1084; Thompson v. Smith, 1 Dill. 458.

⁸ Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. 653, 658. But see Van Hook v. Throckmorton, 8 Paige (N. Y.), 33; People v. Grant, 45 Cal. 97; Stanley v. Sullivan, 71 Wis. 585, 5 Am. St. Rep. 245.

⁹ Re Anderson, 94 Fed. 487, 497.

versed by the proper court of review.¹⁰ It has been held that a marshal or other officer charged with the execution of a writ of possession, under judgment in ejectment, cannot appeal to the court for instructions because of protests made, or notices served upon him, by persons not parties to the action, who claim independent rights in the land.¹¹

§ 441. **Action by court itself.** The Equity Rules now provide: "If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him."¹

¹⁰ Dickinson v. Huntington, C. C. A., 185 Fed. 703.

¹¹ Huntington's Devises v. Taylor, 156 Fed. 700, aff'd Dickinson v. Huntington, C. C. A., 185 Fed. 703.

§ 441. ¹Eq. Rule 8. In the year 1830, an act was passed in England, at the instance of Sir Edward Sugden, the author of Sugden on Powers, afterwards Lord St. Leonards, providing: "That when any person shall have been directed by any decree or order to execute any deed or other instrument, or make a surrender or transfer, or to levy a fine or suffer a recovery, and shall have refused or neglected to execute, make or transfer, or levy or suffer the same, and shall have been committed to prison under process for such contempt, or, being confined in prison for any other cause, shall have been charged with or detained under process for such contempt, and shall remain in such prison, the court may, upon motion or petition, and upon affidavit that such person has after the expiration of two calendar months from the

time of his being committed under or charged with, or detained under such process, again refused to execute such deed or instrument or make such surrender or transfer, or levy or suffer such fine or recovery, order or appoint one of the masters in ordinary, or if the act is to be done out of London, then, if necessary, one of the masters extraordinary, to execute such deed or other instrument or to make such surrender or transfer, for and in the name of such person, and to levy such fine or suffer such recovery, in his name, and to do all acts necessary to give validity and operation to such fine and recovery, and to lead or declare the uses thereof; and the execution of said deed or other instrument, and the surrender or transfer made by the said master, and the fine or recovery levied or suffered by him, shall in all respects have the same force and validity as if the same had been executed or made, levied or suffered, by the party himself; and within ten days after the execution or making of any

It had previously been held that the Supreme Court of the District of Columbia² and a Circuit Court of the United States³ had power to appoint a trustee to execute an assignment of a patent right,⁴ or to have the same made by a master.⁵ A Court of Equity has power to appoint a trustee to protect the rights of the beneficiaries of a trust.⁶ A District Court of the United States has power to direct its marshal to

such deed or other instrument or surrender or transfer, or levying or suffering such fine or recovery, notice thereof shall be given by the adverse solicitor to the party in whose name the same is executed or made; and such party, as soon as the deed or other instrument or surrender, transfer, fine or recovery shall be executed, made, levied, or suffered, shall be considered as having cleared his contempt, except as far as regards the payment of the costs of the contempt, and shall be entitled to be discharged therefrom, under any of the provisions of this act applicable to his case; and the court shall make such order as shall be just, touching the payment of the costs of or attending any such deed, surrender, instrument, transfer, fine, or recovery." "That where a person shall be committed for a contempt in not delivering to any person or persons or depositing in court or elsewhere, as by any order may be directed, books, papers, or any other articles or things, any sequestrator or sequestrators appointed under any commission of sequestration shall have the same power to seize and take such books, papers, writings, or other articles or things, being in the custody or power of the person against whom the sequestration issues, as they would over his

own property; and thereupon such articles or things so seized and taken shall be dealt with by the court as shall be just; and after such seizure it shall be lawful for the court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of this act, to make such order for the discharge of the prisoner, upon such terms, and, if it shall see fit, making any costs to the cause, as to the court shall seem proper."

² Acts of 1 Wm. IV., ch. 36, § 15, R. 15; *Shepherd v. Com'rs of Ross County*, 7 Ohio, 271; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640; *Sayle v. Scott Paper Mfg. Co.*, 55 Fed. 553, 557; *Lynde v. Columbus, C. & I. C. Ry. Co.*, 57 Fed. 993; *York County Sav. Bank v. Abbt*, 139 Fed. 988, 993; *Wilson v. Martin, etc., Co.*, 151 Mass. 515, 8 L.R.A. 309; *supra*, §§ 64, 398.

³ *Underfeed Stoker Co. v. Am. Ship Windlass Co.*, 165 Fed. 65.

⁴ *Ager v. Murray*, 105 U. S. 126, 132, 26 L. ed. 942, 944.

⁵ *Underfeed Stoker Co. v. Am. Ship Windlass Co.*, 165 Fed. 65, when the defendant refused so to do after a sale of the patent right in a suit of which the court had jurisdiction.

⁶ *Drennen v. Heard*, 198 Fed. 414.

remove buildings from land over which a complainant has a right of way.⁷

§ 442. **Bills to carry decrees into execution.** A bill to carry a decree into execution is proper where, after a decree has been pronounced, it has happened that owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events that no ordinary process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them;¹ or where a person who was not a party nor claims under a party to the original decree, claims, in a similar interest, or is unable to obtain the determination of his own right until the decree has been carried into execution;² or by or against a person claiming as assignee of a party to the original decree,³ or otherwise, in privity with such a party, for example, a stockholder or perhaps a creditor of a corporation;⁴ or to carry into execution the judgment of an inferior court of equity.⁵ A bill of this description is generally partly an original bill, though not strictly original; and sometimes it is likewise a bill of revivor or a supplemental bill, or both; and the frame of the bill, and the course of proceedings upon it, vary accordingly.⁶ Such a bill is treated as ancillary to the principal suit, and the Federal court in which the original decree was entered will take jurisdiction of the same irrespective of the citizenship of the parties.⁷ Upon a

⁷ *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909.

§ 442. ¹ *Mitford's Pl.*, ch. i, § 3; *Daniell's Ch. Pr.* (1st Am. ed.) 1689; *Johnson v. Northley*, *Prec. in Ch.* 134; s. c., 2 *Vern.* 407.

² *Mitford's Pl.*, ch. i, § 3; *Daniell's Ch. Pr.* (1st Am. ed.) 1689, 1690; *Rylands v. Latouche*, 2 *Bligh*, 566; *Oldham v. Eboral*, *Cooper Sel. Cases*, *temp. Brougham*, 27.

³ *Lawrence Mfg. Co. v. Janesville C. Mills*, 138 U. S. 552, 34 L. ed. 1005; *Pacific Live Stock Co. v. Hanley*, C. C. A., 200 *Fed.* 468; *Organ v. Gardiner*, 1 *Ch. Cas.* 231; *Lord Carteret v. Paschal*, 3 *Peere*

Wms. 197; *Binks v. Binks*, 2 *Bligh*, P. C. 593; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123; *Daniell's Ch. Pr.* (1st Am. ed.) 1691.

⁴ *Central Tr. Co. v. Western N. C. R. Co.*, 89 *Fed.* 24.

⁵ *Morgan v. —*, 1 *Atk.* 408; *Mitford's Pl.*, ch. 1, § 3; *Daniell's Ch. Pr.* (1st Am. ed.) 1691.

⁶ *Mitford's Pl.*, ch. i, § 3; *Daniell's Ch. Pr.* (1st Am. ed.) 1693.

⁷ *Railroad Co. v. Chamerlain*, 6 *Wall.* 748, 18 L. ed. 859; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123; *Central Tr. Co. v. Western R. Co.*, 89 *Fed.* 24.

bill to carry a decree into execution the court is at liberty to examine into the grounds of the original decree, and if such decree appears to have been erroneous, to refuse to enforce it, even when the same was entered by consent.⁸ Where a decree is capable of being executed by the ordinary process and forms of the court, whatever the iniquity of the decree may be, till it is reversed the court is bound to assist it with the utmost process the course of the court will bear; but where the common process of the court will not serve and things come to be in such a state and condition after a decree made, that it requires a new bill and a second decree upon that before the first decree can be executed, if the first decree is unjust, the court desires to be excused in making it its own, and to build upon such foundations, and charging its conscience with promoting an apparent injustice; and this obliges the court to examine the grounds of the first decree before it makes the same decree again.⁹

⁸ *Lawrence Mfg. Co. v. Janesville C. Mills*, 138 U. S. 552, 562, 34 L. ed. 1005, 1009; *Lewers & Cooke v. Atcherly*, 222 U. S. 285, 56 L. ed. 202; *Gay v. Parprat*, 106 U. S. 679, 27 L. ed. 256; *Lawrence v. Berney*, 2 Rep. in Ch. 127; *Johnson v. Northey*, Prec. in Ch. 134; s. c., 2 Vern. 407; *Atty. Gen. v. Day*, 1 Vesey, 218; *Wert v. Skip*, 1 Vesey, 218; *Hamilton v. Houghton*, 2 Bligh,

P. C. 169; *Mitford's Pl.*, ch. i, § 3; *Daniell's Ch. Pr.* (1st Am. ed.) 1691, 1692. Cf. *Deposit Bank v. Frankfurt*, 191 U. S. 499, 525, 48 L. ed. 276, 286.

⁹ *Lawrence v. Berney*, 2 Ch. R. 127; *Lawrence Mfg. Co. v. Janesville C. Mills*, 138 U. S. 552, 562, 34 L. ed. 1005, 1009; *Mitford's Pl.*, ch. i, § 3; *Daniell's Ch. Pr.* (1st Am. ed.) 1691, 1692.

CHAPTER XXIX.

CORRECTION OF DECREES OTHERWISE THAN BY APPEAL.

§ 443. **Correction of decrees in general.** When a party to a suit in equity, or his representative, feels himself aggrieved by a final decree of the court, there are eight ways in which he can apply to have such decree reversed, set aside, or varied: by petition for a mere clerical or accidental error,¹ by a petition for a rehearing,² by a bill of review,³ by a bill in the nature of a bill of review,⁴ by a supplemental bill in the nature of a bill of review,⁵ by a bill to set aside a decree on account of fraud, mistake, accident, or surprise,⁶ by a bill to suspend or avoid the operation of a decree,⁷ and by an appeal.⁸ An interlocutory decree can be corrected before⁹ or at the entry

§ 443. ¹ § 444.

² § 445.

³ §§ 447-449.

⁴ § 446.

⁵ § 450.

⁶ § 451.

⁷ § 452.

⁸ Ch. XXXVI.

⁹ *Iowa v. Illinois*, 151 U. S. 238, 38 L. ed. 145; *supra*, § 397. See, however, *Gunn v. Black*, 60 Fed. 151. A decree for an accounting, even one making absolute an order that a bill be taken *pro confesso*, *Webster v. Oliver Ditson Co.*, 171 Fed. 895, is interlocutory and may be modified at any time, *Weston El. Instrument Co. v. Empire El. Instrument Co.*, 166 Fed. 867. See *Comly v. Buchanan*, 81 Fed. 58, where a decree for an injunction and an accounting, entered December 9, 1895, was modified on petition January 22, 1897. A decree in a partition

suit adjudging the property susceptible of partition, and appointing petitioners to make the same, is interlocutory and may be set aside or modified at any time before final decree. *Dangerfield v. Caldwell*, C. C. A., 151 Fed. 554. A court refused to modify an interlocutory decree for an injunction, so as to more clearly advise the defendant what he could, and what he could not do without infringing same. *Thomas & Sons Co. v. El. Porcelain Co.*, 114 Fed. 407. An interlocutory decree can be opened to admit new evidence, only on the same terms as a final decree. *Deitch v. Staub*, C. C. A., 115 Fed. 309, 317. It has been said that this will not be done, when the party seeking to modify the interlocutory decree has acquiesced in the same. *Dewey v. Stratton*, C. C. A., 114 Fed. 179.

of the final decree.¹⁰ A rule of the State court permitting decrees or a default to be opened at the term after they have become absolute will not be followed by the Federal courts.¹¹ A motion to set aside an interlocutory decree will ordinarily be denied, if based only upon grounds considered at the hearing.¹²

§ 444. **Amendment of decree without a rehearing.** The rules provide that "clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition without the form or expense of a rehearing."¹ Decretal orders may be corrected in the same manner.² In this way, corrections have been permitted of errors in the title of a decree or order;³ of an omission in a decree for specific performance of a direction to settle the conveyance,⁴ or of a reference as to title;⁵ of an omission in a decree in a creditor's suit of a direction to take the accounts of the personal estate;⁶ of an allowance of interest from a different date from that determined in a master's report which the court had confirmed;⁷ to correct the numbers of certain letters patent, an interest in which was decreed to a party, when there was no issue concerning the identity of the same,⁸ and of other minor defects or redundancies in respect to which a decree did not conform to the directions of the written opinion of the court.⁹ It has

¹⁰ *Henry v. Travelers' Ins. Co.*, 34 Fed. 258; *Clark v. Blair*, 14 Fed. 812; *Rodgers v. Pitt*, 129 Fed. 932; *King v. West Virginia*, 216 U. S. 92, 100, 54 L. ed. 396, 401; *Lewers & Cooks v. Atcherly*, 222 U. S. 285, 295, 56 L. ed. 202, 205. For motions at the foot of a decree, see *supra*, § 405.

¹¹ *Austin v. Riley*, 55 Fed. 833. See *Rogers v. Pitt*, 129 Fed. 932, 937. But see *infra*, § 481.

¹² *A. B. Dick Co. v. Wickelman*, 77 Fed. 853; *Rodgers v. Pitt*, 129 Fed. 932, 937.

§ 444. ¹ Eq. Rule 72. See Wit-

ters v. Sowles, 32 Fed. 130; *Hop B. Mfg. Co. v. Warner*, 28 Fed. 577.

² *Union S. Ref. v. Mathiesson*, 3 Cliff. 146.

³ *Spearing v. Lynn*, 2 Vern. 376.

⁴ *Trevelyan v. Charter*, 9 Beav. 140.

⁵ *Hughes v. Jones*, 26 Beav. 24.

⁶ *Pickard v. Mattheson*, 7 Ves. 293.

⁷ *Fidelity Trust & Safe Deposit Co. v. Roanoke Iron Co.*, 84 Fed. 744.

⁸ *Maginn v. Standard Equipment Co.*, C. C. A., 150, Fed. 139.

⁹ *Gage v. Kellogg*, 26 Fed. 242;

been held that such a correction cannot be made in an appealable case after the term at which the decree was entered,¹⁰ except by consent, and it has been held that when thus corrected the corrected decree cannot be modified.¹¹ An order or decree entered by consent cannot be varied or modified in a material part without the assent of all the parties to the same; but the court, it seems, may give such further directions as are necessary to carry it "into effect, according to its spirit and intent."¹² The former English practice occasionally though rarely allowed similar corrections in what were manifestly mere clerical errors after a decree had been enrolled;¹³ and in the Federal courts it has been said that an error in calculating the amount ordered by the decree to be paid may be corrected after enrolment, upon motion or petition, by entering a credit as for its payment.¹⁴ A decree cannot be set aside after the expiration of the term when it was entered because the remedy was at common law and not in equity.¹⁵ Judgments have been set aside after the terms at which they were rendered where appearances had been made by attorneys without authority.¹⁶ It has been held that the Federal courts can

Rogers v. Riessner, 34 Fed. R. 270; Tufts v. Tufts, 3 W. & M. 429; Pfanschmidt v. Kelly M. Co., 32 Fed. 667; Witters v. Sowles, 32 Fed. 765; Burdsall v. Curran, 31 Fed. 918; Albany v. Steam T. Co., 26 Fed. 318; Dorsheimer v. Rorback, 9 C. E. Green (N. J.), 33; Sprague v. Jones, 9 Paige (N. Y.), 395; Jarmon v. Wiswall, 9 C. E. Green (N. J.), 68. But see Ry. Reg. Mfg. Co. v. North Hudson Co. R. Co., 26 Fed. 411.

¹⁰ Doe v. Waterloo Min. Co., 60 Fed. 643; Hicklin v. Marco, 64 Fed. 609; Born v. Schneider, 128 Fed. 179; *Re* Metropolitan Tr. Co., 218 U. S. 312, 54 L. ed. 1051. *Contra*, Taylor v. Easton, C. C. A., 180 Fed. 363, 368, where the petition was treated as a bill of review; Ommen v. Talcott, 180 Fed. 925, a mistake Fed. Prac. Vol. II.—88.

as to the date of the entry of a decree made pending an appeal.

¹¹ *Ibid*.

¹² Wadsworth, C., in Leitch v. Cumpston, 4 Paige (N. Y.) 476; Gage v. Kellogg, 26 Fed. 242; Rogers v. Riessner, 34 Fed. 270.

¹³ Weston v. Haggerston, G. Cooper, 134; Yow v. Townsend, 1 Dick. 59; Atty. Gen. v. Greenhill, 34 Beav. 174; Beckman v. Peck, 3 J. Ch. (N. Y.) 415; Clark v. Hall, 7 Paige (N. Y.), 382; Thompson v. Goulding, 5 Allen (Mass.), 81. For enrolment of decrees, see *supra*, § 406.

¹⁴ Massie v. Graham, 3 McLean, 41.

¹⁵ Brown v. Allebach, 182 Fed. 264.

¹⁶ After three years, in McGeorge v. Bigstone G. I. Co., 88 Fed. 599.

set aside, after the term at which it was rendered, a final judgment or decree entered by a mistake of the judge without an examination of the pleadings and evidence;¹⁷ one which the judge was induced to make by false representations as to its nature;¹⁸ when the necessity for the correction and the matter from which it is to be made appear upon the face of the record;¹⁹ when, according to the judge's recollection, it does not conform to his decision;²⁰ in which last two cases no notice of the application for the correction is required;²¹ and whenever it can be shown, by evidence adduced *aliunde*, that the judgment does not represent the decision of the court.²² But it has been held that the Federal Courts, after the term at which they were rendered and the time allowed by the rules for an application for a rehearing has expired, have not the power to set aside decrees or judgments for errors of law.²³ A decree entered upon a mandate of the Supreme Court which fails in any respect to comply therewith is not final, and may be modified at a subsequent term.²⁴ It has been held that, after the term at which a decree has been entered, it may be modified as to the time or the manner of its enforcement.²⁵ A Federal court may vacate or correct its judgments or decrees on its own motion during the same term for any cause.²⁶ Where the judge, after he had signed a decree, but before it

After eleven years, in *Maury's Trustees v. Fitzwater*, 88 Fed. 768.

¹⁷ *U. S. v. Williams*, 67 Fed. 384. Such an application should be addressed to the judge who made the error. If he is dead or has left the bench, another judge will rarely, if ever, grant it. *Hicklin v. Marco*, 64 Fed. 609.

¹⁸ *Fisher v. Simón*, 67 Fed. 387.

¹⁹ *Odell v. Reynolds*, C. C. A., 70 Fed. 656.

²⁰ *Ibid.*

²¹ *Ibid.*

²² In such a case the application must be upon notice. *Ibid.*

²³ *Klever v. Seawall*, C. C. A., 65 Fed. 373; *McGregor v. Vt. L. & Tr. Co.*, C. C. A., 104 Fed. 709.

²⁴ *Moran v. Hagerman*, C. C. A., 64 Fed. 499.

²⁵ *Mootry v. Grayson*, C. C. A., 104 Fed. 613, 618; *Farmers' L. & Tr. Co. v. Oregon Pac. R. Co.*, 28 Oreg. 44; s. c., 40 Pac. 1089; *Monkhouse v. Corporation of Bedford*, 17 Ves. 380.

²⁶ *Aetna L. Ins. Co. v. Board of Co. Com'rs*, C. C. A., 79 Fed. 575; *Miocene Ditch Co. v. Moore*, Judge of the United States District Court, C. C. A., 150 Fed. 483; *United States ex rel. Animalum Co. v. Circuit Court of United States, Southern Dist of Iowa*, C. C. A., 129 Fed. 897.

was entered on the journal, suspended its entry, and thereafter proceeded to reform the pleadings and hear the cause anew with the acquiescence of the parties, it was held that the decree had no validity, although it was by mistake filed by the clerk.²⁷ Where a decree was modified, at a term subsequent to its entry, it was presumed that it was not final where the record did not affirmatively show the contrary.²⁸ Where evidence omitted by oversight was offered to the court upon appeal, the case was reversed, with a direction for a rehearing, upon the payment of costs of the original court and the court of review.²⁹

§ 445. **Petition for a rehearing.** A petition for a rehearing is the proper method of correcting before enrolment errors in a decree which are not evidently clerical or accidental. A petition for a rehearing could formerly in England have only been made to a judge before whom the cause was heard, or to the Lord Chancellor.¹ In the Federal courts a petition for a rehearing will usually be entertained only by the judge or justice before whom the cause was heard.² The rules provide that "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."³ A petition filed within the time prescribed by the rules may be heard and granted subsequently.⁴ When the respondent to a petition for a rehearing, at the hearing on the petition does not dispute the fact that the suit

²⁷ *Mahler v. Animarium Co.*, 129 Fed. 897.

²⁸ *Maginn v. Standard Equipment Co.*, C. C. A., 150 Fed. 139.

²⁹ *St. Claire Foundry Co. v. Union Jack Co.*, C. C. A., 184 Fed. 989.

§ 445. ¹ *Daniel's Ch. Pr.* (5th Am. ed.) § 1471.

² *Giant P. Co. v. California V. P. Co.*, 5 Fed. 197, 202.

³ *Eq. Rule* 69. See *McMicken v. Perrin*, 18 How. 507, 15 L. ed. 504;

Bank of Lewisburg v. Sheffey, 140 U. S. 445, 35 L. ed. 493; *First Nat. Bank v. Woodrum*, 86 Fed. 1004.

⁴ *Aspen M. & S. Co. v. Billings*, 150 U. S. 31, 36, 37 L. ed. 986, 988; *Goodard v. Ordway*, 101 U. S. 745, 25 L. ed. 1040; *New Orleans v. Fisher*, C. C. A., 91 Fed. 574, 585; *Giant P. Co. v. California V. P. Co.*, 6 Fed. 197, 202. *Contra*, *Glehn v. Noonan*, 43 Fed. R. 403; s. c., 43 Fed. 550.

could not be appealed, he cannot, after a rehearing has been granted, offer new proof to show that an appeal might lie, and on that ground seek to reverse a decree rendered after a rehearing.⁵ Where a decree for an injunction against the infringement of a patent had been reversed, the mandate ordering, together with the reversal, "that such execution and further proceedings be had in said case, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding;" an application for a writ of *certiorari* had been denied; and the complainant, before the entry of a decree upon the mandate, filed a disclaimer in the Patent Office, seeking to restrict the claims in controversy, so as to avoid the effect of anticipating devices, to which reference was made in the opinion of the Circuit Court of Appeals: he was allowed a rehearing.⁶ Otherwise, without leave of the appellate court, no rehearing for newly discovered evidence can be granted, when a case has been decided upon an appeal.⁷ A rehearing in England was formerly allowed almost as of course, upon the filing of a petition signed by two counsel of whom one at least must have been concerned in the original hearing; the rule having been stated by Lord Hardwicke, that "such credit is given by the court to their opinion that the cause ought to be reheard, that it will, in general, order the cause to be set down" for that purpose, as a matter of course.⁸ This rule, however, has not been adopted in the courts of the United States, where a rehearing is discretionary with the judge to whom the application is made.⁹ Unless the judge acts of his own motion, a rehearing will be granted only for errors of law apparent upon the record and arising upon questions which were not argued at the original hearing, or upon newly discovered evidence of such a character that it would have authorized a new trial in an action at law.¹⁰ A rehearing

⁵ *Moelle v. Sherwood*, 148 U. S. 21, 26, 37 L. ed. 350, 352.

⁶ *Sample v. Am. Soda Fountain Co.*, 134 Fed. 402.

⁷ *Re Potts*, 166 U. S. 263, 41 L. ed. 994.

⁸ *Cunyngham v. Cunynham, Amb.* 39. See *Atty. Gen. v. Brooke*, 18

Ves. 319, 325; *East India Co. v. Boddam*, 13 *Ves.* 421.

⁹ *Mr. Justice Filed in Giant P. Co. v. California V. P. Co.*, 5 Fed. 197.

¹⁰ *Daniel v. Mitchell*, 1 Story, 198; *Jenkins v. Eldredge*, 3 Story, 299; *Emerson v. Davies*, 1 W. & M. 421; *Tufts v. Tufts*, 3 W. & M. 426;

should not be granted for newly discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing,¹¹ nor when it is merely cumulative to that previously received, nor when, if presented, it would not have changed the result.¹² "A new hearing should not be had simply to allow a rehash of old arguments."¹³ "If rehearings are to be had, until the counsel on both sides are entirely satisfied, I fear, that suits would become immortal, and the decision be postponed indefinitely."¹⁴ A rehearing can only take place for the purpose of altering a decree upon grounds which existed at the time when the decree was pronounced, and one will not be allowed to remedy a grievance consequent upon a decree resulting entirely from circumstances that have occurred subsequent to its entry.¹⁵ The rules provide that "every petition

Giant P. Co. v. California V. P. Co., 5 Fed. 197.

¹¹ *Alis v. Stowell*, 85 Fed. 481; *McLeod v. New Albany, C. C. A.*, 66 Fed. 378; *Re Gamewell F. A. Tel. Co., C. C. A.*, 74 Fed. 908; *Bennett v. Schooley*, 77 Fed. 352. A rehearing was denied where the defendant claimed to have discovered that another patent anticipated the one in suit, when such patent was referred to in the defendant's brief and record upon the original hearing. *Combustion Utilities Corporation v. Worcester Gaslight Co.*, 190 Fed. 155; and because of the discovery of a mortgage on the patent, which was shown by the file wrapper then put in evidence, *Money-Weight Scale Co. v. Toledo Computing Scale Co., C. C. A.*, 199 Fed. 905. It has been said that surprise as a ground for the granting of a rehearing in equity must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate, and which ordinary prudence and foresight could not guard against. *Anderson Land & Stock Co. v. McConnell*, 171 Fed. 475.

¹² *Giant P. Co. v. California V. P. Co.*, 5 Fed. 197, 201; *Jenkins v. Eldredge*, 3 Story, 299; *Tufts v. Tufts*, 3 W. & M. 426; *Hicks v. Otto*, 22 Blatchf. 122; *Page v. Holmes B. A. Tel. Co.*, 2 Fed. 330; *Collins Co. v. Coes*, 8 Fed. 517; *Witters v. Sowles*, 31 Fed. 5; *Pfanschmidt v. Kelly M. Co.*, 32 Fed. 667, and cases cited in the opinions in these cases. But see *Webster Loom Co. v. Higgins*, 43 Fed. 673. It has been said that a motion to open a decree in order to introduce new evidence differs from a motion for a rehearing, technically so called, and is not to be governed by the same stringent rules. "It is rather a motion addressed to the discretion of the court with reference to the order of trial." *Campbell Pr. & Mfg. Co. v. Marden*, 70 Fed. 339, 340.

¹³ *Field, J.*, in *Giant P. Co. v. California V. P. Co.*, 5 Fed. 197, 201.

¹⁴ *Story, J.*, in *Jenkins v. Eldredge*, 3 Story, 299, 305.

¹⁵ *Bowyer v. Bright*, 13 Price, 316; *Hurlburt v. Freelove*, 3 Wis. 537.

for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person."¹⁶ The petition for a rehearing should state fully the facts which show the nature of the new evidence, the facts which show that it could not have been found by the exercise of reasonable diligence before the hearing, that it was not known then and that a diligent search was previously made for the evidence. Mere general averments of reasonable diligence and previous ignorance are insufficient.¹⁷ The allegations must be full, precise, and certain. It seems that they will be insufficient if sworn to merely upon information and belief.¹⁸ It has been held that when evidence of new facts not already in issue is to be given, the petition should be accompanied by a supplemental bill in the nature of a bill of review, pleading these facts; in which case, if the petition be granted, the hearing upon that bill will take place at the same time as the rehearing of the original suit.¹⁹ The usual proceedings to obtain a rehearing are for the party desiring it to file his petition in the clerk's office, and then to procure an order directing his opponent to show cause why his prayer should not be granted.²⁰ The adverse party may then answer, controverting or setting up new matter in avoidance of allegations in the petition; or probably may show cause against granting the rehearing on the return-day of the order by an affidavit.²¹ If there be any irregularity in the petition, it may be taken off the file at the respondent's motion.²² Upon the return-day of the order to show cause, if no adjournment be had, the matter is argued before the judge, by whose direction the decree or order complained of was made, unless he be

¹⁶ Equity Rule 69; U. S. v. The Dago, C. C. A., 63 Fed. 182. The petition and affidavits should not be verified before a notary who is one of the petitioner's counsel. Allis v. Stowell, 85 Fed. 481.

¹⁷ Allis v. Stowell, 85 Fed. 481; Hicks v. Otto, 85 Fed. 728; McLeod v. New Albany, C. C. A., 66 Fed. 378.

¹⁸ Page v. Holmes B. A. Tel. Co., 2 Fed. 330.

¹⁹ Baker v. Whiting, 1 Story, 218; Perry v. Phelps, 17 Ves. 173, 178; Head v. Godlee, Johns, 536, 579; Jopp v. Wood, 2 De G., J. & S. 323.

²⁰ Giant P. Co. v. California V. P. Co., 5 Fed. 197.

²¹ Ibid.

²² Wood v. Griffith, 1 Meriv. 35.

absent; when the papers and the briefs of counsel should be filed with the clerk, who will mail them to him.²³ The petition will not be granted without notice to the adverse parties, and an opportunity for their presence afforded them.²⁴ Upon a rehearing the cause or matter is proceeded in as if it were heard for the first time. All depositions taken before the original hearing; though not then used, may be read,²⁵ and the plaintiff may withdraw from evidence any portion of the answer read before.²⁶ No new evidence can be used, unless a supplemental bill has been filed;²⁷ but exhibits not previously used may be produced;²⁸ and if a witness has since the former hearing been convicted of perjury,²⁹ or admitted receiving a bribe to influence his testimony,³⁰ that may be proved to the court. Evidence taken upon an accounting cannot be offered against a person not a party to such accounting unless it is equivalent to an admission upon his part.³¹ After one rehearing, a petition for another can only be filed by special leave of the court, and may be taken off the file if presented without such leave.³² It has been held that an order granting a rehearing after the time prescribed by the rules has expired is void, not merely voidable; and that a party does not, by taking a subsequent step in the cause, waive his right to move to vacate the same.³³ The grant or refusal, absolute or conditional, of an application for a rehearing, which has been made in due time, rests in the discretion of the court where the cause is first heard, and is not a subject of appeal.³⁴ Affidavits presented in support of a motion for a rehearing

²³ *Giant P. Co. v. California V. Empire El. Instrument Co.*, 166 Fed. P. Co., 5 Fed. 195. 867.

²⁴ *Ibid.*, 197.

²⁵ *Cunyngham v. Cunyngham*, Amb. 89, 90.

²⁶ *Allfrey v. Allfrey*, 1 Macn. & G. 87; *Ogle v. Morgan*, 1 De G., M. & G. 359.

²⁷ *Jenkins v. Eldredge*, 3 Story, 299; *infra*, § 194.

²⁸ *Herring v. Globery, Cr. & Ph.* 251.

²⁹ *Needham v. Smith*, 2 Vern. 463.

³⁰ *Ibid.*

³¹ *Weston El. Instrument Co. v.*

³² *Moss v. Baldock*, 1 Phila. 118.

³³ *Glenn v. Lucas*, 43 Fed. 550.

³⁴ *Roemer v. Bernheim*, 132 U. S. 103, 106, 33 L. ed. 277, 279; *Buffington v. Harvey*, 95 U. S. 99, 100, 24 L. ed. 381, 382; *Steines v. Franklin County*, 14 Wall. 15, 22, 20 L. ed. 846, 848; *Railway Co. v. Heck*, 102 U. S. 120, 26 L. ed. 58; *Kennon v. Gilmer*, 131 U. S. 22, 24, 33 L. ed. 110, 111; *Boesch v. Graff*, 133 U. S. 697, 699, 33 L. ed. 787, 788. So held of an application to set aside

which was denied, cannot be considered on an appeal from the final decree.³⁵

§ 446. Supplemental bills in the nature of bills of review.

A supplemental bill in the nature of a bill of review is a bill that brings to the attention of the court new matter, which has arisen or been discovered since, and could not by the exercise of due diligence have been discovered before, the time for taking testimony in a cause expired, and which the party filing the bill alleges as a reason why a decree made and passed therein, but not signed and enrolled, should be reversed or modified.¹ Such a bill cannot be filed after a decree has been signed and enrolled.² The proper remedy in a similar case then is a bill of review.³ A supplemental bill in the nature of a bill of review cannot be used to obtain a reversal or modification of a decree for errors in law apparent upon its face.⁴ That, before enrollment, can only be done by means of a petition for a rehearing.⁵ Matter of revivor and supplement may be incorporated in such a supplemental bill.⁶ An English chancery order made on the 17th of October, 1841, and which should probably be followed here, the clerk taking the place of the registrar and five dollars being reckoned as a pound sterling, provides: "That no supplemental bill, or bill in the nature of a bill of review, grounded upon new matter discovered, or pretended to be discovered, since the pronouncing of any decree, of this court, in order to the reversing or varying of such decree shall be exhibited without the special leave of the court first obtained for that purpose, and unless the party exhibiting the same do first deposit with the registrar of this court so much money as together with the deposit by the rules of this court required to be made on obtaining a rehearing of the cause or causes wherein such decree was pronounced will make up the sum of 50*l.*, as a pledge to answer

an adjudication of bankruptcy. *Re* Columbia Real Estate Co., C. C. A., 112 Fed. 643, 646.

³⁵ *Giles v. Heysinger*, 150 U. S. 627, 631, 37 L. ed. 1204, 1205.

§ 446. ¹ *Perry v. Pheips*, 17 Ves. 173; *Mitford's Pl.*, ch. 1, § 2; *Moore v. Moore*, 2 Ves. Sen. 596; *Story's Eq. Pl.*, §§ 422, 423.

² *Beames' Orders*, 1.

³ See §§ 447, 449.

⁴ *Perry v. Phelps*, 17 Ves. 173.

⁵ See § 445.

⁶ *Perry v. Phelps*, 17 Ves. 176-178.

such costs and damages as shall be awarded to the adverse party, in case the court shall think fit to award any at the hearing of the cause on such supplemental or new bill.”⁷ A supplemental bill in the nature of a bill of review should state the facts which it is desired to prove, and, if they had then occurred, the reason why they were not discovered and given in evidence before publication, and it seems should state positively that the decree has not been enrolled, and not in the alternative, praying one sort of relief as upon a bill of review, if the decree has been enrolled, and if not enrolled, then to have the benefit of it as upon a supplemental bill in the nature of a bill of review.⁸ Such a bill should conclude with a prayer that the cause may be reheard. It should be signed by counsel, and in other respects conform to the requirements of a bill of review upon newly discovered facts.⁹ Like that, it can only be filed by leave of the court, which is obtained in the same way, and upon the same grounds as leave to file such a bill of review;¹⁰ and the proceedings upon the two kinds of bills are also substantially the same.¹¹ But according to Lord Redesdale, “Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill.”¹² Laches may be a ground for refusing leave to file a supplemental bill in the nature of a bill of review, unless such laches is extenuated by laches on the part of the defendant to it.¹³ Such a bill cannot be heard unless accompanied by a petition for a rehearing, when the rehearing of the original and the hearing of the supplemental cause will be set down together.¹⁴ Such a bill cannot be filed to set aside or to reopen an interlocutory order or decree.¹⁵

⁷ Order of 17th October, 1741; Beames' Orders, 368.

⁸ Story's Eq. Pl., § 425. See the language of Lord Eldon in *Perry v. Phelps*, 17 Ves. 173-178.

⁹ Story's Eq. Pl., §§ 422, 425; *Bennett v. Schooley*, 77 Fed. 352. See *infra*, § 448.

¹⁰ Story's Eq. Pl., § 422.

¹¹ Story's Eq. Pl., §§ 422-425.

¹² Mitford's Pl., ch. 1, § 3, pt. 3.

¹³ Story's Eq. Pl., § 423; *Sheffield Canal Co. v. Sheffield & R. Ry. Co.*, 1 Phillips, 484.

¹⁴ *Moore v. Moore*, 2 Ves. Sen. 596, 598; *Perry v. Phelps*, 17 Ves. 173.

¹⁵ *C. & A. Potts Co. v. Creager*, 71 Fed. 574.

§ 447. **Bills of review.** A bill of review is a bill filed to reverse or modify a decree that has been signed and enrolled for error in law apparent upon the face of such decree, or on account of new facts discovered since publication was passed in the original cause, and which could not by the exercise of due diligence have been discovered or used before the decree was made.¹ A bill of review can only be filed to impeach a final, not to impeach an interlocutory decree.² For an interlocutory decree can always be modified or reversed by the court without any bill for that purpose.³ But the expression "final decree may be reversed or modified must be clearly apparent of appeals."⁴ It has been held that such a bill of review is in the nature of a writ of error, and must be governed practically by the same rules that control the appellate court, when considering writs of error.⁵ The errors of law for which a decree may be reversed or modified must be clearly apparent upon the record; that is, "only such as arose upon the pleadings, proceedings, and decree, without reference to the evidence in the cause;"⁶ as, for example, the disregard of a statute,⁷ or want of jurisdiction,⁸ or the finding of a fact contrary to an allegation in a defendant's answer when no evidence was taken;⁹ not errors in drawing conclusions from evidence,¹⁰

¹ § 447. ¹ Mitford's Pl., ch. 1, § 3, pt. 3; Story's Eq. Pl., §§ 403-420; Irwin v. Meyrose, 7 Fed. 533; Nickle v. Stuart, 111 U. S. 776; 28 L. ed. 599; Freeman v. Clay, C. C. A., 52 Fed. 1.

² Jenkins v. Eldredge, 3 Story, 299; Story's Eq. Pl., § 408a.

³ Story's Eq. Pl., § 408a. See *supra*, § 255.

⁴ Story's Eq. Pl., § 408a; Whiting v. Bank of U. S., 13 Pet. 6, 15, 10 L. ed. 33, 37; Ray v. Law, 3 Cranch, 179, 2 L. ed. 404; Jenkins v. Eldredge, 3 Story, 299.

⁵ Acord v. Western Pocahontas Corporation, 156 Fed. 989.

⁶ Bradley, J., in Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381. See also Whiting v. Bank of U. S.,

13 Pet. 6, 10 L. ed. 33; Putnam v. Day, 22 Wall. 60, 22 L. ed. 764; Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481.

⁷ Story's Eq. Pl., § 405; Gregor v. Molesworth, 2 Ves. Sen. 109.

⁸ Ketchum v. Farmers' L. & T. Co., 4 McLean, 1; Miller v. Clark, 47 Fed. 850; s. c., 52 Fed. 900.

⁹ Clark v. Killian, 103 U. S. 766, 26 L. ed. 607.

¹⁰ Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33; Dexter v. Arnold, 5 Mason, 303; Putnam v. Day, 22 Wall. 60, 22 L. ed. 764; Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381; Kimberley v. Arms, 40 Fed. 548; s. c., 136 U. S. 629, 34 L. ed. 557; Journeiman v. Ewing, 85 Fed. 103.

nor errors in casting accounts,¹¹ nor it seems in matters of abatement,¹² nor in the exercise of discretion,¹³ nor matters of form,¹⁴—among which however, the omission of a clause giving an infant defendant a day in which to show cause against a decree is not included, and on that ground a bill of review may be sustained.¹⁵ It has been held to be no sufficient ground for a bill of review that since the decree a State court has given to the Constitution of the State a construction different from that put upon it by the Federal court in its decree;¹⁶ nor that since the decree the Supreme Court has changed its ruling upon a question of law or fact.¹⁷ In England, where the mandatory part of a decree was usually preceded by a statement of the facts upon which it was founded, only the decree itself could be examined for such errors;¹⁸ but in the Federal courts where this custom does not exist, the whole record may be thus examined,¹⁹ but not the evidence at large.²⁰ Facts, which are inconsistent with the pleadings and decrees in the original cause, when alleged in a bill of review, not founded upon newly discovered evidence, cannot be considered.²¹ Bills of review for errors apparent upon the record may be filed after the term at which the decree sought to be corrected was entered,²² but not after the expiration of the time limited for an appeal,²³ except under extraordinary circumstances. Where, however, such a bill was presented for

¹¹ *Massie v. Graham*, 3 McLean, 41; *Beames' Ord.* 1; *Story's Eq. Pl.*, § 405.

¹² *Story's Eq. Pl.*, § 411; *Hartwell v. Townsend*, 6 Bro. Parl. 107; *Slingsby v. Hale*, 1 Ch. Cas. 122.

¹³ *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381; *Irwin v. Meyrose*, 7 Fed. 533.

¹⁴ *Story's Eq. Pl.*, § 411.

¹⁵ *Story's Eq. Pl.*, § 407; *Perry v. Phelps*, 17 Ves. 173; *Gregor v. Molesworth*, 2 Ves. Sen. 109. See *supra*, 401.

¹⁶ *King v. Dundee M. & Tr. I. Co.*, 28 Fed. 33; *Hoffman v. Knox*, 50 Fed. 484.

¹⁷ *Tilghman v. Werk*, 39 Fed. 680.

¹⁸ *Story's Eq. Pl.*, § 407.

¹⁹ *Whiting v. Bank of U. S.*, 13 Pet. 6, 10 L. ed. 33; *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381; *Clark v. Killian*, 103 U. S. 766, 26 L. ed. 607.

²⁰ *Ibid.* *Quinton v. Neville*, C. C. A., 152 Fed. 879; *Acord v. Western Pocahontas Corporation*, 156 Fed. 989.

²¹ *Quinton v. Neville*, C. C. A., 152 Fed. 879.

²² *Home St. Ry. Co. v. City of Lincoln*, C. C. A., 162 Fed. 133.

²³ *Thomas v. Harvie's Heirs*, 10 Wheat. 146, 6 L. ed. 287; *Kennedy*

filing within the time and the court delayed passing upon the application until subsequently, it was treated as filed upon the day when it was presented.²⁴ Where the Circuit Court of Appeals had inadvertently directed a complete reversal of the decree below together with a dismissal of the bill with costs, the Circuit Court had entered a decree of dismissal with costs, in accordance with such mandate, and the Supreme Court had denied a petition for a *certiorari*, the case not being appealable thereto; after payment of the costs by the complainant, the Circuit Court of Appeals granted him leave to file a bill of review in the Circuit Court to modify its decree upon the mandate, so as to provide that the bill of complaint be not wholly dismissed and part of the injunctive relief granted.²⁵ The time within which the control of the District Court over the case is suspended by an appeal subsequently dismissed, is not included in the computation of time;²⁶ but the period between the entry of a void order vacating the order sought to be reviewed and the vacation of such void order is included.²⁷ Laches for a shorter period of time might be a ground for dismissing a bill of review.²⁸ It has been held that a bill of review for want of jurisdiction cannot be filed after the term of the decree, unless the decree states that the objection was duly raised, or a certificate that the question of jurisdiction was raised has been made during the term.²⁹ After a decree has been affirmed by the appellate court, it cannot be reviewed for any reason without leave of that court;³⁰ even if the affirmance

v. Georgia State Bank, 8 How. 586, 12 L. ed. 1209; Clark v. Killian, 103 U. S. 766, 26 L. ed. 607; Story's Eq. Pl., § 410; Cocke v. Copenhaver, C. C. A., 126 Fed. 145. See also Massie v. Graham, 3 McLean, 41; McDonald v. Whitney, 39 Fed. 466; Rector v. Fitzgerald, C. C. A., 59 Fed. 808. Home St. Ry. Co. v. City of Lincoln, C. C. A., 162 Fed. 133.

²⁴ Fraenkl v. Cerecedo, 216 U. S. 295, 54 L. ed. 486.

²⁵ Faber-Castell v. Faber, C. C. A., 145 Fed. 626.

²⁶ Ensminger v. Powers, 108 U. S. 292, 27 L. ed. 732.

²⁷ Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97.

²⁸ Farmers' Loan & Trust Co. v. Green Bay & M. R. Co., 16 Fed. 100, 113; Duncan v. Atlantic M. & O. R. Co., 38 Fed. 840; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

²⁹ Chamberlin v. Peoria, D. & E. Ry. Co., C. C. A., 118 Fed. 32.

³⁰ Southard v. Russell, 16 How. 547, 14 L. ed. 1052; Kingsbury v. Buckner, 134 U. S. 654, 33 L. ed. 1050; Kimberly v. Arms, 40 Fed. 548; s. c., 136 U. S. 629, 34 L. ed.

was by a divided court.³¹ Leave to make such an application to the court below should be inserted in the mandate of the appellate court.³² Leave will rarely, if ever, be granted then to file a bill of review for errors in law.³³ Leave of court is not needed to enable a party to file a bill of review for errors apparent upon the face of the record.³⁴ A bill defective as a bill of review may be sustained as a cross-bill,³⁵ and a petition to set aside a decree may be sustained as a bill of review when a defendant thereto raises no objections to the formal defects in the same.³⁶ It has been said that a bill of review is not, in so far a continuation of the original suit as to affect, with notice of *lis pendens* a purchaser in good faith after a final decree and before the bill of review was filed or notice to the purchaser of an intention to file the same;³⁷ and a decree upon such a bill of review, to which he is not a party, will not affect his rights.³⁸ A Federal court will not entertain a bill to review a decree of a State court.³⁹ Under the former practice, the usual defense to a bill of review for errors apparent upon the face of the decree was by demurrer;⁴⁰ to which was usually joined a plea setting forth in full the original decree, although

557; *Watson v. Stevens*, C. C. A., 53 Fed. 31; *Franklin Savings Bank v. Taylor*, C. C. A., 53 Fed. 854; *infra*, § 448. But it was held that a Circuit Court might, without leave of the Supreme Court, entertain a bill to enjoin the enforcement of a judgment against the complainant upon a mandate of the Supreme Court on the ground that the complainant was not in fact a party to such judgment nor bound thereby. *Brown v. Walker*, 84 Fed. 532.

³¹ *Leslie v. Town of Urbana*, C. C. A., 56 Fed. 762.

³² *Watson v. Stevens*, C. C. A., 53 Fed. 31, 35. See also *Society of Shakers v. Watson*, C. C. A., 77 Fed. 512.

³³ *Southard v. Russell*, 16 How. 547, 14 L. ed. 1052; *Kingsbury v. Buckner*, 134 U. S. 650, 671; *Story's Eq. Pl.*, § 408.

³⁴ *Ross v. Prentiss*, 4 McLean, 106. *Lewis v. Holmes*, C. C. A., 194 Fed. 842.

³⁵ *Houghton v. West*, 2 Bro. Parl. Rep. by Tomlins, 88; *Story's Eq. Pl.*, § 401, n. 5.

³⁶ *Taylor v. Easton*, C. C. A., 180 Fed. 363, 368; *Kaw Valley Drainage Dist. v. Union Pac. R. Co.*, C. C. A., 163 Fed. 836.

³⁷ *Rector v. Fitzgerald*, 59 Fed. 808, 811; *Ludlow v. Kidd*, 3 Ohio, 541. See also *Lee County v. Rogers*, 7 Wall. 181, 19 L. ed. 160. *Contra*, *Earle v. Couch*, 3 Met. (Ky.) 450; *Clarey v. Marshall's Heirs*, 4 Dana (Ky.), 95, 96.

³⁸ *Ohio River R. Co. v. Fisher*, C. C. A., 115 Fed. 929.

³⁹ *Craver v. Faurot*, 64 Fed. 241.

⁴⁰ *Mitford's Pl.*, ch. 2, § 2, pt. 1, 5. *Acord v. Western Pocahontas Corporation*, 156 Fed. 989.

there seems to have been no necessity for this practice.⁴¹ If the demurrer was overruled, the decree was reversed or modified and the errors allowed, and no further answer or hearing was necessary.⁴² If the demurrer was sustained, that had all the effect of confirming the decree, and put an end to the suit.⁴³ The rule was in such a case only to vary the decree upon such errors as are complained of, except as to consequential directions, which will be altered to conform to the changes made.⁴⁴ If a bill of review for apparent error contained a statement of the evidence taken in the original cause, that might have been stricken out of the bill as surplusage on motion;⁴⁵ or it might have been a ground of demurrer, if specially assigned;⁴⁶ but the bill, if otherwise good, could be dismissed for that reason upon a general demurrer,⁴⁷ although such evidence or an allegation of an error of fact cannot on a general demurrer be used in support of the bill.⁴⁸ It was held that such a bill of review could not be dismissed upon motion because of the pendency of a prior bill to review the same proceedings,⁴⁹ nor because it did not appear that the complainant thereto would be benefited or that the defendant to the same would be prejudiced by continuing the litigation.⁵⁰

§ 448. Provisions peculiar to bills of review for matters of fact newly discovered. Bills of review upon matters of fact newly discovered can be filed only by express leave of the court.¹ Such a bill can be filed at a term subsequent to the entry of the decree,² even if the original decree was entered by default³ or recites that it was entered on consent, which the bill of review charges not to have been given.⁴ It has been said

⁴¹ Ibid.

⁴² Cook v. Bamfield, 3 Swanst. 607.

⁴³ Webb v. Pell, 3 Paige (N. Y.), 368.

⁴⁴ Moore v. Moore, 2 Ves. Sen. 596, 598.

⁴⁵ Bradley, J., in Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

⁴⁶ Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

⁴⁷ Ibid.

⁴⁸ Shelton v. Van Kleeck, 106 U. S. 532, 27 L. ed. 269.

⁴⁹ Lewis v. Holmes, C. C. A., 194

Fed. 842.

⁵⁰ Ibid.

§ 448. 1 Anon., 2 P. Wms. 283, Perry v. Phelps, 17 Ves. 173; Ross v. Prentiss, 4 McLean, 106; Story's Eq. Pl., § 412.

² Taylor v. Easton, C. C. A., 180 Fed. 363, 368; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

³ Acord v. Western Pocahontas Corporation, 156 Fed. 989.

⁴ Kaw Valley Drainage Dist. v.

that a bill of review for matters of fact, can be allowed, although the original decree was entered by default.^{4*} It has been held that an objection that a collusive transfer of the subject-matter of the suit was made, for the purpose of conferring Federal jurisdiction, cannot be taken for the first time after final decree has been entered and the term ended.⁵ Leave should be obtained by a petition praying for leave to file the bill, and supported by an affidavit showing that the new matter, which it is desired to prove, was not known to the petitioner, and could not have been discovered by him, with the exercise of due diligence, in time to prove it before the entry of the decree sought to be reviewed.⁶ It seems that the affidavit must be positive, and not merely upon information and belief.⁷ Previous knowledge of it by the petitioner's attorney or other agent while acting in that capacity, is equivalent to knowledge by the petitioner, and will be a reason for refusing to allow him to file the bill.⁸ If the newly discovered facts are proved by documents that were under the control of the petitioner, very good reasons for his not discovering and producing them before must be shown in order to entitle him to file a bill of review founded upon them.⁹ Leave was denied when the newly discovered evidence consisted chiefly of public records, and the only excuse was the poverty and ignorance of the plaintiffs and the default of their counsel, there being no charge of fraud or collusion.¹⁰ The affidavit should also state the nature of the new matter, and the evidence desired to be given in its support, in order that the court may judge of its relevancy and materiality.¹¹ The evi-

Union Pac. R. Co., C. C. A., 163 Fed. 836.

* Accord v. Western Pocahontas Corporation, 156 Fed. 989.

⁵ Anon., 342 P. Wms. 283; Perry v. Phelps, 17 Vesey, 773; Ross v. Prentice, 4 McLean 106.

⁶ Wortley v. Birkhead, 2 Ves. Sen. 571; Young v. Keighly, 16 Ves. 348; Purcell v. Miner, 4 Wall. 519; 18 L. ed. 459; Dexter v. Arnold, 5 Mason, 303; Massie v. Graham, 3 McLean, 41; Ross v. Prentiss, 4 McLean, 106; Story's Eq. Pl., §§ 412, 413.

⁷ Page v. Holmes B. A. Tel. Co., 2 Fed. 330.

⁸ Norris v. Le Neve, 3 Atk. 26; Greenlee v. McDowell, 4 Ired. Eq. (N. C.) 481; Story's Eq. Pl., §§ 413, 414.

⁹ Forum Romanum, 187.

¹⁰ Accord v. Western Pocahontas Corporation, 156 Fed. 989. See Jorgensen v. Young, C. C. A., 136 Fed. 378.

¹¹ U. S. v. Sampeyreac, Hempst. 118; Dexter v. Arnold, 5 Mason, 303; Massie v. Graham, 3 McLean, 41; Story's Eq. Pl., § 412.

¹² Ord v. Noel, 6 Madd. 127; Jorgensen v. Young, C. C. A., 136

dence must be not only new, but material,¹² relevant, not merely hearsay,¹³ nor incompetent,¹⁴ and such as, if answered in point of fact, would clearly entitle the plaintiff to a decree and show that the decree, of which complaint is made, has deprived him of some substantial equity,¹⁵ or would raise a question of so much nicety and difficulty as to be a fit subject of judgment in the cause.¹⁶ The new matter may be concerning a point not in issue in the original cause,¹⁷ provided that it be connected with the subject-matter of the bill.¹⁸ A bill of review will not lie on the ground of newly discovered evidence which is merely cumulative,¹⁹ or goes to impeach the character of witnesses,²⁰ or shows a defense that is purely technical.²¹ It has been held that a bill of review will not lie on the ground that a decree offered in evidence in the original suit and there held to be *res adjudicata* has since been set aside for want of jurisdiction, unless it is shown that the defect in the jurisdiction could not have been known or discovered by the exercise of reasonable diligence when the decree was offered in evidence.²² It has been said that the matter upon the discovery of which a bill of review is based, if previously known to the other party, must be of such a nature that he was not in conscience obliged to have discovered it to the court; for if it was known to him and such as in conscience he ought to have discovered, he obtained the decree by fraud, and it ought to be set aside by an original bill.²³ Permission to file such a bill of

Fed. 378; Ward v. Ward, C. C. A., 149 Fed. 204; Richardson v. Lowe, C. C. A., 149 Fed. 625.

¹³ Ward v. Ward, C. C. A., 149 Fed. 204.

¹⁴ Ward v. Ward, C. C. A., 149 Fed. 204; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

¹⁵ Keith v. Alger, C. C. A., 124 Fed. 32.

¹⁶ Ord v. Noel, 6 Madd. 127.

¹⁷ Partridge v. Osborne, 6 Russ. 195.

¹⁸ U. S. v. Sampyreac, Hempst. 118.

¹⁹ Southard v. Russell, 16 How. Pr. 547; Richardson v. Lowe, C. C.

A., 149 Fed. 625; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

²⁰ Southard v. Russell, 16 How. 547, 14 L. ed. 1052; Acord v. Western Pocahontas Corporation, 156 Fed. 989.

²¹ Keith v. Alger, C. C. A., 124 Fed. 32.

²² Vetterlein v. Barker, 45 Fed. 74.

²³ Manaton v. Molesworth, 1 Eden, 18, 25. But see U. S. v. Sampyreac, Hempst. 118; s. c. as Sampyreac v. U. S., 7 Pet. 222, 8 L. ed. 665; Bennett v. Schooley, 77 Fed. 352; Municipal S. Co. v. Game-

review is always in the discretion of the court;^{23a} subject to review upon appeal,²⁴ and lapse of time since the discovery of the new matter will always have great weight in inducing the court to look with disfavor upon an application for leave to file such a bill of review.²⁵ Ordinarily, permission will be refused, after the time to appeal has expired, without an appeal.²⁶ When to reopen the decree would be productive of mischief to innocent parties, leave may be denied.²⁷ It has been said, that the question of diligence is preliminary, and having been once disposed of by permission to file the bill, it will not again be considered on the final hearing;²⁸ but such a bill has been dismissed because leave to file the same was improvidently granted.²⁹ It has been said that if the decree impeached has been affirmed by an appellate court, such a bill of review can only be filed by leave of that court;³⁰ but that in the absence of special circumstances leave will be granted by the court of review, as of course.³¹ Such leave was refused where the newly discovered evidence had it been in the original record, clearly could not have changed the decision.³² A bill of re-

well F. A. Tel. Co., 77 Fed. 452. A refusal of witnesses to state what their testimony would be, is no ground for granting permission to file such a bill of review when the complainant thereto knew that they had some knowledge concerning the matters in controversy. *Novelty Tufting Mach. Co. v. Buser*, C. C. A., 158 Fed. 83.

^{23a} *Beames' Orders*, 1; *Massie v. Graham*, 3 McLean, 41; *Story's Eq. Pl.*, §§ 404, 417.

²⁴ *Hopkins v. Hebard*, C. C. A., C. C. A., 194 Fed. 301. The appeal cannot be conditioned upon the filing of a bond for more than sufficient to secure payment of costs. *Lewis v. Holmes*, C. C. A., 194 Fed. 842.

²⁵ *Blandy v. Griffith*, 6 Fish. Pat. Cas. 434; *Thomas v. Harvie*, 10 Wheat. 146, 151, 6 L. ed. 287, 289; Fed. Prac. Vol. II.—89.

Tilghman v. Werk, 39 Fed. 680; *Hopkins v. Hebard*, C. C. A., 194 Fed. 301; *Story's Eq. Pl.*, § 419.

²⁶ *Jorgenson v. Young*, C. C. A., 136 Fed. 378.

²⁷ *Acord v. Western Pocahontas Corporation*, 156 Fed. 989.

²⁸ *Kelley Bros. & Spielman v. Diamond Drill & Machine Co.*, 142 Fed. 868.

²⁹ *Acord v. Western Pocahontas Corporation*, 156 Fed. 989; *Hopkins v. Hebard*, C. C. A., 194 Fed. 301.

³⁰ *Southard v. Russell*, 16 How. 547, 14 L. ed. 1052.

³¹ *Seymour v. White County*, C. C. A., 92 Fed. 115; *supra*, § 448. But see *Keith v. Alger*, C. C. A., 124 Fed. 32.

³² *Lafferty Mfg. Co. v. Acme Ry. Signal & Mfg. Co.*, C. C. A., 143 Fed. 321. See *Keith v. Alger*, C. C. A., 124 Fed. 32.

view for newly discovered matter, if filed without leave, may upon motion be dismissed or taken off the file.³³

§ 449. Provisions common to all bills of review. "To entitle a person to bring a bill of review, it is necessary that he should have obeyed or performed the decree; as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done, which extinguishes the party's right at the common law, as making of assurance or release, acknowledging satisfaction, canceling bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court."¹ If, however, the plaintiff to the bill of review be insolvent,² or for any other reason it be impossible for him to obey the original decree;³ or if he were directed to perform an act after the performance of another act by the other party, and that other has omitted to perform his part thereof;⁴ or if the direction were to another defendant to the original decree and not to the party who files the bill of review;⁵ or perhaps, if he have given security for its performance,⁶—his disobedience is no objection. By an English order in Chancery, made on March 12, 1700, it was ordered that for the future no bill of review should be allowed or admitted unless the party who preferred it first deposited the sum of £50 with the registrar of the court, as a pledge to answer such costs and damages as the court should award to

³³ *Carroll v. Parran*, 11 Bland (Md.), 125, note.

§ 449. ¹ *Daniell's Ch. Pr.* (3d Am. ed.) 1634, 1635. See also *Beames' Orders*, 4; *Massie v. Graham*, 3 McLean, 41; *Hoffman v. Knox*, 50 Fed. 484. This rule applies even when it appears on the face of the former decree that the court had not jurisdiction of the subject-matter. *Miller v. Clark*, 47 Fed. 850.

² *Davis v. Speiden*, 104 U. S. 83, 26 L. ed. 660.

³ *Story's Eq. Pl.*, § 406; *Wiser v. Blachly*, 2 J. Ch. (N. Y.), 488; *Davis v. Speiden*, 104 U. S. 83, 26 L. ed. 660.

⁴ *Partridge v. Osborne*, 5 Russ. 195, 251; *Story's Eq. Pl.*, § 406.

⁵ *Hobbs v. State Tr. Co.*, C. C. A., 68 Fed. 618.

⁶ *Stallings v. Goodloe*, 3 Murph. 159; *Taylor v. Person*, 2 Hawks (N. C.), 298.

the adverse party, in case it should think fit to dismiss the bill of review.⁷ This order should probably be followed here, five dollars being reckoned as the equivalent as a pound sterling, and the money being deposited with the clerk of the court.⁸ The court may, however, dispense with this requirement.⁹ A decree entered by consent cannot be impeached by a bill of review.¹⁰ A decree entered by consent can be set aside only by an original bill alleging fraud or surprise.¹¹ It is no objection to a bill of review that the party filing it has entered and procured the enrolment of the decree; "because," said Lord Nottingham, "he can have no error till it be enrolled, and perhaps the defendant will never enroll it;"¹² and a party may file a bill of review to a decree entirely in his favor, claiming that it is less beneficial to him than it should have been.¹³ If upon a bill of review a former decree has been reversed, another bill of review may be brought to reverse the decree of reversal;¹⁴ but after a bill of review has been dismissed upon demurrer or otherwise, no second bill of review will be allowed to be filed.¹⁵ It has been held that a bill of review cannot be filed pending an appeal, although the plaintiff alleges that he does not intend to perfect his appeal.¹⁶ No person can file a bill of review except a party who has been aggrieved by the decree complained of,¹⁷ or the assignee by operation of law of such a party.¹⁸ A bill of review cannot be filed to set aside a decree in favor of a corporation that has been dissolved; and a former officer thereof, upon whom notice has been served,

⁷ Beames' Orders, 313; Anon., 2 P. Wms, 283.

⁸ Davis v. Speiden, 104 U. S. 83, 26 L. ed. 660.

⁹ Ibid.

¹⁰ Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481.

¹¹ Gilbert v. Endean, 9 Ch. D. 259, 266. See *infra*, § 355.

¹² Cook v. Bamfield, 3 Swanst. 607.

¹³ Cook v. Bamfield, 3 Swanst. 607; Dexter v. Arnold, 5 Mason, 303.

¹⁴ Mitford's Pl., ch. 1, § 3; Stafford v. Bryan, 2 Paige (N. Y.), 45.

¹⁵ Pitt v. Earl of Arglass, 1 Vern. 441; Dunn v. Filmore, 1 Vern. 135.

¹⁶ Kimberly v. Arms, 40 Fed. 545, 550; s. c., 136 U. S. 629, 34 L. ed. 557; Willian v. Willian, 16 Ves. 72.

¹⁷ Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33; Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481. But see King v. Dundee M. & Tr. I. Co., 28 Fed. 33.

¹⁸ Story's Eq. Pl., § 409; Thompson v. Maxwell, 95 U. S. 391, 24 L. ed. 481.

may resist the application.¹⁹ "If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way than by a bill of review."²⁰ All the parties to the original decree should be joined either as plaintiffs or as defendants to the bill of review.²¹ The personal representative of one of the members of a firm, who were defendants to the original bill, is not, when beyond the jurisdiction of the court, an indispensable party to a bill of review, filed after such partner's death.²² It is doubtful whether a purchaser from the successful party to the decree can be made a defendant to a bill of review.²³ Lord Redesdale gives the following rules for the framing of a bill of review: "In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it and the fact of the discovery, though it may be doubted whether after leave given to file the bill that fact is traversable."²⁴ The bill may pray simply that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. The bill may also, if the original suit has become abated, be at the same time a bill of revivor. A supplemental bill may likewise be added, if any event has

¹⁹ Board of Councilmen of Frankfort v. Deposit Bank, 120 Fed. 165.

²⁰ Waite, C. J., in Shaw v. Railroad Co., 100 U. S. 605, 611, 25 L. ed. 757, 758.

²¹ Bank of U. S. v. White, 8 Pet. 262, 8 L. ed. 938.

²² Perkins v. Hendryx, 127 Fed. 448.

²³ Rector v. Fitzgerald, 59 Fed. 808.

²⁴ But see U. S. v. Sampeyreac, Hempst. 118; Dexter v. Arnold, 5 Mason, 303; Story's Eq. Pl., 420, note 7.

happened which requires it; and particularly if any person not a party in the original suit becomes interested in the subject he must be made a party to the bill of review by way of supplement."²⁵ A bill of review may set forth both errors in law upon the face of the former decree, and facts newly discovered.²⁶ Such a bill is not multifarious, except under extraordinary circumstances.²⁷ The plaintiff, however, was not allowed to put his case in the alternative, as a bill of review, or, if the court should think it not good as such, then as a bill of revivor and supplement.²⁸ It is improper for a bill of review on account of errors of law to contain a statement of the evidence in the original cause.²⁹ A bill of review which seeks relief because the original decree was erroneous for errors of law appearing on its face, and because of the discovery of new facts, and because of fraud has been held multifarious.³⁰ A bill of review is not considered as a continuance of the former bill, but as in the nature of an original bill.³¹ A bill of review should be signed by counsel, and otherwise conform in general to the requirements of an original bill.³² If the court had jurisdiction of the original suit, it can take jurisdiction of the bill of review, even though it would have none were the latter regarded as the beginning of a new suit.³³ It has been said that a Federal court cannot take cognizance of a bill of review to a decree of a State court.³⁴ The issue of process and the service and the appearance of a defendant to a bill of review is made and enforced in the same manner as to an original bill.³⁵ But if the defendant be beyond the jurisdiction of the court, service of a subpoena upon his solicitor in the former suit may be allowed by the court.³⁶ If there is no service or appearance, a decree

²⁵ Mitford's Pl., ch. 1, § 3, pt. 3.

See also *Whiting v. Bank of U. S.*, 13 Pet. 6, 10 L. ed. 33.

²⁶ *Acord v. Western Pocahontas Corporation*, 156 Fed. 989.

²⁷ *Acord v. Western Pocahontas Corporation*, 156 Fed. 989.

²⁸ *Perry v. Phelps*, 17 Ves. 173.

²⁹ *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381.

³⁰ *Kimberly v. Arms*, 40 Fed. 548,

559; s. c., 136 U. S. 629, 34 L. ed. 557.

³¹ *Home St. Ry. Co. v. City of Lincoln*, C. C. A., 162 Fed. 133.

³² Mitford's Pl., ch. 1, § 2, pt. 3.

³³ *Oglesby v. Attrill*, 12 Fed. 227. See § 21.

³⁴ *Bradley, J.*, in *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407.

³⁵ *Home St. Ry. Co. v. City of Lincoln*, C. C. A., 162 Fed. 133.

³⁶ See *supra*, § 165.

upon a bill of review is void.³⁷ According to Lord Redesdale: "When any matter beyond the decree is to be offered against opening the enrolment, as length of time, that matter must be pleaded; otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like."³⁸ "A bill of review upon the discovery of new matter and a supplemental bill of the same nature being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill."³⁹ If a demurrer to such a bill of review or supplemental bill were overruled, it did not dispose of the cause; and the defendant had to answer, because fact was at issue.⁴⁰ If the demurrer is allowed, however, the suit is at an end.⁴¹ The defendant may, it seems, traverse, and attempt to disprove, the allegations concerning the discovery of the new facts.⁴² Upon the argument of the demurrer, nothing could be read except the bill of review and the decree;⁴³ and, in the Federal courts, the record⁴⁴ in the original suit; but, after the demurrer had been overruled, the plaintiff was at liberty to read any evidence that was submitted therein, as at a hearing, the cause being then equally open.⁴⁵ Filing a bill of review does not prevent the execution of the decree impeached.⁴⁶ The court has power, when sustaining such a bill, to set aside a conveyance made in pursuance of the decree.⁴⁷ Where an appeal from the original decree has been taken and dismissed with costs, the cause will not be erased from the docket by a decree

³⁷ *Home St. Ry. Co. v. City of Lincoln*, C. C. A., 162 Fed. 133.

³⁸ *Mitford's Pl.*, ch. 2, § 2, pt. 2.

³⁹ *Mitford's Pl.*, ch. 2, § 2, pt. 2.

⁴⁰ *Cook v. Bamfield*, 3 Swanst. 607.

⁴¹ *Mitford's Pl.*, ch. 2, § 2, pt. 2.

⁴² *Dexter v. Arnold*, 5 Mason, 303; *U. S. v. Sampeyreac*, Hempst. 118; *Story's Eq. Pl.*, § 420, n. 7.

⁴³ *Catterall v. Purchase*, 1 Atk. 290.

⁴⁴ *Whiting v. Bank of U. S.*, 13 Pet. 13, 10 L. ed. 38; *Story's Eq. Pl.*, § 407.

⁴⁵ *Catterall v. Purchase*, 1 Atk. 290.

⁴⁶ *Williams v. Mellish*, 1 Vern. 117, n.

⁴⁷ *Bank of U. S. v. Ritchie*, 8 Pet. 128, 8 L. ed. 890.

sustaining a bill of review for want of jurisdiction; and in such a case the court will not usually order a restitution of the costs of the original cause in the district and appellate courts paid by the plaintiff to the bill of review.⁴⁸ Where a decree for an injunction was set aside upon a bill of review, and the original bill dismissed, it was held that the court had no power to continue the injunction in force pending an appeal.⁴⁹ After a decision upon an appeal, permission to apply for leave to file a bill of review must be obtained from the appellate court before it can be presented to that of original jurisdiction,⁵⁰ and will only be granted where the former court has a strong impression that the decree ought to be reviewed.⁵¹ Where the principal relief sought was denied, but upon a bill of review the decree was modified so as to grant minor relief, to which there had been no objection, it was held that the court of first instance had no right to compel the defendant to repay the costs received under the original decree.⁵²

§ 450. Bills in the nature of bills of review. As has been said above,¹ only parties to the decree impeached or their privies by operation of law, as heirs, executors, or administrators, are entitled to file a bill of review; but other persons in interest and in privity of estate, who are aggrieved by the decree, can have the same relief by means of a bill in the nature of a bill of review.² Such are assignees, devisees, and remaindermen of the original unsuccessful parties.³ Property owners were permitted to file such a bill after a decree foreclosing a street railroad mortgage, to which they were not parties,

⁴⁸ *Miller v. Clark*, 52 Fed. 900.

See *Washington Bridge Co. v. Stewart*, 31 How. 413, 11 L. ed. 658. Such costs were, however, allowed by U. S. C. C., S. D. N. Y., after the decision of the Circuit Court of Appeals, in *Von Faber-Castell v. Faber*, C. C. A., 145 Fed. 626.

⁴⁹ *Kelley Bros. & Spielman v. Diamond Drill & Machine Co.*, 142 Fed. 868.

⁵⁰ *Novelty Tufting Mach. Co. v. Buser*, C. C. A., 158 Fed. 83; *McClintock v. City of Pawtucket*, 180 Fed. 320.

⁵¹ *Novelty Tufting Mach. Co. v. Buser*, C. C. A., 158 Fed. 83.

⁵² *Castell v. Faber*, C. C. A., 166 Fed. 281, reversing C. C. A., 145 Fed. 626.

§ 450. ¹ See § 449, *supra*.

² *Story's Eq. Pl.*, § 409.

³ *Story's Eq. Pl.*, § 409; *Whiting v. Bank of U. S.*, 13 Pet. 6, 10 L. ed. 33; *Singleton v. Singleton*, 8 B. Monr. (Ky.) 340; *Turner v. Berry*, 38 Ill. 541.

in order to compel compliance with a contract made pending the litigation between the receiver and the new complainants for the permanent abandonment of the portion of the railroad covered by the mortgage.⁴ A bill setting up newly discovered evidence, tending to show the invalidity of a patent, was described as a supplemental bill in the nature of a bill of review, in the permission granted to file the same.⁵ Lord Redesdale also speaks as follows concerning such a bill: "If a decree is made against a person who has no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a bill for review. Thus, if a decree is made against a tenant for life only, a remainderman in tail or in fee, cannot defeat the proceedings against the tenant for life, but by a bill, showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court."⁶ It has been said, however, that leave of the court is required before such a bill can be filed.⁷ Otherwise, the frame of and proceedings under bills in the nature of bills of review are substantially the same as those relating to bills of review.

§ 451. Bills to impeach decrees on account of fraud, accident or mistake. If a decree has been obtained by fraud,¹ accident² or mistake,³ it may be impeached by an

⁴ *Thompson v. Schenectady Ry. Co.*, 119 Fed. 634.

⁵ *Kelley v. Diamond Drill & Machine Co.*, C. C. A., 136 Fed. 855.

⁶ *Mitford's Pl.*, ch. 1, § 2, pt. 3.

⁷ *Thompson v. Schenectady Ry. Co.*, 119 Fed. 634.

§ 451. ¹ *Mitford's Pl.*, ch. 1, § 2,

pt. 3. See also *Story's Eq. Pl.*, § 426; *Richmond v. Tayleur*, 1 P. Wms. 734; *Barnes v. Powell*, 1 Ves. Sen. 120; *Evans v. Bacon*, 90 Mass. 213; *Pacific R. of Mo. v. Mo. Pac. Ry. Co.*, 111 U. S. 505, 28 J. ed. 498.

² *Hendryx v. Perkins*, C. C. A.,

original bill without the leave of the court.⁴ The fraud used in obtaining the decree is the principal point in issue, and it is necessary to establish the same by proof before the propriety of the decree can be investigated;⁵ and where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be.⁶ Such a bill has been called an original bill in the nature of a bill of review.⁷ It may be filed by a privy to one of the parties to the suit, although he did not obtain his interest until after the former case was pending.⁸ There are dicta stating that a decree obtained by fraud may be set aside upon petition;⁹ but it was finally settled that after enrolment a decree could only be impeached for this account by an original bill.¹⁰ This is the only manner in which a decree entered by consent can be impeached.¹¹ Decrees entered by collusion,¹² and, under extraordinary circumstances, decrees entered by surprise,¹³ or mistake,¹⁴ may also be rectified in this manner. Certain other cases, although if logical arrangement solely were considered they should be considered under other heads, yet as they are usually spoken of in this connection by the books, may be here referred to. Lord Redesdale uses the following language, which has been copied by all subsequent text-writers: "Besides cases of direct fraud in obtaining a decree, it seems to have been considered,

114 Fed. 801; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, C. C. A., 116 Fed. 1.

³ Mitford's Pl. ch. 1, § 2, pt. 3; and authorities cited in two previous notes.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Mussel v. Morgan*, 3 Bro. Ch. R. 74, 79; *Story's Eq. Pl.*, § 426. For the distinction between such a decree and a bill of review, see *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, C. C. C., 155 Fed. 524.

⁸ *Northern Pac. Ry. Co. v. Boyd*, C. C. A., 177 Fed. 804.

⁹ *Sheldon v. Fortescue Aland*, 3 P. Wms. 104, 111; *Story's Eq. Pl.*, § 426.

¹⁰ *Mussel v. Morgan*, 3 Bro. Ch. R. 74, 79; *Bennett v. Hamill*, 2 Sch. & Lefr. 566, 576; *Story's Eq. Pl.*, § 426.

¹¹ *Buck v. Fawcett*, P. Wms. 242; *Davenport v. Stafford*, 8 Beav. 503; *Gilbert v. Endean*, L. R. 9 Ch. D. 259; *Seton on Decrees* (4th ed.), 1536.

¹² *Buck v. Fawcett*, 3 P. Wms. 242; *Northern Pac. Ry. Co. v. Boyd*, C. C. A., 177 Fed. 804, collusion against a creditor. *Story's Eq. Pl.*, §§ 426, 428.

¹³ *Stevens v. Guppy*, 1 Turn. & Rus. 178.

¹⁴ *Hendryx v. Perkins*, C. C. A., 114 Fed. 801.

that where a decree has been made against a trustee, the *cestui que trust* not being before the court and the trust not discovered; or against a person who has made some conveyance or incumbrance not discovered; or when a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit; the concealment of the trust or subsequent conveyance or incumbrance, or will, in these several cases, ought to be treated as a fraud. It has been also said that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill."¹⁵

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.¹⁶ The bill was demurrable if it failed to allege that the complainant thereto was misled to his prejudice by a fraudulent representation or suppression of which he complains.¹⁷ All the parties to the original suit or their representatives should be joined as parties to it.¹⁸ Such a bill may be filed in the court of first instance to enjoin the enforcement of a judgment pending an appeal,¹⁹ and after a mandate of affirmance has been remitted to it by a court of review,²⁰ and to enjoin an officer of the appellate court from enforcing a decree of reversal and sale when such decree was procured from the court of review by fraud.²¹ A bill to set aside a decree for fraud, accident or mistake, may be filed after the expiration of the time for a bill of review;²² but laches

¹⁵ Mitford's Pl., ch. 1, § 2, pt. 3. Upon a bill to set aside a judgment for mistake stronger proof of freedom from negligence is required than upon a motion for a new trial. *Village of Cellina v. Eastport Sav. Bank Co.*, C. C. A., 68 Fed. 401. It has been said that when a motion for a new trial and a petition for a rehearing have been denied, equity will not entertain a bill to set aside a judgment on the same ground as that alleged in such motion and petition. *Hendrickson v. Bradley*, C. C. A., 85 Fed. 508.

¹⁶ Mitford's Pl., ch. 2, § 1, pt. 3; Story's Eq. Pl., § 476.

¹⁷ *Massachusetts Ben. L. Ass'n v. Lohmiller*, C. C. A., 74 Fed. 23.

¹⁸ *Harwood v. Railroad Co.*, 17 Wall. 78, 21 L. ed. 558.

¹⁹ *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, C. C. A., 155 Fed. 524.

²⁰ *Nelson v. First Nat. Bank*, 70 Fed. 526.

²¹ *Carver v. Jarvis-Conklin M. Tr. Co.*, 73 Fed. 9.

²² *Dewey v. Stratton*, C. C. A., 114 Fed. 179.

may be a good defense to such a bill.²³ A bill to set aside a judgment or decree of a State court on account of fraud may be filed in a Federal court,²⁴ and if originally filed in a State court, may be removed to a Federal court, when the requisite difference of citizenship exists.²⁵ A bill to set aside the decree of a Federal court on account of fraud may be filed in a Federal court irrespective of the citizenship of the parties.²⁶ Although such a bill is ancillary to the former suit in the same court, upon demurrer thereto judicial notice will not be taken of any matters in the former suit not set forth in the new bill, unless, perhaps, when it is filed by a party to the former suit.²⁷ A judgment of a Federal court entered after personal service upon the defendant cannot, after the time to file a bill of review has expired be set aside by an original bill because the record does not show the jurisdictional difference of citizenship.²⁸ A bill defective as a bill to set aside a decree for fraud might perhaps be sustained as a bill of review for matters apparent upon the record, but not unless filed within the time allowed for an appeal.²⁹ Upon an application for leave to file a bill of review for matters of fact newly discovered which were insufficient to support the bill, the court refused to separate from such allegations other allegations of fraud in obtaining the original decree, and to permit the bill to be filed as a bill to set aside the decree for fraud.³⁰ A bill to set aside a decree for fraud must show a valid and meritorious defense to the original decree.³¹ A decree sustaining such a bill may be reversed upon appeal.³²

²³ *Hendryx v. Perkins*, C. C. A., 114 Fed. 801.

²⁴ *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547; *Arrowsmith v. Gleason*, 129 U. S. 86, 101, 32 L. ed. 630, 635. But see *Neugé v. Clapp*, 101 U. S. 551, 25 L. ed. 1026; *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 177, 30 L. ed. 196, 204.

²⁵ *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870. See *supra*, § 51.

²⁶ *Pacific R. of Mo. v. Mo. Pac.*

Ry. Co., 111 U. S. 505, 28 L. ed. 498; *supra*, § 51.

²⁷ *Richardson v. Loree*, 94 Fed. 375. But see *supra*, § 329.

²⁸ *Donham v. Springfield H. Co.*, 62 Fed. 110.

²⁹ *Dunlevy v. Dunlevy*, 38 Fed. 462. See *supra*, § 447.

³⁰ *Kimberly v. Arms*, 40 Fed. 548, 558; s. c., 136 U. S. 629, 34 L. ed. 557.

³¹ *Kimberly v. Arms*, 40 Fed. 548; s. c., 136 U. S. 629, 34 L. ed. 557.

³² *Hendryx v. Perkins*, C. C. A., 114 Fed. 801.

§ 452. Bills to suspend or avoid the operation of decrees or judgments. Lord Redesdale speaks as follows concerning bills to suspend the operation of decrees: "The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus during the troubles after the death of Charles the First, upon a decree for a foreclosure in case of non-payment of principal, interest, and costs due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequences of his engagements with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court upon a new bill enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree."¹ "The embarrassment, occasioned by the civil war in the reign of Charles I., and the state of affairs after his death, before the restoration of Charles II., occasioned many extraordinary applications to the court of Chancery for relief, and perhaps induced the court to go far in extending relief; but there were many cases of extreme hardship, in which it was deemed impossible, consistently with established principles, to give relief; and all cases determined soon after the restoration, upon circumstances connected with the prior disturbed state of the country, ought to be considered with much caution."² No instance is known of the maintenance of such a bill in a Federal court. In a few cases the Federal courts have sustained bills to suspend the operation and enjoin the enforcement of judgments at law for matters subsequent.³

§ 452. ¹ Mitford's Pl., ch. 1, § 2, pt. 3; Cocker v. Bevis, 1 Ch. Cas. 61; and also referring to Venables v. Foyle, 1 Ch. Cas. 2; Whorewood v. Whorewood, 1 Ch. Cas. 250; Wakelin v. Walthal, 2 Ch. Cas. 8.

² Mitford's Pl., ch. 1, § 2, pt. 3.

³ Johnson v. St. Louis, I. M. & S. Ry. Co., 141 U. S. 602, 610, 35 L. ed. 875, 876; Parker v. The Judges, 12 Wheat. 561, 6 L. ed. 729. See Ballance v. Forsyth, 24 How. 183, 16 L. ed. 733.

CHAPTER XXX.

PRACTICE AT COMMON LAW IN CIVIL ACTIONS.

§ 453. **Common-law practice in general.** Actions at common law are either civil or criminal. The Supreme Court considers the practice of the court of King's Bench in England as affording outlines for its practice at common law.¹ In civil actions at common law the District Courts follow in general the practice in the courts of the State where they are held, except in those particulars which are regulated by Federal statute.² The Revised Statutes provide, that "the practice, pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings and forms, and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."³ A proceeding be-

§ 453. ¹ Supreme Court Rule 3. *Amy v. Watertown*, 130 U. S. 301, 304, 32 L. ed. 946, 947; *Bradley, J.*: "The statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading, form and mode of pleadings, must conform to the State Laws and the practice of the State Courts, except where Congress itself has legislated upon a particular subject and prescribed a rule." A substantial compliance with the statute is sufficient. *Hein v. Westinghouse Air Brake Co.*, 168 Fed. 766. The State practice must be followed in pleadings upon foreign judgments, *Cruz v. O'Boyle*, 197 Fed. 824; in pleading of counter-claims and off-sets,

Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179; and in affidavits of defense, *Hilliard v. Lyons*, C. C. A., 180 Fed. 685. Where, by rule of court, they are made by the pleading, the plaintiff may avail himself upon the trial of admissions therein without formally offering them in evidence, *Ibid.*; and in the form of demurrers, *Brown v. Cumberland Tel. & Tel. Co.*, 181 Fed. 246.

² U. S. R. S., § 914. It has been doubted whether a misjoinder of defendants can be raised upon demurrer. *U. S. v. Comet Oil & Gas Co.*, 187 Fed. 674.

³ U. S. R. S., § 914.

gun by an attachment is a civil cause within the meaning of the statute.⁴ So is a proceeding to establish a will under the Missouri statute.⁵

The phrase "as near as may be" has been held not to mean "as near as may be possible," nor "as near as may be practicable;"⁶ but to devolve upon the Federal courts the duty of construing and deciding, and to give them the power to reject any subordinate provision in such State statutes, which in their judgment would unwisely incumber the administration of the law, to tend to defeat the ends of justice in their tribunals.⁷

The State practice will not be so far followed as to permit a suit founded upon a right that is purely equitable to be tried upon the common law side of the court;⁸ or as to permit an equitable defense,⁹ or an equitable set off, to be pleaded in an action at common law.¹⁰ Ejectment in a Federal Court cannot

⁴ *Citizens' Bank v. Farwell*, C. C. A., 56 Fed. 570.

⁵ *Sawyer v. White*, C. C. A., 122 Fed. 223, 227; *Foster v. Rochester*, S. D. N. Y., Jan'y. 1912.

⁶ *I. & St. L. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. ed. 898, 901; *Phelps v. Oaks*, 117 U. S. 236, 239, 29 L. ed. 888, 889.

⁷ *I. & St. L. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. ed. 898, 901; *Phelps v. Oaks*, 117 U. S. 236, 239, 29 L. ed. 888, 889. See *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602.

⁸ *Fenn v. Holme*, 21 How. 481, 16 L. ed. 198; *Hooper v. Scheimer*, 23 How. 235, 16 L. ed. 452; *Smith v. McCann*, 24 How. 398, 16 L. ed. 714; *Sheirburn v. De Cordova*, 24 How. 423, 16 L. ed. 741; *Strother v. Lucas*, 6 Pet. 763, 8 L. ed. 573; *Swayze v. Burke*, 12 Pet. 11, 9 L. ed. 980; *Claggett v. Kilbourne*, 1 Black, 346, 17 L. ed. 213; *infra*, §§ 454, 477; *Goodyear Shoe Machinery Co. v. Dancel*, C. C. A., 119 Fed. 692. If the objection is not raised upon the trial it will be waived. *Union Pac. Ry. Co. v. Har-*

ris, C. C. A., 63 Fed. 800, 12 C. C. A., 598; *Highland Boy Gold Min. Co. v. Strickley*, C. C. A., 116 Fed. 852, 54 C. C. A., 186; *Cook v. Foley*, C. C. A., 152 Fed. 41, 52. It has been held that an action brought in the Federal court at common law may, by consent, be transferred to the equity side of the court. *U. S. v. Wells*, 203 Fed. 146.

⁹ *Doe v. Roe*, 31 Fed. 97; *Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859; *Montijo v. Owen*, 14 Blatchf. 324; *Parsons v. Denis*, 7 Fed. 317; *Buller v. Slidel*, 43 Fed. 116; *Schoolfield v. Rhodes*, 82 Fed. 153; *Davis v. Davis*, C. C. A., 72 Fed. 81; *Young v. Mahoning County*, 51 Fed. 585, 590. See *N. Pac. R. Co. v. Paine*, 119 U. S. 561, 30 L. ed. 513; *Wilcox & Gibbs Guano Co. v. Phenix Ins. Co.*, 61 Fed. 199; *McManus v. Chollar*, C. C. A., 128 Fed. 902; *Tegarden v. LeMarchel*, 129 Fed. 487; *infra*, § 454.

¹⁰ *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059. *Contra* as to a common-law set off, *infra*, note 59.

be sustained upon a title which is purely equitable, although the State practice would have permitted such a suit in the State court.¹¹ Ejectment cannot be sustained upon a land warrant;¹² nor upon an entry made with a register and receiver of the land office, although the State Legislature authorizes a suit in such a case.¹³ An action of ejectment will not lie when the defendant is in possession under a contract, which plaintiff avers to be void, because obtained by a breach of trust.¹⁴ Where a deed, contract or sale is void for fraud, an action of ejectment may be maintained by a rightful owner of the property, without resorting to equity to set the same aside.¹⁵ In ejectment, it is immaterial which party has the best equitable title.¹⁶ A bondholder cannot sue at common law, in a Federal court, to recover damages from a former receiver, who has, by his fraudulent acts, injured the mortgaged property before its sale, although a State court might afford such relief.¹⁷ It has been held that a suit by a party to a contract, to compel its performance by a stranger to the same, who has assumed its obligations in a subsequent contract with the promiser, can only be enforced in equity, although the State practice would permit such an action to be maintained at common law.¹⁸ The fact that a prayer for an accounting is joined with one for the recovery of the possession of land will not entitle the plaintiff to appeal to a court of equity.¹⁹

In the following particulars the practice at common law in civil cases in the Circuit and District Courts of the United

¹¹ *Sheirburn v. De Cordova*, 24 How. 423, 16 L. ed. 741; *Swayze v. Burke*, 12 Pet. 11, 9 L. ed. 980; *Fenn v. Holme*, 21 How. 481, 16 L. ed. 198; *Hooper v. Scheimer*, 23 How. 235, 16 L. ed. 452; *Smith v. McCann*, 24 How. 398, 16 L. ed. 714; *Claggett v. Kilbourne*, 1 Black, 346, 17 L. ed. 213; *Beatty v. Wilson*, 161 Fed. 453.

¹² *Strother v. Lucas*, 6 Pet. 763, 8 L. ed. 573; *Fenn v. Holme*, 21 How. 481, 16 L. ed. 198.

¹³ *Hooper v. Scheimer*, 23 How. 235, 16 L. ed. 452.

¹⁴ *Mead v. Chesbrough Bldg. Co.*, C. C. A., 151 Fed. 998.

¹⁵ *Mead v. Chesbrough Bldg. Co.*, C. C. A., 151 Fed. 998, 1006; *Mead v. Gallatin*, C. C. A., 151 Fed. 1006.

¹⁶ *Mead v. Chesbrough Bldg. Co.*, C. C. A., 151 Fed. 998.

¹⁷ *Fletcher v. Burt*, 126 Fed. 619.

¹⁸ *Goodyear Shoe Machinery Co. v. Dancel*, C. C. A., 119 Fed. 692. But see *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210. *Contra*, *Union Mutual Life Ins. Co. v. Hanford*, 143 U. S. 187, 190, 6 L. ed. 118, 120.

¹⁹ *Hipp v. Babin*, 19 Howard, 271, 15 L. ed. 633.

States is regulated by Federal statutes: writs and process,²⁰ service by publication or without the district,²¹ pleading in actions for the infringement of patents²² and copyrights,²³ amendments,²⁴ provisional remedies,²⁵ abatement and revivor,²⁶ consolidation of suits,²⁷ evidence, testimony and depositions,²⁸ selection of juries,²⁹ trials,³⁰ manner of taking exceptions during a trial,³¹ motions for new trials,³² judgments,³³ correction of judgments,³⁴ costs,³⁵ executions and proceedings supplementary thereto,³⁶ contempts,³⁷ bills of exceptions,³⁸ and writs of error.³⁹

²⁰ *Infra*, § 455. But see *Stewart v. Justices of St. Clair Co. Court*, 47 Fed. 482, 484; *Leas & McVitty v. Merriman*, 132 Fed. 510.

²¹ *Supra*, § 166.

²² U. S. R. S., § 4920. Profits cannot be recovered in an action at law, *Brown v. Lanyon*, C. C. A., 148 Fed. 838, 78 C. C. A., 728; but where the complaint alleged that the damages to the plaintiff and the profits to the defendant were the same specified amount, the court took jurisdiction accordingly, *Portland Gold Min. Co. v. Hermann*, C. C. A., 160 Fed. 91. Where the proof is conflicting in an action at law for infringement, it is a question for the jury to decide whether the patented invention is of a primary character and the patent a pioneer. *Transit Development Co. v. Cheatham El. Switching Device Co.*, C. C. A., 194 Fed. 963.

²³ U. S. R. S., § 4969.

²⁴ U. S. R. S., § 954; *infra*, § 361.

²⁵ *Infra*, §§ 470, 471.

²⁶ *Supra*, § 220.

²⁷ *Infra*, § 472.

²⁸ *Supra*, chap. XXI.

²⁹ U. S. R. S., §§ 800, 882; *infra*, § 473.

³⁰ *Infra*, §§ 473-476.

³¹ *Consumers' Cotton-Oil Co. v.*

Ashburn, C. C. A., 81 Fed. 331, 333, 26 C. C. A., 436.

³² *Infra*, § 478.

³³ *Infra*, § 480.

³⁴ *Infra*, § 481.

³⁵ *Supra*, ch. xxvii. But see *Huntress v. Epsom*, 15 Fed. 732; *New Hampshire L. Co. v. Tilton*, 29 Fed. 764; *Primrose v. Fenno*, 113 Fed. 375, 376. It has been said that, in determining who is the successful party, the Federal courts should follow the State statutes and decisions. *Scatcherd v. Love*, C. C. A., 166 Fed. 53. See § 408, *supra*. As to security for costs, see *Henning v. W. U. Tel. Co.*, 40 Fed. 658; *O'Brien v. Hearn*, 125 Fed. 95; *supra*, § 425.

³⁶ *Supra*, § 427; *Kaill v. Board of Directors*, C. C. A., 194 Fed. 73.

³⁷ *Supra*, §§ 428-436.

³⁸ *Infra*, § 479.

³⁹ *Western Dredging Co. v. Heldmaier*, 116 Fed. 179; *Francisco v. Chicago & A. R. Co.*, C. C. A., 149 Fed. 354; *Richmond & D. R. Co. v. McKee*, C. C. A., 50 Fed. 906; *McClellan v. Pyeatt*, C. C. A., 50 Fed. 686; *Kentucky L. & A. Ins. Co. v. Hamilton*, C. C. A., 63 Fed. 93; *infra*, chapter on Writs of Error and Appeals. A Federal court is not bound to follow a State statute providing that the case must be

It has been held that as to the following matters the Circuit and District Courts will in civil actions at common law follow the statutes of the respective states where they are held: form of writ,⁴⁰ except the teste and signature^{40a} indorsement of writ,⁴¹ indorsement of summons,⁴² the return of process,⁴³ but not when the court otherwise directs,⁴⁴ right of assignee to sue in his own name,⁴⁵ personal service of writ and process on individuals⁴⁶ and on corporations,⁴⁷ at least if domestic corporations,⁴⁸ joinder of parties,⁴⁹ joinder of causes of action,⁵⁰

dismissed unless proceedings are therein taken within one year after a reversal by the State Supreme Court. *Manitowoc Malting Co. v. Feuchtwanger*, 196 Fed. 506.

⁴⁰ *Brown v. C. & O. C. Co.*, 4 Fed. 770. See *Baltimore & O. R. Co. v. Hamilton*, 16 Fed. 181. It has been held that a suit in the United States Circuit Court for the penalty provided by the Act of 1885, ch. 164, § 3, for violation of the provisions of the act relating to alien contracts for labor, may be properly begun by *capias* in accordance with the State law. *U. S. v. Banister*, 70 Fed. 44. But see *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602.

^{40a} *Infra*, § 455.

⁴¹ *Brown v. Pond*, 5 Fed. 31, 37. But see § 361.

⁴² *U. S. v. Rose*, 14 Fed. 681.

⁴³ *Gokey v. Boston & M. R. Co.*, 130 Fed. 992; *aff'd* as *Boston & Maine Railroad v. Gokey*, 210 U. S. 155, 52 L. ed. 1002.

⁴⁴ *U. S. R. S.*, § 918; *Gokey v. Boston & M. R. Co.*, 130 Fed. 992; *aff'd* as *Boston & Maine Railroad v. Gokey*, 210 U. S. 155, 52 L. ed. 1002; *infra*, § 455.

⁴⁵ *Edmunds v. Illinois C. R. Co.*, 80 Fed. 78, where the cause of action arose under a Federal Statute, the Interstate Commerce Act.

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Where there is no State Statute, the suit must be brought in the name of the assignor. *Nederland L. I. Co. v. Hall*, 84 Fed. 278.

⁴⁶ *Shampeau v. Connecticut R. L. Co.*, 37 Fed. 771; *Wilson v. Fine*, 37 Fed. 789; *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946. See *supra*, §§ 163-166. So held as to the form of a return of service. *Trimble v. Erie El. M. Co.*, 89 Fed. 51; *Wilson v. Hurst*, *Peters C. C.* 441; *U. S. v. Lotridge*, 1 McLean, 246.

⁴⁷ *Re Louisville Underwriters*, 134 U. S. 488, 493, 33 L. ed. 991, 994; *Miller's Adm'r v. Norfolk & W. R. Co.*, 41 Fed. 431; *McCormick H. Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833; *Société Foncière v. Milliken*, 135 U. S. 304, 34 L. ed. 208. See *supra*, § 164.

⁴⁸ *Amy v. Watertown*, 130 U. S. 30, 32 L. ed. 946.

⁴⁹ *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. 478; *Delaware Co. Com'rs v. Diebold S. Co.*, 133 U. S. 473, 488, 33 L. ed. 674, 680. Non-joinder of husband in action by wife, although the woman is an alien. *Morning Journal Ass'n v. Smith*, *C. C. A.*, 56 Fed. 141.

⁵⁰ *Castro v. De Uriarte*, 12 Fed. 250. But see *O'Connell v. Reed*, *C. C. A.*, 56 Fed. 531; *Bowden v. Burnham*, *C. C. A.*, 59 Fed. 752; *Holt v. Bergevin*, 60 Fed. 1.

joinder of defenses,⁵¹ form of pleading,⁵² verification of pleading,⁵³ time,⁵⁴ and manner⁵⁵ of service of pleading and amendment of pleading,⁵⁶ except as to defects of form,⁵⁷ matters that may be proved under the general denial,⁵⁸ set off and counterclaim of cause of action at common law,⁵⁹ interpleader,⁶⁰ notice of trial or of argument,⁶¹ time of filing referee's report,⁶² time of bringing a case on for trial and of entry of judgment for insufficiency of answer,⁶³ discontinuance,⁶⁴ compulsory dismissal or non-suit;⁶⁵ form of a verdict;⁶⁶ manner of entering and recording judgment, including provisions for the entry of judgment.

⁵¹ *Cole v. Carson*, C. C. A., 153 Fed. 278; *Leonard v. Merchants' Coal Co.*, C. C. A., 162 Fed. 885.

⁵² *U. S. v. Atlantic Coast Line R. Co.*, 153 Fed. 918.

⁵³ *West v. Home Ins. Co.*, 18 Fed. 622; *Cottier v. Stimson*, 18 Fed. 689.

⁵⁴ *Ricard v. Inhabitants New Providence*, 5 Fed. 433. But not necessarily as to the return day. *Ewing v. Burnham*, 74 Fed. 384.

⁵⁵ *Wilson v. Fine*, 38 Fed. 789.

⁵⁶ *Rosenbach v. Dreyfuss*, 1 Fed. 391. But see *U. S. R. S.*, § 954; *Erstein v. Rothschild*, 22 Fed. 61; and *infra*, § 454.

⁵⁷ *Manitowoc Malting Co. v. Muechtwanger*, 169 Fed. 983. See §§ 208, 211, *supra*.

⁵⁸ *Yocum v. Parker*, C. C. A., 130 Fed. 770.

⁵⁹ *Partridge v. Felix Mut. L. I. Co.*, 15 Wall. 573, 21 L. ed. 229; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810; *Charnley v. Sibley*, C. C. A., 73 Fed. 980. *Contra*, *Jewett Car Co. v. Kirkpatrick*, 107 Fed. 622, holding to the contrary of the cases in the Supreme Court that no affirmative judgment can be awarded upon a counterclaim. But not of equitable set-off. *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059.

⁶⁰ *Harris v. Hess*, 10 Fed. 263.

In the absence of statute, interpleader or the bringing in of a new party cannot be ordered at common law. *Bertha Z. & M. Co. v. Carico*, 61 Fed. 132, 136. For the practice in equity, see *supra*, § 157. *Huxley v. Pennsylvania Warehousing & S. D. Co.*, C. C. A., 184 Fed. 705.

⁶¹ *Rosenbach v. Dreyfuss*, 2 Fed. 23. But see *Osborne v. Detroit*, 28 Fed. 385.

⁶² *Parker v. Ogdensburg & L. C. R. Co.*, 79 Fed. 817.

⁶³ *Springs v. James*, 172 Fed. 626.

⁶⁴ *Nussbaum v. Northern Ins. Co.*, 40 Fed. 337; *Gassman v. Jarvis*, 94 Fed. 603. Where the State statute permitted a plaintiff to dismiss, without prejudice, before the final submission of the case to the jury, it was held to be error to refuse to allow the plaintiff to do this before a peremptory instruction for the defendant, although the motion was not made until after the judge had said that he would sustain the defendant's motion for a verdict. *Knight v. Illinois Cent. R. Co.*, C. C. A., 180 Fed. 368.

⁶⁵ *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 29, 39; 11 Sup. Ct. 478, 481, 35 L. ed. 55.

⁶⁶ *Glenn v. Sumner*, 132 U. S. 152, 156, 10 Sup. Ct. 41, 33 L. ed. 301;

ment against one or more defendants; ⁶⁷ opening judgment by default, ⁶⁸ authorizing a judgment *non obstante veredicto* to be joined with a motion for a new trial; ⁶⁹ suspension of judgment pending writ of error; ⁷⁰ but, it has been held, that a Federal court at common law cannot set aside a judgment by default after the term of its entry, although the State practice authorizes such an order. ⁷¹

In following a State statute, the Federal courts usually read the word "county" as "judicial district." ⁷² A State statute authorizing an action to be brought in a firm name was not followed in an action at common law in the Federal court there held. ⁷³ A State statute allowing an association consisting of seven or more to sue and be sued in the name of one of its officers, was followed at common law in the Federal court sitting in such State, ⁷⁴ but not in a Federal court sitting in another State. ⁷⁵ A State statute providing that a county can be sued only in a specified court; ⁷⁶ or that a foreign corporation cannot sue until it has complied with certain statutory requirements, ⁷⁷ or that an action cannot be brought upon a judgment without leave of the court that rendered it, ⁷⁸ or that a special

Knight v. Illinois Cent. R. Co., C. C. A., 180 Fed. 368, 372.

⁶⁷ Sawin v. Kenny, 93 U. S. 289, 23 L. ed. 926; Knight v. Illinois Cent. R. Co., C. C. A., 180 Fed. 368, 372.

⁶⁸ Brown v. Phila. W. & B. R. Co., 9 Fed. 183. But see *infra*, § 481.

⁶⁹ Troxell v. Delaware, L. & W. R. Co., 180 Fed. 871.

⁷⁰ U. S. v. Sturgis, 14 Fed. 810.

⁷¹ U. S. v. One Trunk, 155 Fed. 651. See Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013; Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603, 609, 43 L. ed. 1103, 1105. *Contra*, Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co., C. C. A., 76 Fed. 479, 481; Travelers' Protective Ass'n v. Gilbert, 55 L.R.A. 538, 111 Fed. 269, 276.

⁷² Lung Chung v. No. Pac. Ry. Co., 19 Fed. 254, 257; Treadwell v. Seymour, 41 Fed. 579; Miller's Adm'r v. Norfolk & W. R. Co., 41 Fed. 431.

⁷³ Adams v. May, 27 Fed. 907.

⁷⁴ Hoey v. Coleman, 46 Fed. 221, 225. See *supra*, § 78.

⁷⁵ Chapman v. Barney, 129 U. S. 677, 682, 32 L. ed. 800, 801. See *supra*, § 78.

⁷⁶ Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86; Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766; Chicot County v. Sherwood, 148 U. S. 529, 37 L. ed. 546.

⁷⁷ Bank of British N. A. v. Barling, 44 Fed. 641; *aff'd as Barling v. British Bank of N. A.*, C. C. A., 50 Fed. 260.

⁷⁸ Phelps v. O'Brien Co., 2 Dill. 318; Union Tr. Co. v. Rochester & P. R. Co., 29 Fed. 609.

appearance for the purpose of objection to the jurisdiction is equivalent to a general appearance,⁷⁹ or regulating the practice in applying for, and giving the right in certain cases to postponements of trials or to discontinuances,⁸⁰ is not binding on a Federal court. The fact that the State practice permits an original application by a municipal bondholder for a *mandamus* does not deprive a Federal court of jurisdiction over an action by him to recover a judgment which can only be enforced by such a writ.⁸¹ It has been held that a motion to dismiss an action at common law as frivolous may be made at any time.⁸² Exemptions from service of process have been discussed in the chapter on subpoenas.⁸³

§ 454. Pleading at common law. In actions at common law in civil causes, the District Courts of the United States follow the forms and rules of pleading observed in the courts of the States where they are held, except in those particulars that are regulated by Federal statutes.¹ The same

⁷⁹ So. Pac. Co. v. Denton, 146 U. S. 202, 209, 36 L. ed. 943, 945. Cf. Mexican C. Ry. Co. v. Pinckney, 149 U. S. 194, 37 L. ed. 699.

⁸⁰ Texas & Pac. Ry. Co. v. Nelson, C. C. A., 50 Fed. 418.

⁸¹ Shepard v. Tulare, 94 Fed. 1.

⁸² O'Connell v. Mason, C. C. A., 132 Fed. 245; Webb v. Fisher, 109 Tenn. 701, 60 L.R.A. 791, 72 S. W. 110.

⁸³ *Supra*, § 167.

§ 454. ¹ U. S. R. S., § 913; Moy v. Mercer County, 30 Fed. 246; Myers v. Cunningham, 44 Fed. 346 per Ricks, J.; Marvin v. C. Aultman & Co., 46 Fed. 338, 339. Actions by the United States against railway companies to recover penalties for violations of the Safety Appliance Act. Act of March 2, 1893, 27 St. at L. 531; U. S. v. Atlantic Coast Line R. Co., 153 Fed. 918; and of the act forbidding cattle to be kept in a car for a period longer than twenty-eight hours without unloading, Act of June 29, 1906,

c. 3594, 34 St. at L. 607, Comp. St. Supp. 1907, p. 918; N. Y. Cent. & H. R. R. Co. v. U. S., C. C. A., 165 Fed. 833; are treated as actions of debt and the pleadings conform in general to the State practice. An action of debt will lie on behalf of the United States to recover duties upon imports, U. S. v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647; Meredith v. U. S., 13 Peters, 486, 10 L. ed. 258; internal revenue taxes, Dollar Sav. Bank v. U. S., 19 Wall. 227, 22 L. ed. 80; U. S. v. Washington Mills, 2 Cliff. 601, 607; U. S. v. Pacific Railroad, 4 Dillon, 66; U. S. v. Tilden, 9 Benedict, 368; and the amount of a stamp tax, U. S. v. Chamberlin, 219 U. S. 250, 55 L. ed. 204. It has been held that the State law concerning what constitutes a fatal variance between the facts and the pleadings must be followed. Norfolk & A. Terminal Co. v. Rotole, C. C. A., 4th Ct., 179 Fed. 639, 645, where it was said that an applica-

rule applies as regards the joinder of parties,² the joinder of causes of action,³ the joinder of defenses,⁴ the verification of pleadings,⁵ the time⁶ and manner⁷ of service, and the amendment⁸ of pleadings. The pleading of an equitable defense⁹ of an equitable set off¹⁰ is not permitted at common law. But where the State practice so permits, the defendant may plead as a set-off or counterclaim a cause of action at common law against the plaintiff, and to obtain an affirmative judgment for such excess as he may prove.¹¹ In an action by the United States, the defendant cannot recover an affirmative judgment against the government on a counterclaim, although it may be determined that there is a balance due him.¹² The designation of the complaining party as "plain-

tion to amend upon the trial would have been granted. Where one count in a declaration is good, a general demurrer to the whole declaration cannot be sustained, except in part. The same rule applies where matter divisible in its nature is alleged by different paragraphs in the same count which state different causes of action. *Burgess v. Mazetta Mfg. Co.*, C. C. A., 198 Fed. 855.

² *Delaware Co. Com'rs v. Diebold S. Co.*, 133 U. S. 473, 488, 33 L. ed. 674, 680; *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. 478. Non-joinder of husband in action by wife, although the woman is an alien. *Morning Journal Ass'n v. Smith*, C. C. A., 56 Fed. 141.

³ *Castro v. De Uriarte*, 12 Fed. 250. But see *O'Connell v. Reed*, C. C. A., 56 Fed. 531; *Bowden v. Burnham*, C. C. A., 59 Fed. 752; *Holt v. Bergevin*, 60 Fed. 1.

⁴ *Cole v. Carson*, C. C. A., 153 Fed. 278; *Leonard v. Merchants' Coal Co.*, C. C. A., 162 Fed. 885.

⁵ *West v. Home Ins. Co.*, 18 Fed. 622; *Cottier v. Stimson*, 18 Fed. 689.

⁶ *Ricard v. Inhabitants New Providence*, 5 Fed. 433. But not necessarily as to the return day. *Ewing v. Burnham*, 74 Fed. 384.

⁷ *Wilson v. Fine*, 38 Fed. 789.

⁸ *Rosenbach v. Dreyfuss*, 1 Fed. 391; *Hannum v. Jerome*, 184 Fed. 179. But see citations §§ 208, 211, 454, *supra*; U. S. R. S., § 954; *Erstein v. Rothschild*, 22 Fed. 61.

⁹ *Bennett v. Butterworth*, 11 How. 669; *Montijo v. Owen*, 14 Blatchf. 324; *Parsons v. Denis*, 7 Fed. 317; *Doe v. Roe*, 31 Fed. 97; *Buller v. Slidell*, 43 Fed. 116; *Young v. Mahoning County*, 51 Fed. 585, 590; *Davis v. Davis*, C. C. A., 72 Fed. 81; *Schoolfield v. Rhodes*, 82 Fed. 153.

¹⁰ *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059.

¹¹ *Partridge v. Felix*, Mut. L. I. Co., 15 Wall. 573, 21 L. ed. 229; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810; *Charnley v. Sibley*, C. C. A., 73 Fed. 980; *Arkwright Mills v. Aultman & Taylor Machinery Co.*, 128 Fed. 195. *Contra*, *Jewett Car Co. v. Kirkpatrick*, 107 Fed. 622.

¹² U. S. v. Gillies, 144 Fed. 991.

tiff" or as "complainant" has no effect upon a decision determining whether the action is brought at law or in equity.¹³ Legal and equitable causes of action cannot be joined in a single suit, although this is permitted by the State practice.¹⁴ The charge that fraud and concealment exists, or that there has been a conspiracy in the matter, does not prevent an action for the payment of money or for the recovery of real or personal property from being prosecuted upon the common law side of the court.¹⁵ It has been held that, in an action at law to recover money due under a contract, an allegation of fraud in procuring the same is an equitable defense, which the court has no jurisdiction to entertain, even upon the consent of the parties.¹⁶ Where the plaintiff had an equitable defense to a release under seal pleaded by the defendant, the trial judge postponed the trial in order to allow the plaintiff to bring an independent suit in equity to set aside the release.¹⁷ It has been held that a receipt in full, which is not under seal, may be avoided for fraud at common law, and that the maker cannot sue in equity to cancel the same.¹⁸ It has been said that a release under seal, which is pleaded by the defendant in an action at common law, may be avoided by the plaintiff under a replication that the same was procured by fraud.¹⁹ It has been held that this cannot be done unless the plaintiff first returns, or offers to return, the money received as the consideration for

¹³ *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389.

¹⁴ *Berkey v. Cornell*, 90 Fed. 711.

¹⁵ *South Penn Oil Co. v. Miller*, C. C. A., 175 Fed. 729.

¹⁶ *Levi v. Mathews*, C. C. A., 145 Fed. 152.

¹⁷ *Vandervelden v. Chicago & N. W. Ry. Co.*, 61 Fed. 54.

¹⁸ *Such v. Bank of State of New York*, 127 Fed. 450. In an action at law for a personal injury, it is no objection to a release, offered in evidence by the defendant, that the plaintiff did not know when he signed it, that it was a general release, or that he had sustained any physical injury, there being no

proof of fraud, misrepresentation or mental incompetency at the time of its execution. *Simpson v. Pennsylvania R. Co.*, C. C. A., 159 Fed. 423.

¹⁹ *Wagner v. National Life Ins. Co.*, C. C. A., 90 Fed. 395. But see *Hartshorn v. Day*, 19 How. 211, 222, 15 L. Ed. 605; *Ivinson v. Hut-ton*, 98 U. S. 79, 25 L. Ed. 66; *George v. Tate*, 102 U. S. 564-570, 26 L. Ed. 232; *Shampeau v. Lumber Co.*, 42 Fed. 760; *Johnson v. Granite Co.*, 53 Fed. 569; *Vandervelden v. Railroad Co.*, 61 Fed. 54; *Kosztelnik v. Iron Co.*, 91 Fed. 606; *Hill v. Northern Pac. Ry. Co.*, C. C. A., 113 Fed. 914, 917.

the execution of the release.²⁰ The misconduct of arbitrators not apparent upon the face of the award, and not affecting their jurisdiction, cannot be pleaded to an action at law upon the award.²¹ A State statute allowing a champertous agreement to be pleaded in abatement to an action was not followed by a Federal court.²² An equitable estoppel may be pleaded in an action of ejectment at common law.²³

It has been held: that the defense of contributory negligence must be pleaded if the State statute requires this;²⁴ that, where there is a mere general averment upon the subject, a motion to make the same more specific or definite and certain will be granted, when the State practice permits such motions as to any matter of special defense,²⁵ but that where the common law prevails, such a defense may be proved under the plea of the general issue.²⁶

The plaintiff's pleading must show the jurisdiction, including the defendant's residence.²⁷ It is the safer practice to

²⁰ *Hill v. Northern Pac. Ry. Co.*, C. C. A., 113 Fed. 914.

²¹ *Hartford F. Ins. Co. v. Bonner M. Co.*, 44 Fed. 151, 156. When by contract payments are to be made upon the certificates of an architect or engineer, it has been held that the same are conclusive in common law and cannot be attacked for fraud except in a court of equity. *Wood v. Chicago, S. F. & C. R. Co.*, 39 Fed. 52; *Cook v. Foley, C. C. A.*, Eighth Circuit, 152 Fed. 41, 51; *Herrick v. Belknap & Vt. C. R. Co.*, 27 Vt. 673, opinion by Redfield, C. J. *Contra*, *Louisville, Evansville & C. R. Co. v. S. P. Meyer et al.*, C. C. D. Ky., Barr, J., aff'd by divided court, 30 L. ed. 689 which contains the opinion below. *Chism v. Schiffer*, 51 N. J. Law 1; *B. & O. Ry. Co. v. Polly Woods Co.*, 14 Grattan (Va.) 448; *School District v. Randall*, 5 Nebraska 408, 410. It seems that for a mistake, they can be attacked in equity only. *Newlan v. Duncan*, 60 Ill. 233.

²² *Byrne v. Kansas City, Ft. S. & M. R. Co.*, 55 Fed. 44.

²³ *Dickerson v. Colgrove*, 100 U. S. 578, 582, 25 L. ed. 618, 620; *Wehrman v. Conklin*, 155 U. S. 327, 39 L. ed. 173; *Marine Iron Works v. Wiess, C. C. A.*, 148 Fed. 145; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Nat. Nickel Co. v. Nevada Nickel Syndicate, C. C. A.*, 112 Fed. 44, 46; *Cheatham v. Edgefield Mfg. Co.*, 131 Fed. 118. But see *Mulqueen v. Schlichter Jute Cordage Co.*, 108 Fed. 931; *Highland Boy G. Min. Co. v. Strickley, C. C. A.*, 116 Fed. 852.

²⁴ *Gadonnex v. New Orleans Ry. Co.*, 128 Fed. 805, 806; *Hardy v. Chicago, St. P., M. & O. Ry. Co.*, 172 Fed. 454.

²⁵ *Gadonnex v. New Orleans Ry. Co.*, 128 Fed. 805.

²⁶ *Canadian Pac. Ry. Co. v. Clark, C. C. A.*, 73 Fed. 76, 81; *C. C. A.*, 74 Fed. 362; 20 C. C. A. 447, 452.

²⁷ *Laskey v. Newton*, 50 Fed. 634. Where the State practice permits

plead an objection to the jurisdiction by a special plea in abatement, no matter what the State statute may be;²⁸ but this is not indispensable where the State practice permits matters in abatement to be joined with other defenses.²⁹ Where the State practice so permits, a general denial in the defendant's answer puts in issue the allegations in plaintiff's pleading concerning citizenship and residence.³⁰ It has been held that annexing to a complaint, as an exhibit, a copy of the contract sued upon, with a reference to the same in the body of the pleading, is not equivalent to positive allegations in the complaint of the terms of the contract according to their legal effect or *in hæc verba*.³¹ And that a suit upon a special contract not executed must be on a count setting out the special contract; but when the special contract has been executed the common counts are sufficient.³² Pleading at common law in patent cases is regulated by the Revised Statutes.³³ These are quoted, and the decisions construing the same are cited in a previous section.³⁴ The Revised Statutes provide that "in all actions arising under the laws respecting copyrights, the defendant may plead the general

the institution of a suit by a notice of motion, the notice must show the facts essential to confer the Federal jurisdiction. *West Fork Glass Co. v. Innes-Weld Glass Co.*, C. C. A., 178 Fed. 205.

²⁸ *Imperial Ref. Co. v. Wyman*, 38 Fed. 574; *Jones v. Rowley*, 73 Fed. 286; *National Masonic Ass'n v. Sparks*, 83 Fed. 225. See *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725; *Foster v. Cleveland, C. & St. L. Ry. Co.*, 56 Fed. 434. It has been held that this cannot be done in the districts of Ohio. *Kimball v. Detroit, M. & T. S. L. Ry.*, 189 Fed. 409.

²⁹ *Steigleder v. McQuesten*, 198 U. S. 141, 49 L. ed. 986; *Cole v. Carson*, C. C. A., 153 Fed. 278; *Leonard v. Merchants' Coal Co.*, C. C. A., 162 Fed. 885.

³⁰ *Roberts v. Lewis*, 144 U. S. 653, 36 L. ed. 579; *Roberts v. Langen-*

bach, C. C. A., 119 Fed. 349; *Lindsay-Bitton Live Stock Co. v. Justice*, C. C. A., 191 Fed. 163. As to what defenses may be proved under the general issue in assumpsit under the common counts, see *Dawes & Co. v. Peebles' Sons Co.*, 6 Fed. 856, 859.

³¹ *Penrose v. Pacific Mutual Life Ins. Co.*, 66 Fed. 253.

³² *Chesapeake & O. C. Co. v. Knapp*, 9 Peters, 541, 563, 9 L. ed. 222, 230; *Dawes & Co. v. Peebles' Sons Co.*, 6 Fed. 856, 858.

³³ U. S. R. S., §§ 49, 50.

³⁴ See § 188, *supra*. It has been held in the Sixth Circuit that the pleadings of both the plaintiff and the defendant in such an action must conform to the rules of pleadings in actions on the case at common law. *Myers v. Cunningham*, 44 Fed. 346, per Ricks, J.; *Moy v. Mercer County*, 30 Fed. 246; *Mar-*

issue, and give the special matter in evidence.”³⁵ It has been held that a declaration in an action to recover damages under the Anti-Trust law is bad for duplicity, when it alleges, in a single count, that defendant entered into a contract, combination and conspiracy in restraint of trade;³⁶ and that it was bad for duplicity and uncertainty, when it gave no information concerning the combination and conspiracy, “except that the combination is in the form of a trust, and that the combination and conspiracy are in restraint of trade,” not stating when, how, by whom, or for what purpose they were formed.³⁷ A de-

vin v. C. Aultman & Co., 46 Fed. 338, 339; Walker on Patents, § 442. *Contra*, Cottier v. Stimson, 20 Fed. 906, 907. In New York, a cause of action to recover penalties for infringement of copyright cannot be joined with one for damages for tort not connected with copyright, namely, the circulation of the piratical publication under the plaintiff's name. Ohman v. City of New York, 168 Fed. 953.

³⁵ U. S. R. S., § 4969. The Pennsylvania practice in replevin is not followed by the courts of the United States, there held, in actions to enforce a forfeiture under the Revised Statutes (U. S. R. S., § 4965) for a breach of copyright. Falk v. Curtis, 102 Fed. 967; s. c., C. C. A., 107 Fed. 126; Gustin v. Record Pub. Co., 127 Fed. 603. See § 150, *supra*.

³⁶ Rice v. Standard Oil Co., 134 Fed. 464.

³⁷ Rice v. Standard Oil Co., 134 Fed. 464, 468. A declaration was held to be sufficient, which alleged in detail the establishment of the shoe machinery business of the plaintiff at Boston in 1893, his engaging thereafter in interstate commerce, his building up of the business, his procuring of patents and the construction of shoe machines thereunder, the expenditure of nearly \$100,000 to develop the business,

the profits of the business immediately prior to the alleged wrongful acts of the defendant and the entire loss of profits thereafter, a list of the customers with whom he had done business and persons with whom he was negotiating for further business, the trade conditions prior to the organization of the defendant company, the illegal combination and conspiracy of its concerns, its utilization of leases and licenses as an instrumentality to create an illegal monopoly and combination (the general forms of leases and licenses being set forth verbatim in an exhibit), the effect of these leases and licenses in excluding the plaintiff from the market, the attempt through the leases and licenses to extend the scope and operation of the defendant company's patents, the superior merit and efficiency of the plaintiffs' line of shoe machinery, the threats of the officers of the defendant company to the plaintiff made in pursuance of its scheme to monopolize, the destruction of the established business and interstate commerce of the plaintiff, the diversion of his customers, the destruction of the value of his patent interests, and other injuries to his business and property.” And further: “13. Accord-

ingly, the plaintiff says that the defendant is and has been since its organization an illegal combination in restraint of trade and a monopoly existing wrongfully and in violation of the act of Congress of July 2, 1890, chapter 647, commonly known as the Sherman Act; that each and every one of the leases, copies of which are hereto annexed, is a contract in restraint of trade and commerce among the several states and with foreign nations, in that the effect has been to prevent practically all of the shoe manufacturers in the United States from purchasing, leasing, or otherwise acquiring or obtaining in any of the states of the United States or in any foreign market or elsewhere, except from the defendant shoe machinery and mechanisms; that said group or system of leases which the defendant has required and secured to be signed by nearly all the shoe manufacturers in the United States have created and now maintain a conspiracy and combination in restraint of trade and commerce among the several states and with foreign nations, to which the defendant and all its acquired concerns and companies are parties, whereby the defendant has monopolized and now monopolizes substantially the entire trade and commerce in shoe machinery and mechanisms among the several states and with foreign nations and suppresses all competition therein, and has entirely excluded the plaintiff from participation in such trade and commerce; that said leases are essential parts of an illegal scheme, combination, and conspiracy in restraint of trade and commerce, and have been utilized by the defendant as an important instrumentality in

creating and supporting its illegal monopoly in the business of dealing in, and with shoe machinery and mechanisms.

"14. That through and by reason of the said conspiracy and monopoly acquired by the defendant company of practically the entire business of manufacturing shoe machinery throughout the United States the plaintiff has been prevented from selling the shoe machinery manufactured by him, including machines covered by said patents relating thereto enumerated in paragraph 1 to the manufacturers included in Exhibit A and to the other shoe manufacturers in the various states of the United States, and by means of each and all acts done by the defendant in pursuance of said monopoly the defendant has utterly destroyed the interstate trade and commerce of the plaintiff with said shoe manufacturers by the loss of many orders and customers directly resulting therefrom, the interests of the plaintiff in the aforesaid patents enumerated in paragraph 1 have been rendered valueless, and the plaintiff has otherwise been greatly injured in his business and property by reason of said monopoly and the acts of the defendant done in pursuance thereof, and to carry the same into effect, which are declared to be unlawful by the aforesaid act of Congress of July 2, 1890, chapter 647, to the amount of three hundred thousand (\$300,000) dollars, to recover threefold which damages and costs of suit, including a reasonable attorney's fee under section 7 of said act, this suit is brought." *Chiley v. United Shoe Mach. Co.*, 202 Fed. 598, 599, 600. A declaration was held to be suffi-

cient which alleged in substance "that the plaintiff is trustee of the Goddu Sons Metal Fastening Company, duly appointed by the Supreme Judicial Court of Maine in proceedings for the dissolution of that corporation; that as such trustee he holds title to all property and rights of action of the Goddu Sons Metal Fastening Company; that the Goddu Sons Metal Fastening Company, after its organization in 1897, acquired certain patents pertaining to shoe machinery, and that it made preparations to place upon the market machines constructed under its patents, and spent a considerable sum in advertising that it constructed machines ready for sale or lease; that a number of shoe manufacturers were desirous of using these machines upon terms beneficial to the company; that the company was prepared and intended to engage in trade and commerce, and to do a large and profitable business in shoe machinery among the several states and with foreign nations; that the defendant the United Shoe Machinery Company was organized in 1899, for the purpose of acquiring by legal and illegal means certain companies engaged in manufacturing and dealing in shoe machinery, and of driving out of business other companies or concerns engaged in that business, and of preventing other companies or concerns from entering into that business, thereby suppressing and preventing competition and acquiring and maintaining a monopoly of the shoe machinery business, and that it has acquired and now maintains a practical monopoly of that business; that the defendants Winslow, Brown, and Hurd are, and have been since the

organization of the United Shoe Machinery Company, officers and directors and members of the executive committee of that corporation, exercising management and control of its business affairs; that in pursuance of the plan to suppress and eliminate competition, and to support and protect the monopoly of the United Shoe Machinery Company, the individual defendants, or some of them, entered into negotiations with certain of the stockholders of the Goddu Sons Metal Fastening Company for the purchase of their stock, and that as a result of these negotiations the United Shoe Machinery Company acquired a majority of the stock and the control and management of the Goddu Sons Metal Fastening Company; that in pursuance of its plan to eliminate competition, and to support and protect its monopoly, the United Shoe Machinery Company caused its president, the defendant Winslow, to be elected president of the Goddu Sons Metal Fastening Company, its own treasurer, the defendant Brown, to be elected treasurer of the Goddu Sons Metal Fastening Company, and a part of its own directors, including the defendant Hurd, to be elected as the entire board of directors of the Goddu Sons Metal Fastening Company; that the persons so elected have ever since been continued in their respective offices by means of the stock control exercised by the United Shoe Machinery Company; that the control thus acquired by the United Shoe Machinery Company has been exercised, not for the purpose of carrying on and developing the business for which the Goddu Sons Metal Fastening Company was organized, but for the purpose of

claration or petition to recover damages awarded by the Interstate Commerce Commission as reparation for excessive or discriminating rates must show that said rates were wrongful in one of these respects.³⁸ An averment that the Commission has so found is insufficient,³⁹ but where such a declaration did not in terms allege the particular rates upon which the commission passed, but set out the citations of the cases where its determination was reported for the purpose of incorporating the pertinent facts of such decisions into the pleading by reference, it was held that the court was authorized to examine the facts set out in such decisions when deciding a demurrer.⁴⁰ In an action to recover the penalty for a violation of the law requiring a carrier to unload cattle for rest, water and feeding, within each consecutive twenty-eight hours, the Government is not required to allege or prove the non-existence of the exceptional cases which relieve the defendant from such requirement.⁴¹ In the Eastern District of Pennsylvania upon a declaration in an action against a clerk because of his refusal to permit papers to be filed, it was held that the facts showing

preventing that company from doing business, thereby preventing and destroying its competition, and protecting and supporting the monopoly of the United Shoe Machinery Company; that the officers of the Goddu Sons Metal Fastening Company, in pursuance of the plan and purpose of the United Shoe Machinery Company, have continuously declined to cause the Goddu Sons Metal Fastening Company to make any use of its patents and patent rights, or to permit it to do any business, that the assets of the Goddu Sons Metal Fastening Company have thus remained idle and have become wasted, and thus that its patents are now about to expire and have become practically worthless; that the United Shoe Machinery Company and the individual defendants have thus accomplished their purpose of destroying the competition

of the Goddu Sons Metal Fastening Company, and of sustaining the monopoly of the United Shoe Machinery Company; that the Goddu Sons Metal Fastening Company has been greatly injured in its business and property; and that the plaintiff is entitled, under the Sherman Anti-Trust Act, to recover threefold damages, costs of suit, and a reasonable attorney's fee." *Stow v. United Shoe Mach. Co.*, 202 Fed. 602, 603, 604.

³⁸ *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 200 Fed. 614.

³⁹ *Ibid.*

⁴⁰ *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, C. C. A., 195 Fed. 12. See *Jacoby v. Pennsylvania R. Co.*, 200 Fed. 989.

⁴¹ *N. Y. Sent. & H. R. R. Co v. U. S.*, C. C. A., 165 Fed. 833.

that damages therefrom resulted must be allowed.⁴² Such an action may be brought upon the bond, in the name of the United States, for the use of the party injured.⁴³

§ 455. **Writs and process in general.** The Revised Statutes provide that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof."¹ It has been held in the Second Circuit that a rule of State practice which permits an attorney to issue a summons, subpoena, or other process without the seal of the court or the signature of the clerk, will not be followed by the Federal court;² and a summons issued without such seal and signature is void, and cannot be cured by amendment.³ Writs and process which issue from the Supreme Court and from the Circuit Courts of Appeals, must bear *teste* of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a District Court must bear *teste* of the judge of that court or, when that office is vacant, of the clerk thereof.⁴ All process must bear *teste* from the day of its issue.⁵ It has been held that a writ with the proper seal, but wrongly tested, may be amended.⁶ The Supreme Court has power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction,⁷ and power to issue writs of mandamus to any courts appointed under the authority of the United States; and where a State, public minister, consul, or vice-consul is a party, to persons holding office under the authority of the United States.⁸ In cases of which the Supreme

⁴² U. S. v. Bell, 127 Fed. 1002.

⁴³ Ibid. See Kinney v. U. S. Fidelity & Guaranty Co., 182 Fed. 1005.

§ 455. ¹ U. S. R. S., § 911. A notice to a garnishee is not process; it may be signed by the marshal and it need not be signed by the clerk nor bear the seal of the court. Wile v. Cohn, 63 Fed. 759. See *supra*, § 453.

² Dwight v. Merritt, 4 Fed. 614; Peaslee v. Haberstro, 15 Blatchf.

472. • *Contra*, Chamberlain v. Mensing, 47 Fed. 435.

³ Dwight v. Merritt, 4 Fed. 614; Peaslee v. Haberstro, 15 Blatchf. 472. • *Contra*, Chamberlain v. Mensing, 47 Fed. 435.

⁴ U. S. R. S., § 911.

⁵ U. S. R. S., § 912.

⁶ U. S. v. Turner, 50 Fed. 734.

⁷ Jud. Code, § 234, 36 Stat. at L. 1087 re-enacting U. S. R. S. § 688. See § 456, *infra*.

⁸ Ibid. See § 457, *infra*.

Court has original jurisdiction, it may issue any writ used in practice at common law, although there is no statutory authority for the same.⁹ The Supreme Court and the District Courts have the power to issue writs of *scire facias*.¹⁰ The Supreme Court, the Circuit Courts of Appeals and the District Courts have power to issue all writs, not specifically provided for by statute, which are necessary for exercise of their respective jurisdictions and agreeable to the usages and principles of law.¹¹ Writs to seize articles that are an infringement of a copyright are regulated by the rules of the Supreme Court of the United States previously quoted.¹² Such a writ is not strictly a writ of replevin, although in the nature of the same, and it need not follow the technical provisions of any State practice.¹³ The Revised Statutes provide "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."¹⁴ This authorized those courts to direct that writs, issued from them, shall be returned within a different time than that prescribed by the State laws.¹⁵ The Revised Statutes provide that "No summons, writ, declaration,

⁹ Kentucky v. Dennison, 24 How. 66.

¹⁰ Ibid., § 262, re-enacting U. S. R. S., § 716, *infra*. See § 469, *infra*.

¹¹ Ibid. In Stewart v. Justices of St. Clair Co. Court, 47 Fed. 482, 484, Judge Phillips said "By this is meant the mode of process in the State where the United States Circuit Court sits." Admiralty Rule 12 of the Circuit Court of Appeals for the Second Circuit provides that "a writ of inhibition may be awarded by this court on motion of the appellant to stay proceedings

in the court below, when circumstances require it.

¹² 214 U. S. 533, quoted § 150, *supra*. See Stern v. Jerome H. Remick & Co., 164 Fed. 781.

¹³ Stern v. Jerome H. Remick & Co., 164 Fed. 781.

¹⁴ U. S. R. S., § 918.

¹⁵ Gokey v. Boston & Maine R. Co., 130 Fed. 992; *aff'd* Boston & Maine Railroad v. Gokey, 210 U. S. 155, 52 L. ed. 1002. U. S. v. U. S. F. & G. Co., C. C. A., 186 Fed. 477. In Massachusetts, the return days of

return process, judgment, or other proceedings in civil causes, in any court of the United States shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to wit, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall, in its discretion, and by its rules, prescribe."¹⁶ It has been held: that an amendment may add the date to a writ,¹⁷ and the signature of the clerk when it issued from his office,¹⁸ and a description of the defendant in his official capacity;¹⁹ that where the State statute permits a writ of attachment to be amended by the addition of a seal, such a writ may be so amended by the Federal Court after a removal;²⁰ that an omission in the papers

original writs are the same as they were under the State practice in 1793 and must be on the first day of some term fixed by statute with a test dated sufficiently in advance of such return days as to afford due opportunities for service. *Re Kinney*, 202 Fed. 137. See *Elson v. Waterford*, 135 Fed. 247. Where a summons, returnable on the first Tuesday of October next, was not served until subsequent to the return day, it was held to be sufficient to oblige the defendant to appear on or before the first Tuesday next succeeding the date of service, although the date of issuing the writ had not been changed. *Speare v. Stone*, C. C. A., 193 Fed. 375.

¹⁶ U. S. R. S., § 954. See *Parks v. Turner*, 12 How. 39, 46, 13 L. ed. 883, 887; *Roach v. Hulings*, 16 Pet. 319, 10 L. ed. 979; *Tilton v. Coffield*, 93 U. S. 163, 167, 23 L. ed. 858; *Jacob v. U. S.*, Brock 520, 525;

Rosenbach v. Dreyfuss, 1 Fed. 391; *U. S. v. Batchelder*, 9 Int. Rev. Rec. 98; *Warren v. Moody*, 9 Fed. 673; *Thomas v. U. S.*, 15 Ct. Cl. 242; *Russell v. U. S.*, 15 Ct. Cl. 168, *Gulf, C. & S. F. Ry. Co., v. James*, 48 Fed. 148, 150; *Am. Alkali Co. v. Campbell*, 113 Fed. 398; *Great Northern Ry. Co. v. Herron*, C. C. A., 136 Fed. 49; *U. S. R. S.*, §§ 636, 948, 914, 5595, 5596.

¹⁷ *Gilbert v. South Carolina I. & W. I. Exposition Co.*, 113 Fed. 523. The rule was applied where the non-resident came into the State for the sole purpose of appearing in a criminal proceeding, in obedience to a recognizance previously given by him. *Kaufman v. Garner*, 173 Fed. 550.

¹⁸ *Bryan v. Ker*, 222 U. S. 107, 56 L. ed. 114.

¹⁹ *Hastings v. Herold*, 184 Fed. 759.

²⁰ *Wolf v. Cook*, 40 Fed. 432.

upon which an attachment has been granted may be supplied by an amendment in a case where the State practice does not permit such an amendment;²¹ that petitions and bonds on removal are process within the statute and may be amended in a proper case;²² that amendments of pleadings will be allowed in all cases authorized by the State statute.²³ Amendments are rarely allowed to the plaintiff in penal actions and actions to enforce forfeitures.²⁴ It has been said that United States Revised Statutes, Section 602, providing for the continuance of all process, pleadings and proceedings during a vacancy, is a remedial statute, to be liberally construed in aid of its general purpose.²⁵ The Supreme Court has said, speaking of the act requiring a conformity with the State practice in actions at common law: "There can be no doubt, we think, that the mode of service of process is within the categories named in the act;"²⁶ but where the Federal court adopted a rule regulating the service of process in accordance with the then State practice, it was held that service thus made was good although the State practice had subsequently been amended.²⁷ It was so held when the long established practice of the Federal court, concerning service upon towns, differed from that required by the State statute.²⁸ Where the State practice requires a summons to run in the name of the State, the summons, if properly tested, need not run in the name of the United States.²⁹ Where the State statute is silent, the Federal court is not bound to follow the State practice concerning exemption from service³⁰ and the determination of the validity thereof.³¹

²¹ Bowden v. Burnham, 59 Fed. 752, 754; Erstein v. Rothschild, 22 Fed. 61, 64; Booth v. Denike, 65 Fed. 43; *infra*, § 369.

²² Kinney v. Columbia Sav. & L. Ass'n, 191 U. S. 78, 48 L. ed. 103.

²³ Leman v. Baltimore & O. R. Co., 128 Fed. 111.

²⁴ U. S. v. Batchelder, 9 Int. Rev. Rec. 98.

²⁵ U. S. v. Murphy, 82 Fed. 983.

²⁶ Amy v. Watertow, 130 U. S. 301, 304, 32 L. ed. 946, 947.

²⁷ Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602.

²⁸ Elson v. Waterford, 135 Fed. 247.

²⁹ Chamberlain v. Mensing, 47 Fed. 435. It has been held that the power of the Federal Courts to issue the writ of *Capias ad satisfaciendum* is derived from the Judiciary and Process Acts of 1789, and is not affected by the Illinois Statute of June 17, 1895. U. S. v. Arnold, C. C. A., 69 Fed. 987.

³⁰ Kaufman v. Garner, 173 Fed. 550.

³¹ Kaufman v. Garner, 173 Fed.

The Revised Statutes make it the marshal's duty to execute, throughout the district, all lawful precepts directed to him and issued under the authority of the United States;³² and give him and all his deputies the same powers as the sheriff's in the same State and their deputies.³³ It has been held at Circuit that process, other than subpoenas *ad testificandum*, can only be served by the marshal or his deputy;³⁵ but that, when the laws of the State give such power to a sheriff, the marshal may appoint a person to serve a particular writ or perform any other special service,³⁶ that the blank form of a writ, signed and sealed, may be given by the clerk to an attorney; that the attorney may fill in the writ, in his own handwriting, with the names of the parties, style of action, and date; that the marshal may give the attorney a blank form appointing a deputy in which the attorney may write the name of the process-server;³⁷ and that when the writ as served is indorsed by an attorney not admitted to practice in the Federal court but qualified for admission, the court may amend it without thereby invalidating the service, by substituting another attorney, or by admitting the attorney to practice in such court.³⁸ The validity of the service of a summons is not affected because a copy of the complaint, thereto annexed, contains no allegations which show the jurisdiction of the court.³⁹

It has been held that a notice of a motion for judgment upon a contract, under the Virginia code,⁴⁰ need not be sealed, nor signed, by the clerk, although it is the first proceeding in the suit.⁴¹

550; *Higham v. Iowa State Travelers' Ass'n.*, 183 Fed. 845.

³² U. S. R. S., § 787.

³³ U. S. R. S., § 788. Deputy United States Marshals in Alaska appointed under the act of May 17, 1884, may execute process issued by United States Commissioners exercising the powers of Justices' Courts according to the statutes of Oregon. *Holden v. Williams*, 75 Fed. 798. See *supra*, § 340.

³⁴ *Russell v. Ashley*, Hempst. 546; *Miller v. Scott*, 6 Phila. (Pa.) 484; *Schwabacker v. Reilly*, 2 Dill. 127.

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³⁵ *Schwabacker v. Reilly*, 2 Dill. 127. But see *Amy v. Watertown*, 130 U. S. 301, 304, 32 L. ed. 946, 947; *Hyman v. Chales*, 12 Fed. 855; *U. S. v. Jailer of Fayette Co.*, 2 Abb. U. S. 265.

³⁶ *Hyman v. Chales*, 12 Fed. 855.

³⁷ *Jewett v. Garrett*, 47 Fed. 625.

³⁸ *Ibid.*

³⁹ *Goodman v. City of Ft. Collins*, C. C. A., 164 Fed. 970.

⁴⁰ § 3211.

⁴¹ *Leas & M'Vitty v. Merriman*, 132 Fed. 510.

§ 456. **Writs of prohibition.** A writ of prohibition is a writ issuing out of a court of superior jurisdiction, and directed to an inferior court for the purpose of preventing the inferior tribunal from usurping a jurisdiction to which it is not entitled.¹ A writ of prohibition is a civil proceeding even when designed to stop a criminal proceeding.²

The Supreme Court has power to issue writs of prohibition to the District Courts of the United States when proceeding as courts of admiralty.³ In a similar case a writ of prohibition may issue to the District Court of the United States for the District of Alaska.⁴ Where the court of admiralty has jurisdiction of the vessel sued and of the subject-matter, the Supreme Court will not interfere to correct an error in the decision,⁵ even upon a question as to the validity of a statute.⁶ It seems that the Supreme Court has no power to issue a writ of prohibition in any other case, except when necessary for the exercise of its jurisdiction in some matter before it;⁷ or possibly when an application is made by a State, public minister, or consul,⁸ but the writ has been granted to prevent a single judge from settling a decree upon a mandate of the Supreme Court under "The Act to protect trade and commerce against unlawful restraints and monopolies."⁹ When a State is the

§ 456. ¹High on Extraordinary Remedies, § 762.

The history of the writ of prohibition is well described in a letter by Professor Theodore W. Dwight to the *New York Tribune*, in reference to *Re Cooper*, 138 U. S. 44, 34 L. ed. 993, published Jan. 19, 1891, reprinted in the fourth edition of this treatise § 362.

²Farnsworth v. Montana, 129 U. S. 104, 113, 32 L. ed. 616, 618; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601.

³U. S. R. S., § 688; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610, 30 L. ed. 274.

⁴*Re Cooper*, 138 U. S. 404, 34 L. ed. 993.

⁵*Ex parte Gordon*, 105 U. S. 515, 26 L. ed. 953; *Ex parte Hagar*, 104

U. S. 520, 26 L. ed. 816; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 894; *Re Fassett*, 142 U. S. 479, 484, 35 L. ed. 1087, 1088; *Re Engles*, 146 U. S. 357, 36 L. ed. 1004; *Re Morrison*, 147 U. S. 14, 37 L. ed. 60.

⁶*Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 894.

⁷*Ex parte Gordon*, 1 Black, 503, 17 L. ed. 134; *Re Christy*, 3 How. 292, 11 L. ed. 603; *Ex parte War-mouth*, 17 Wall. 64, 21 L. ed. 543; *Ex parte Graham*, 10 Wall. 541, 19 L. ed. 981; *Re Massachusetts*, 197 U. S. 482, 49 L. ed. 845.

⁸*Re Baiz*, 135 U. S. 403, 34 L. ed. 222.

⁹*Ex parte U. S.*, 226 U. S. 420, 57 L. ed. —.

relator the writ issues only when the respondents are aliens or citizens of another State.¹⁰

The Circuit Courts of Appeal cannot issue writs of prohibition, except where that writ is necessary for the efficient administration of the particular jurisdiction for which they are invested;¹¹ and when an appeal or writ of error is pending, or an attempt to take such an appeal or sue out such a writ has been made.¹² They cannot issue the writ when a writ of error or appeal is merely contemplated¹³ nor to prevent a judge from hearing a cause in which it is claimed that he is interested.¹⁴

No District Court of the United States has the power to issue a writ of prohibition except when necessary for the exercise of its jurisdiction in some matter previously before it.¹⁵ It seems that the Supreme Court of the District of Columbia has the power to issue writs of prohibition directed to inferior courts and to public boards and officers acting in a quasi judicial capacity within its territorial jurisdiction.¹⁶

It is doubtful whether any court has the power to issue a writ of prohibition against a court-martial.¹⁷ Where the court against which the writ is sought has clearly no jurisdiction of the suit or prosecution issued before it originally or of some collateral matter arising therein, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy; the writ of prohibition should issue,¹⁸ and a refusal to grant a writ, where all the proceedings appear of record,

¹⁰ *Re Massachusetts*, 197 U. S. 482, 49 L. ed. 222.

¹¹ U. S. v. *Williams*, C. C. A., 67 Fed. 384; *Re Paquet*, C. C. A., 114 Fed. 437; *Zell v. Judges*, C. C. A., 149 Fed. 86.

¹² U. S. v. *Williams*, C. C. A., 67 Fed. 384; *Re Paquet*, C. C. A., 114 Fed. 437; *Zell v. Judges*, C. C. A., 149 Fed. 86.

¹³ *Zell v. Judges*, C. C. A., 149 Fed. 86.

¹⁴ *Re Paquet*, C. C. A., 114 Fed. 437.

¹⁵ U. S. R. S., § 716; *Re Binger*, 7 Blatchf. 159.

¹⁶ See argument of Messrs. Jeff. Chandler and Eppa Houston, in *Smith v. Whitney*, 116 U. S. 167, 173, 29 L. ed. 601, 602; Act of Feb. 27, 1827, ch. 69, § 2 (19 St. at L. 253); U. S. v. *Schurz*, 102 U. S. 378, 26 L. ed. 167; *Price v. State*, 8 Gill (Md.), 295, 310.

¹⁷ *Smith v. Whitney*, 116 U. S. 167, 175, 29 L. ed. 601, 603; U. S. v. *Maney*, 61 Fed. 140.

¹⁸ *Re Rice*, 155 U. S. 396, 39 L. ed. 198; *Re N. Y. & Porto Rico S. S. Co.*, 155 U. S. 523, 39 L. ed. 246.

may be reviewed by a writ of error.¹⁹ But where there is another remedy, by appeal or otherwise, or where the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the grant or refusal of the writ is discretionary;²¹ and it is not obligatory where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings.²² Prohibition is not the proper remedy, when a District Court has improperly taken jurisdiction of a suit against a non-resident.²³ The requirement of a bond upon an appeal does not justify the issue of the writ.²⁴

The usual practice is, upon an application regularly called a suggestion in the name of the United States on the relation of the party aggrieved, for the court to grant a rule to the judge sought to be prohibited, to show cause why the writ should not issue, and to accompany the rule with an order that he proceed no further in the case till the decision of the Supreme Court in the premises.²⁵ It has been said that when the suit complained of is brought by a private person he may be joined as a defendant; but that when it is a suit or prosecution on behalf of the government the writ of prohibition can go to the court only.²⁶ The proceedings of a court-martial cannot be prohibited by such a writ addressed to an officer who ordered the court-martial to convene, but is not himself a member of it.²⁷ The application for the writ

¹⁹ *Smith v. Whitney*, 116 U. S. 167, 173, 29 L. ed. 601, 602.

²⁰ *Re Rice*, 155 U. S. 396, 39 L. ed. 198.

²¹ *Re Rice*, 155 U. S. 396, 39 L. ed. 198; *Re N. Y. & Porto Rico S. S. Co.*, 155 U. S. 523, 39 L. ed. 246. *Re Cooper*, 143 U. S. 472, 495, 36 L. ed. 232, 239; *Am. Construction Co. v. Jacksonville, T. & K. Ry. Co.*, 148 U. S. 372, 379, 37 L. ed. 486. *Ex parte Oklahoma*, 220 U. S. 191, 55 L. ed. 431. The denial of the writ is not an adjudication that the court below had jurisdiction of the suit or proceeding. Consolidated

Rubber Tire Co. v. Ferguson, C. C. A., 183 Fed. 756.

²² *Smith v. Whitney*, 116 U. S. 167, 173, 29 L. ed. 601, 602; *Re Cooper*, 143 U. S. 472, 495, 36 L. ed. 232, 239; *Re Rice*, 155 U. S. 396, 403, 39 L. ed. 198, 201.

²³ *Ex parte Wisner*, 203 U. S. 449, 461, 51 L. ed. 264, 268.

²⁴ *Alexander v. Crollot*, 199 U. S. 580, 50 L. ed. 317.

²⁵ *U. S. v. Hoffman*, 4 Wall. 158, 18 L. ed. 354.

²⁶ *Smith v. Whitney*, 116 U. S. 167, 176, 29 L. ed. 601, 603, per Gray, J.

²⁷ *Ibid.*

should be supported by an affidavit where the motion for the writ of prohibition is founded upon matter not appearing upon the face of the proceeding below.²⁸ It is the duty of the respondent to produce any evidence that exists to countervail the petitioner's proof of such new matter.²⁹

The writ of prohibition cannot be used to correct errors of a court in deciding matters of law or fact within its jurisdiction,³⁰ or to undo what has been done;³¹ nor after a cause is finished below.³² "The only effect of the writ is to suspend all action, and to prevent any further proceeding in the prohibited direction."³³

§ 457. Mandamus. The writ of mandamus is a command issuing in the name of the United States directed to a person, corporation, or inferior court within its jurisdiction, requiring it so do some particular thing therein specified, which pertains to its office or duty, and which the court issuing the writ determines to be its duty.¹ The Supreme Court has power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States;² or where a State or an ambassador, or other public minister, or a consul or vice-consul is a party, to persons holding office under the authority of the United States,³ but when a State is a party, only when such officer is a citizen of another State.⁴ The Constitution prohibits the grant to that court of any further original jurisdiction to issue writs of mandamus to officers of the United States.⁵ The constitutionality of the grant to the Supreme Court of power to issue writs of mandamus to other courts of the United States has been

²⁸ *Re Baiz*, 135 U. S. 403, 430,
34 L. ed. 222, 230, per Fuller, C. J.

²⁹ *Ibid.*

³⁰ *Smith v. Whitney*, 116 U. S.
167, 176, 29 L. ed. 601, 603.

³¹ *U. S. v. Hoffman*, 4 Wall. 158,
18 L. ed. 354.

³² *Ex parte Joins*, 191 U. S. 93,
48 L. ed. 110.

³³ *U. S. v. Hoffman*, 4 Wall. 158,
18 L. ed. 354.

§ 457. ¹ *Ex parte Crane*, 5 Pet.
189, 190, 8 L. ed. 92, 93.

² U. S. R. S., § 688; *Re Green*,
141 U. S. 325, 35 L. ed. 765.

³ U. S. R. S., § 688. See *Ken-
tucky v. Dennison*, 24 How. 66, 16
L. ed. 717; *Virginia v. Rives*, 100 U.
S. 313, 316, 25 L. ed. 667, 668, *Re
Baiz*, 135 U. S. 403, 34 L. ed. 222;
Virginia v. Paul, 148 U. S. 107, 37
L. ed. 386.

⁴ *Re Massachusetts*, 197 U. S. 482,
49 L. ed. 845.

⁵ *Marbury v. Madison*, 1 Cranch,
137, 2 L. ed. 60.

upheld on the ground that such a writ is in the nature of appellate jurisdiction.⁶ The Circuit Courts of Appeal have jurisdiction to grant the writ of mandamus in aid of their appellate jurisdiction,⁷ and to prevent such jurisdiction from being defeated by unauthorized action of the District Court.⁸ Such a court has no power to compel a District Court to take original jurisdiction of a cause,⁹ or to dismiss a case for want of jurisdiction as a Federal court,¹⁰ when the jurisdictional question is Federal in its nature; but it has been said that it may do so when the jurisdiction is disputed upon other grounds;¹¹ and it may compel a District Court to proceed in a case which the latter has stayed under the belief that it has no jurisdiction of the same.¹²

A mandamus will issue to compel a court to exercise its discretion in one way or another.¹³ A mandamus will issue to compel a court to proceed in a case which it has dismissed for want of jurisdiction, when the record before the lower court showed its jurisdiction, and there is no review by appeal or writ of error;¹⁴ but not when through mistake a paper show-

⁶ *Ex parte Crane*, 5 Pet. 189, 190, 8 L. ed. 92, 93.

⁷ *Barber Asphalt Pav. Co. v. Morris*, C. C. A., 132 Fed. 945; *Ex parte Chicago Title & Tr. Co.*, C. C. A., 146 Fed. 742.

⁸ *McClellan v. Carland*, 217 U. S. 268, 54 L. ed. 762.

⁹ *McClellan v. Carland*, 217 U. S. 268, 280, 54 L. ed. 762, 766, where, upon *certiorari*, the Supreme Court directed the Circuit Court of Appeals to issue such a writ. *U. S. ex rel. Mudsill Min. Co. v. Swan*, C. C. A., 65 Fed. 647; *Collin County Nat. Bank of McKinney, Tex. v. Hughes*, C. C. A., 152 Fed. 414; *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, C. C. A., 155 Fed. 524.

¹⁰ *U. S. v. Severens*, C. C. A., 71 Fed. 768. See *New Liverpool Salt Co. v. Wellborn*, C. C. A., 160 Fed. 923.

¹¹ *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, C. C. A., 155 Fed. 524.

¹² *McClellan v. Carland*, 217 U. S. 268, 54 L. ed. 762.

¹³ *Ex parte Crane*, 5 Pet. 189, 190, 8 L. ed. 92, 93; *Ex parte Morgan*, 114 U. S. 174, 29 L. ed. 135; *Ex parte Parker*, 120 U. S. 737, 30 L. ed. 818; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211.

¹⁴ *Insurance Co. v. Comstock*, 16 Wall. 258, 21 L. ed. 493; *Railroad Co. v. Wiswall*, 23 Wall. 507, 23 L. ed. 103; *Hoadley v. San Francisco*, 94 U. S. 4, 24 L. ed. 34; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Ex parte Railway Co.*, 103 U. S. 794, 26 L. ed. 461; *Ex parte Baltimore & O. R. Co.*, 108 U. S. 566, 27 L. ed. 812; *Hollon Parker, Petitioner*, 131 U. S. 221, 33 L. ed. 123. But see *Re Burdett*, 127 U. S. 711, 32 L. ed. 321. *Re Pennsylvania*

ing the jurisdiction was not in the record and before the court.¹⁵ After a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and judgment in favor of the plea and for a dismissal of the action, the plaintiff is confined to his remedy by writ of error, and cannot by mandamus compel the inferior court to take jurisdiction of his case.¹⁶ The writ of mandamus may issue: to compel a Circuit Court of Appeals to take jurisdiction of a writ of error, which it has improperly dismissed;¹⁷ but not to remand a case where jurisdiction is claimed upon the ground of a separable controversy between citizens of different States,¹⁸ nor where there is a controversy as to whether the suit is of a civil nature or for a penalty,¹⁹ or where a difference of citizenship appears, but the record does not show the residence of one or more of the parties,²⁰ nor, it seems, in any case where jurisdiction is claimed because of difference of citizenship and the question may be reviewed upon appeal or writ of error;²¹ to compel a District Judge of the United States to order the marshal to deliver to the county jailer certain prisoners convicted under indictments, or other criminal proceedings, illegally removed to the District Court of the United States;²² to compel the allow-

Co., 137 U. S. 451, 453, 34 L. ed. 738, 739.

¹⁵ *Re* Sherman, 124 U. S. 364, 31 L. ed. 423.

¹⁶ *Ex parte* Baltimore & O. R. Co., 108 U. S. 566, 27 L. ed. 812; *Ex parte* Railway Co., 103 U. S. 794, 26 L. ed. 461; *Re* Pennsylvania Co., 137 U. S. 451, 453, 34 L. ed. 738, 739.

¹⁷ *Matter of* Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; *Re* Merchants' Stock & Grain Co., 223 U. S. 639, 56 L. ed. 584.

¹⁸ *Re* Pollitz, 206 U. S. 323, 51 L. ed. 1081, in which the writer was counsel; *Ex parte* Nebraska, 209 U. S. 436, 52 L. ed. 876; *Ex parte* Harding, 219 U. S. 363, 55 L. ed. 252.

¹⁹ *Ex parte* Gruetter, 217 U. S. 586, 54 L. ed. 892.

²⁰ *Ibid.*

²¹ *Ex parte* Hoard, 105 U. S. 578, 26 L. ed. 1176; *Ex parte* Harding, 219 U. S. 363, 55 L. ed. 252; overruling in this respect *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264; *Re* Moore, 209 U. S. 490, 52 L. ed. 904; and disapproving *Re* Winn, 213 U. S. 458, 53 L. ed. 873, which holds that the question whether the cause of action arises under the Constitution or laws of the United States may be reviewed by mandamus.

²² *Virginia v. Rives*, 100 U. S. 313, 323, 329, 25 L. ed. 667, 671, 673; *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633.

ance of an appeal;²³ provided the applicant was a party to the suit;²⁴ to compel a judge to settle a bill of exceptions and to sign the same after it has been settled by him,²⁵ but not to sign a bill of exceptions which he considers does not state correctly the proceedings before him;²⁶ to compel a court to proceed in a suit which it had improperly stayed;²⁷ to compel a judge to set aside an order denying an injunction and vacating a restraining order which he has previously granted forbidding action by an officer of a State;²⁸ to set aside an order beyond its jurisdiction made subsequent to a final decree,²⁹ to take jurisdiction of a writ of *scire facias* which it has improperly quashed;³⁰ to prescribe the method and direct the service of a writ of *scire facias*, and, after due service, to take jurisdiction of, and to decide, the issues raised;³¹ to compel a court to proceed to judgment,³² and when the act of signing the judgment was purely ministerial, to sign the same;³³ to execute a judgment it has rendered;³⁴ to execute a previous mandate of the Supreme Court;³⁵ or of a

²³ *Ex parte Jordan*, 94 U. S. 248, 24 L. ed. 123; *Ex parte Railroad Co.*, 95 U. S. 221, 24 L. ed. 355; *Vigo's Case*, 21 Wall. 648, 22 L. ed. 690. But it was said that the writ may be denied where the order appealed from was wholly discretionary, or where the discretion was properly exercised. *Lewis v. Baltimore & L. R. Co.*, C. C. A., 62 Fed. 218.

²⁴ *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49.

²⁵ *Chateaugay O. & I. Co., Petitioner*, 128 U. S. 544, 32 L. ed. 508. See *Ex parte Crane*, 5 Pet. 189, 190, 8 L. ed. 92, 93.

²⁶ *Ex parte Bradstreet*, 4 Pet. 102, 7 L. ed. 796.

²⁷ *Livingston v. Dorgenois*, 7 Cranch, 577, 3 L. ed. 444; *Barber Asphalt Pav. Co. v. Morris*, C. C. A., 67 L.R.A. 761, 132 Fed. 945; *McClellan v. Carland*, 217 U. S. 268, 54 L. ed. 762.

²⁸ *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 55 L. ed. 575.

²⁹ *New Liverpool Salt Co. v. Wellborn*, C. C. A., 160 Fed. 923, but see *Ex parte Bradstreet*, 8 Pet. 588, 8 L. ed. 1054.

³⁰ *Re Connaway*, 178 U. S. 421, 44 L. ed. 1134.

³¹ *Collin County Nat. Bank of McKinney, Tex. v. Hughes*, C. C. A., 152 Fed. 414.

³² *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 9 L. ed. 233.

³³ *Ex parte Bradstreet*, 6 Pet. 774, 8 L. ed. 577; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949; *Ex parte Many*, 14 How. 24, 14 L. ed. 311. But see *Ex parte Morgan*, 114 U. S. 174, 29 L. ed. 135.

³⁴ *U. S. v. Peters*, 5 Cranch, 115, 3 L. ed. 53; *Stafford v. Union Bank*, 16 How. 135, 14 L. ed. 876.

³⁵ *White v. U. S.*, 1 Black, 501, 17 L. ed. 227; *U. S. v. Fossatt*, 21 How. 445, 16 L. ed. 186; *Ex parte Dubuque & P. R. Co.*, 1 Wall 69,

Circuit Court of Appeals;³⁶ and to compel the reinstatement in a court of the United States or of the District of Columbia of an attorney who had been disbarred, in a case of which the court had no jurisdiction or acted with flagrant impropriety.³⁷ It has been said that the writ might be granted to compel the court to direct a witness to answer a question put to him in the course of his deposition, but held that this cannot be done unless there has been a strict compliance with all the provisions of the statute.³⁸ A mandamus will not be issued when there is any other appropriate relief,³⁹—as, for example, by writ of error or appeal,⁴⁰ nor to control the exercise of discretion,⁴¹ except, possibly, in case of a very flagrant abuse of discretion.⁴² The writ of mandamus has been denied when asked to compel a court or judge to allow or refuse an amendment of a pleading,⁴³ to order

17 L. ed. 514; *Re Washington & G. R. Co.*, 140 U. S. 91, *infra*, Chapter on Writs of Error and Appeals. But see *Ex parte Railway Co.*, 101 U. S. 711, 25 L. ed. 872; *Re Humes*, 149 U. S. 192, 37 L. ed. 698.

³⁶ *Ex parte Chicago Title & Tr. Co.*, C. C. A., 146 Fed. 742.

³⁷ *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Ex parte Robinson*, 19 Wall. 506, 22 L. ed. 205. But see *Ex parte Burr*, 9 Wheat. 529, 6 L. ed. 152; *Ex parte Secombe*, 19 How. 9, 15 L. ed. 565; *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552; *Re Green*, 141 U. S. 325, 35 L. ed. 765. But see *Barnes v. Lyons*, C. C. A., 187 Fed. 881.

³⁸ *Re Robert Gair Co.*, C. C. A., 196 Fed. 492.

³⁹ *Bank of Columbia v. Sweeny*, 1 Pet. 567, 7 L. ed. 265; *U. S. v. Addison*, 22 How. 174, 16 L. ed. 304; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; *Re Morrison*, 147 U. S. 14, 26, 37 L. ed. 60, 65.

⁴⁰ *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; *Ex parte Baltimore & O. R. Co.*, 108 U. S. 566,

27 L. ed. 812; *Ex parte Brown*, 116 U. S. 401, 29 L. ed. 676; *Connecticut Mut. L. Ins. Co.*, Petitioner, 131 U. S. App. clxxxi; *Re Morrison*, 147 U. S. 14, 26, 37 L. ed. 60, 65; *Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379, 37 L. ed. 486, 489. An appeal from an interlocutory injunction affords an adequate remedy. *Ex parte Oklahoma*, 220 U. S. 191, 55 L. ed. 431; *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, C. C. A., 155 Fed. 524.

⁴¹ *Ex parte Railway Co.*, 101 U. S. 711, 25 L. ed. 872; *Ex parte Roberts*, 6 Pet. 216, 8 L. ed. 375; *Ex parte Davenport*, 6 Pet. 661, 8 L. ed. 537; *Ex parte Bradstreet*, 7 Pet. 634, 8 L. ed. 810; *Ex parte Bradstreet*, 4 Pet. 102, 7 L. ed. 796; *Ex parte Bradstreet*, 8 Pet. 588, 8 L. ed. 1054; *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. ed. 676; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949.

⁴² *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214.

⁴³ *Ex parte Bradstreet*, 7 Pet. 634, 8 L. ed. 810.

the withdrawal of a plea,⁴⁴ to allow the filing of double pleas,⁴⁵ upon the application of a private individual to remand a civil case after a motion for a remand had been denied by the court below,⁴⁶ to retain jurisdiction of a case which had been remanded to the State court since the act of March 3, 1887,⁴⁷ to vacate interlocutory orders which did not terminate the suit,⁴⁸ to vacate a preliminary injunction,⁴⁹ to vacate an order setting aside a non-suit,⁵⁰ to punish a party for an alleged contempt,⁵¹ to open a default,⁵² to quash a writ of execution,⁵³ to admit a prisoner to bail,⁵⁴ to diminish the amount of bail required for a prisoner's discharge,⁵⁵ to approve a bond,⁵⁶ to compel the issue of a *subpoena duces tecum*,⁵⁷ to grant a rehearing,⁵⁸ to receive further proofs on an appeal in admiralty,⁵⁹ to vacate an order directing a district attorney and a marshal to deliver the official books of record to persons appointed by the President as their successors, whose title they disputed,⁶⁰ to transmit a particular specified paper with the transcript of the record.⁶¹ It will

⁴⁴ *Ex parte Sweeny*, 1 Pet. 567, 7 L. ed. 265.

⁴⁵ *Ex parte Davenport*, 6 Pet. 661, 8 L. ed. 537.

⁴⁶ *Ex parte Hoard*, 105 U. S. 578, 26 L. ed. 1178; *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081; *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876; *Ex parte Harding*, 219 U. S. 363, 55 L. ed. 252, *supra*.

⁴⁷ *Re Pennsylvania Co.*, 137 U. S. 451, 453, 34 L. ed. 738, 739.

⁴⁸ *Ex parte Hoyt*, 13 Pet. 279, 10 L. ed. 161; *Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *Gain v. Relf*, 15 Pet. 9, 10 L. ed. 642; *Ex parte Perry*, 102 U. S. 183, 26 L. ed. 43; *Ex parte Schwab*, 98 U. S. 240, 25 L. ed. 105; *Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379, 37 L. ed. 486, 489.

⁴⁹ *Ex parte Schwab*, 98 U. S. 240, 25 L. ed. 105.

⁵⁰ *Ex parte Loring*, 94 U. S. 418, 24 L. ed. 165.

⁵¹ *Minnesota Moline Plow Co. v.*

Dowagiac Mfg. Co., C. C. A., 126 Fed. 746.

⁵² *Ex parte Roberts*, 6 Pet. 216, 8 L. ed. 375.

⁵³ *U. S. ex rel. Harless v. Judges*, C. C. A., 85 Fed. R. 178.

⁵⁴ *Ex parte Flippin*, 94 U. S. 348, 24 L. ed. 194; *U. S. ex rel. Harless v. Judges*, C. C. A., 85 Fed. 177. But see *Hudson v. Parker*, 156 U. S. 277, 39 L. ed. 424.

⁵⁵ *Ex parte Taylor*, 14 How. 3, 14 L. ed. 302.

⁵⁶ *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. ed. 676.

⁵⁷ *Vacuum Cleaner Co. v. Platt*, C. C. A., 196 Fed. 398. But see *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211.

⁵⁸ *U. S. v. Bullock*, 6 Pet. 485, note, 8 L. ed. 473, note.

⁵⁹ *Re Hawkins*, 147 U. S. 486, 37 L. ed. 251.

⁶⁰ *Re Parsons*, 150 U. S. 150, 37 L. ed. 1034.

⁶¹ *Starcke v. Klein*, C. C. A., 62 Fed. 502. The proper remedy seems

not issue except in an extraordinary case against a judge where there is no proof of a demand that he do as the writ would direct.⁶² Where the record shows apparent jurisdiction, the writ will not be issued to compel a dismissal of a cause for want thereof, unless evidence showing such a defect is before the court.⁶³ It is not the office of a mandamus to direct a court to decide in a particular way the matter before it within its jurisdiction,⁶⁴ even when there is no remedy by writ of error or appeal.⁶⁵

The issue of the writ is within the discretion of the court.⁶⁶

As a general rule a writ of mandamus will not issue when there is any other adequate remedy for the relator,⁶⁷ but the want of any other remedy does not always authorize the issue of the writ.⁶⁸

The District Courts of the United States have power to issue a mandamus, upon motion of the Attorney-General or any District Attorney of the United States, to compel any officer of the United States to file the bonds, make returns, and perform any other duties required by chapter 95 of laws passed at the Second Session of the Forty-third Congress, relating to costs and fees;⁶⁹ and to compel the Union Pacific Railroad Company to operate its road as required by law.⁷⁰ As long as the

to be a *certiorari* for a diminution of the record. See *infra*, § 460.

⁶² *Edinburg Coal Co. v. Humphreys*, C. C. A., 134 Fed. 839.

⁶³ *Re Cleland*, 218 U. S. 120, 54 L. ed. 962. Where the evidence was not before the court of review, it refused to issue the writ to compel the dismissal of proceedings in bankruptcy against the corporation, on the ground that the petition failed to show that such corporation belonged to the class specified in the statute. *Matter of Riggs*, 214 U. S. 9, 53 L. ed. 887.

⁶⁴ *Re Morrison*, 147 U. S. 1, 26, 37 L. ed. 55, 65. *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, C. C. A., 155 Fed. 524.

⁶⁵ *Re Rice*, 155 U. S. 396, 39 L. ed. 198.

⁶⁶ *Re Cleland*, 218 U. S. 120, 122, 54 L. ed. 962, 964, where it was said that the delay and inconsistent position of the petitioner to the writ might be a ground for denying the same. *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211.

⁶⁷ *Re Pennsylvania Co.*, 137 U. S. 451, 453, 34 L. ed. 738, 739.

⁶⁸ *Ness v. Fisher*, 223 U. S. 683, 56 L. ed. 610.

⁶⁹ 18 St. at L. 333.

⁷⁰ 17 St. at L. 509, § 4; U. S. v. U. P. R. Co., 2 Dill. 527; U. P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428. It seems that the corporation may be thus compelled to operate its telegraph lines by itself alone through its own corporate officers. *Union Pac. Ry. Co. v. U. S.*, 59 Fed. 813, 833.

Commerce Court continues to exist, it has exclusive jurisdiction to grant the writ of mandamus to compel the compliance, by railway companies and other common carriers, with the provisions of the Interstate Commerce Act;⁷¹ but the writ will not be issued unless the matter has first been submitted to the Interstate Commerce Commission.⁷² The Commerce Court has no jurisdiction to compel the Interstate Commerce Commission to entertain a complaint which the commission has dismissed under the belief that it is beyond its jurisdiction.⁷³ Such a writ may be issued by the Supreme Court of the District of Columbia.⁷⁴ It was held that the Circuit Court of the United States for the Southern District of New York had the power to grant the writ to compel the Board of General Appraisers to examine and decide a case, of which it had jurisdiction under the Customs Administrative Act.⁷⁵

Otherwise those courts have no power to issue a writ of mandamus, except when necessary for and ancillary to the exercise of their respective jurisdiction in another matter;⁷⁶ even

⁷¹ Jud. Code, Sec. 207, 36 St. at L. 1087. See Secs. 75, 151, *supra*, 25 St. at L. 862, §§ 6, 10, 23, as amended by Act of June 29, 1906, ch. 3591, 34 St. at L. 585. See U. S. v. Delaware, L. & W. R. Co., 40 Fed. 101, 105. The writ was denied where the relator based his claim for relief upon a contract made in aid of the Johnson Act fixing an equitable basis for the distribution of cars. U. S. ex rel. Greenbrier Coal & Coke Co. v. Norfolk & W. Ry. Co., C. C. A., 143 Fed. 266, reversing 138 Fed. 849.

⁷² Baltimore & Ohio R.R. Co. v. U. S. ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. ed. 292. The writ has been issued to compel carriers to carry the petitioners' coal, in such reasonable quantities as can be handled, U. S. ex rel. Stony Fork Coal Co. v. Louisville & N. R. Co., 195 Fed. 88; to compel an express company to transport intoxicating liquor into a jurisdiction where pro-

hibition was established by law, U. S. ex rel. Friedman v. U. S. Express Co., 180 Fed. 1006; and to compel common carriers to file annual reports, U. S. v. Union Stockyard & Transit Co., 192 Fed. 330.

⁷³ Interstate Commerce Commission v. U. S. ex rel. Humboldt Steamship Co., 224 U. S. 474, 56 L. ed. 849.

⁷⁴ *Ibid.*, *infra*, § 458.

⁷⁵ 26 St. at L. 137. Thomas Prosser & Son v. United States, C. C. A., 158 Fed. 971.

⁷⁶ U. S. R. S., § 716; McIntire v. Wood, 7 Cranch, 504, 3 L. ed. 420; McClung v. Silliman, 6 Wheat. 598, 5 L. ed. 340; Graham v. Norton, 15 Wall. 427, 21 L. ed. 177; Bath County v. Amy, 13 Wall. 244, 20 L. ed. 539; County of Greene v. Daniel, 102 U. S. 187, 26 L. ed. 99; Davenport v. County of Dodge, 105 U. S. 237, 26 L. ed. 1018; Louisiana v. Jumel, 107 U. S. 711, 727, 27 L. ed. 448, 453; Gares v. N. W. Nat. Bldg.,

when the relief sought concerns a right secured by the Constitution of the United States.⁷⁷

A District Court cannot by removal acquire jurisdiction to grant a mandamus in a case where it could not do so upon an application originally addressed to it.⁷⁸ The fact that a District Court of the United States has no jurisdiction of an original proceeding by mandamus to compel municipal officers to levy a tax to pay bonds does not affect its jurisdiction of an action at law by a citizen of another state to recover judgment on such bonds, although any judgment recovered can be enforced only by mandamus.⁷⁹ An application to a District Court by a receiver appointed in supplementary proceedings by a State court, seeking a writ of mandamus to require the clerk of the District Court to pay a fund in the registry of that court to the receiver, is an original proceeding, and the court has no power to grant the writ.⁸⁰ Before the Evarts Act of March 3, 1891, a Circuit Court could, as ancillary to a case of which it had appellate jurisdiction, issue a writ of mandamus to a District Court of the United States.⁸¹

The most frequent instances in which writs of mandamus are issued by the District Courts of the United States are to compel the levy of taxes by officers of municipal or other public corporations to satisfy judgments previously obtained in the courts which issue the writs.⁸² "When so employed, the writ

L. & I. Ass'n, 55 Fed. 209; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536, 49 L. ed. 870; Covington & C. Br. Co. v. Hager, 203 U. S. 109, 51 L. ed. 111. But see Frank v. Butler County, C. C. A., 139 Fed. 119.

⁷⁷ Covington & C. Br. Co. v. Hager, 203 U. S. 109, 51 L. ed. 111. But it has been held that the writ may issue to compel a State Board of Equalization, with the exception of the Governor, to equalize taxes. *Huidekoper v. Hadley*, C. C. A., 177 Fed. 1.

⁷⁸ *Indiana ex rel. Munice v. L. E. & W. R. Co.*, 85 Fed. 1. *Contra*, *State ex rel. Postal Tel. Cable Co. v. Del. & A. Tel. & T. Co.*, 47 Fed.

633; *People v. Colorado C. R. Co.*, 42 Fed. 638, 640.

⁷⁹ *Waite v. City of Santa Cruz*, 89 F. 619.

⁸⁰ *Re Forsyth*, 78 Fed. 296.

⁸¹ *Smith v. Jackson*, 1 Paine, 455; *The New England*, 3 Sumner, 495; *The Enterprise*, 3 Wall. Jr. 58; *Ex parte Jesse Hoyt*, 13 Pet. 279, 10 L. ed. 161.

⁸² *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627; *Commissioners v. Aspinwall*, 24 How. 376, 16 L. ed. 735; *Supervisors v. U. S.*, 4 Wall. 435, 18 L. ed. 419; *Weber v. Lee County*, 6 Wall. 210, 18 L. ed. 781; *U. S. v. New Orleans*, 98 U. S. 381, 25 L. ed. 225.

is not a new suit, but simply process in aid of execution."⁸³ When such a writ is issued by a District Court of the United States, to enforce its own judgment, the jurisdiction cannot be enlarged so as to include a judgment of another court.⁸⁴ It has been held that the court will not thus control the discretion of the municipal authorities, to make appropriations to pay current expenses out of the fund in the city treasury.⁸⁵ It has been said that, after a claim against a school district has been duly established and liquidated, mandamus is the proper remedy to compel payment of the same.⁸⁶ Where judgments rendered on certain railroad aid bonds issued by a township contained orders making it the duty of the county commissioners of the county in which the township was located to levy annually a necessary tax to make the annual interest payments on the bonds, but such judgments did not direct the clerk to issue writs of mandamus thereafter if defaults should occur in the levy of the tax; it was held that they did not contain process within themselves for their own enforcement, so that, on the board's default, it was necessary for the owner of the judgments to obtain orders of the court to compel performance.⁸⁷ The writ will not issue to compel such an officer to perform a duty not imposed upon him by the law of the State under which he was appointed.⁸⁸ When the statute authorized a city council to levy a tax to pay a funded debt "if it believe that the public good and the best interests of the city require," a mandamus was issued after judgment to compel the levy of

Tucker v. Hubbert, C. C. A., 196 Fed. 849. But see *Board of Com'rs of Grand County v. King*, C. C. A., 54 Fed. 202. For a case where the county justices were imprisoned for contempt because of their disobedience to such a writ see *Re Copenhaver*, 54 Fed. 660.

⁸³ *Thompson v. Perris Irr. Dist.*, 116 Fed. 769.

⁸⁴ *U. S. ex rel. Kerr v. New Orleans*, C. C. A., 117 Fed. 610, 612.

⁸⁵ *Cleveland v. U. S.*, C. C. A., 111 Fed. 341, 347.

⁸⁶ *Whitaker & Ray Co. v. Rob-*

erts, County Superintendent of Schools, 155 Fed. 882.

⁸⁷ *Board of Com'rs of Hertford County, N. C. v. Tome*, C. C. A., 153 Fed. 81.

⁸⁸ *U. S. v. Macon County*, 99 U. S. 582, 25 L. ed. 331; *U. S. v. Labette County*, 7 Fed. 318; *U. S. v. County of Clark*, 95 U. S. 769, 24 L. ed. 545; *Memphis v. U. S.*, 97 U. S. 293, 24 L. ed. 920; *Brownsville v. League*, 129 U. S. 493, 32 L. ed. 780. Cf. *Hicks v. Cleveland*, C. C. A., 106 Fed. 459; *Padgett v. Post*, C. C. A., 106 Fed. 600; *Little Rock*

the tax.⁸⁹ A repeal of the State statute authorizing the officer to levy the tax does not divest the power of the Federal court to compel him to do so by mandamus, after a judgment upon a contract before the repeal.⁹⁰ A State statute forbidding the issue of a mandamus, in certain cases, will not impair the jurisdiction of the Federal courts in that respect.⁹¹ Where the charter of the municipal corporation has been repealed and its corporate existence extinguished, no such mandamus can be granted.⁹² A mandamus to compel the levy of a tax cannot be issued until after a judgment has been obtained.⁹³ It has been held that an action will lie to obtain a special judgment which will not warrant the issue of an execution and can only be enforced by a mandamus, although in the State court the only remedy could be an original mandamus.⁹⁴ A mandamus was granted to compel the transfer of stock in a corporation to the buyer of the same at a sale under an execution issued by the same court.⁹⁵ A District Court has no jurisdiction to compel a postmaster by mandamus to transmit mail matter at a lower rate of postage than that charged,⁹⁶ nor to compel a collector to examine into the facts as to the validity of a claim to a trade-mark affecting importations.⁹⁷ It has been said that, although a District Court may have the power to grant the writ of mandamus at the application of a receiver in bankruptcy, it will not do so to compel a postmaster to transport the

v. U. S. ex rel. Howard, C. C. A., 103 Fed. 418.

⁸⁹ Galena v. Amy, 5 Wall. 705, 18 L. ed. 560.

⁹⁰ Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403.

⁹¹ U. S. ex rel. Kilpatrick v. Capdevielle, C. C. A., 118 Fed. 809.

⁹² Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Barkley v. Levee Com'rs, 93 U. S. 258, 23 L. ed. 893. But see U. S. v. Port of Mobile, 12 Fed. 768. For the power of the court to appoint a receiver in such a case, see *supra*, § 306.

⁹³ Rosenbaum v. Bauer, 120 U. S.

450, 30 L. ed. 743; and cases cited.

⁹⁴ Aylesworth v. Gratiot County, 43 Fed. 350, 352. "Where the plaintiff is otherwise entitled to relief in this court, he will not be debarred therefrom by reason of the fact that his remedy in the State court upon the same cause of action would be of a character which we were not entitled to administer here." Ibid. See Jordan v. Cass County, 3 Dillon, 185; Davenport v. County of Dodge, 105 U. S. 237, 26 L. ed. 1018.

⁹⁵ Hair v. Burnell, 106 Fed. 280.

⁹⁶ U. S. v. Pearson, 24 Blatchf. 453.

⁹⁷ *Re Vintschger*, 50 Fed. 459.

receiver's publications, when there is doubt as to their being available.⁹⁸

A State court cannot issue a mandamus against an officer of the United States to compel the performance of a duty of his Federal office.⁹⁹ The only courts which have any original jurisdiction to issue such a writ against an officer of the United States, in the absence of special statute, and where neither a State, nor an ambassador or other public minister, nor a consul or vice-consul is a party, are the Supreme Court of the District of Columbia,¹⁰⁰ and, the Territorial courts.¹⁰¹ A state court cannot by injunction or otherwise interfere with the issue of a mandamus by a Federal court.¹⁰²

§ 458. Jurisdiction of the Supreme Court of the District of Columbia to issue a writ of mandamus to an officer of the United States. The Supreme Court of the District of Columbia has the power to issue the writ of mandamus, to an officer of the United States or other person within its territorial jurisdiction in cases in which the relator is by common law entitled to seek relief.¹ The writ will not issue in a case where its effect would be to direct or control the head of an executive department in the exercise of judgment or discretion, even when in the exercise of his discretion the officer has been called

⁹⁸ *Re Coleman*, 131 Fed. 151.

⁹⁹ *McClung v. Silliman*, 6 Wheat. 598, 5 L. ed. 340.

¹⁰⁰ *Kendall v. U. S.*, 12 Pet. 524, 9 L. ed. 1181; *U. S. v. Schurz*, 102 U. S. 378, 26 L. ed. 167. See *U. S. v. Guthrie*, 17 How. 284, 15 L. ed. 102; *infra*, § 458.

¹⁰¹ *Clough v. Curtis*, 134 U. S. 361, 33 L. ed. 945. It has been held that the District Court of Alaska may issue a mandamus to compel a commissioner of that Territory to proceed in a cause, *Finn v. Hoyt*, 52 Fed. 83; and that mandamus should not issue to compel a commission with quasi-judicial functions to enroll an applicant as a member of a tribe. *Kimberlin v. Commission to Five Indian Tribes*, C. C. A., 104 Fed. 653.

¹⁰² *U. S. v. King*, 74 Fed. 493; *Clapp v. Otoe County*, C. C. A., 104 Fed. 473.

§ 458. 19 St. at L. 253; *U. S. v. Schurz*, 102 U. S. 378, 394, 26 L. ed. 167, 171; *Kendall v. U. S.*, 12 Pet. 524, 9 L. ed. 1181; *Decatur v. Paulding*, 14 Pet. 497, 10 L. ed. 559; *Kendall v. Stokes*, 3 How. 87, 11 L. ed. 506; *Com'r of Patents v. Whiteley*, 4 Wall. 522, 18 L. ed. 335; *U. S. ex rel. Miller v. Black*, 128 U. S. 40, 50, 32 L. ed. 354, 358; *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811; *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. ed. 183; *Roberts v. U. S.*, 176 U. S. 221, 44 L. ed. 443; *U. S. ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074.

upon to interpret several statutes of doubtful meaning and he has made an erroneous interpretation of the same;² but when the officer refuses to act at all in a case where he is bound to

² Congress on March 3, 1837, passed an act giving a pension to the widow of any officer who had died in the naval service. On the same day Congress passed a resolution granting a pension to the widow of Stephen Decatur for a certain period of time. Mrs. Decatur applied for and received her pension under the general law, with a reservation of her rights under the resolution, claiming the special pension granted by that as well. The Secretary of the Navy, acting under the opinion of the Attorney General, decided that she could not have both. Upon her application for a mandamus to compel the Secretary to grant her a special pension, the writ was denied. *Decatur v. Paulding*, 14 Pet. 497, 515, 516, 10 L. ed. 559, 568, 569, per Taney, C. J. An application for a mandamus against the Secretary of the Navy by a commander in the navy of the Republic of Texas, for pay alleged to be due him from the United States since the annexation of Texas under the joint resolutions for annexation of Texas, was denied. *Brashear v. Masón*, 6 How. 92, 12 L. ed. 357. An application for a mandamus to the Secretary of the Treasury to compel the payment of a salary to a Territorial judge for the unexpired term of his office, from which he claimed that he had been improperly removed by the President, was denied. *U. S. ex rel. Goodrich v. Guthrie*, 17 How. 284, 303, 305, 15 L. ed. 102, 105, 106. An application for a mandamus to compel the Commissioner of Patents to refer an application for a

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re-issue, which he had decided did not come within the statute, to "the proper, examiner, or otherwise examine or cause the same to be examined according to law," was denied. *Com'r of Patents v. Whiteley*, 4 Wall. 522, 18 L. ed. 335. Neither an injunction will issue to prevent, nor a mandamus issue to compel, the cancellation of an entry in the Land Office under which a claim is made to lands. *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62. See also *Sioux City & St. P. R. Co. v. U. S.*, 36 Fed. 610, 612.

Where the Commissioner of the Land Office had decided that a patent should not issue, in a case where numerous questions of law and fact arose, some of them depending upon circumstances which rested upon parol proof, and where the exercise of judicial functions, some of them of a high character, was required, an application for a writ of mandamus was refused. *U. S. v. Commissioner*, 5 Wall. 563, 565, 18 L. ed. 692, 693. The writ will not issue to review the decision of the Secretary of the Interior as to the practice to be pursued in making applications for land patents. *U. S. ex rel. Ness v. Fisher*, 223 U. S. 683, 56 L. ed. 610. Where the Commissioner of Pensions had decided upon an application for an increase of a pension, that the applicant was not entitled to the same, and this decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate given to the pensioner, it was held that no mandamus would issue to compel an in

act,³ or when by special statute or otherwise a purely ministerial duty, which he is bound to perform without question, is

crease of the pension. *U. S. ex rel. Dunlap v. Black*, 128 U. S. 40, 48, 32 L. ed. 354, 357. Mitchell furnished material and performed labor for the United States under a contract; and when the work was done and the materials furnished he presented his account to the proper office for adjustment and settlement. The balance was found to be correct so far as the labor and material were concerned, but it was also found that through penalties and forfeitures that balance was liable to be materially reduced. It also appeared that Mitchell was indebted to contractors and others in a large amount for work done and materials furnished under the contract. The Treasury officials agreed with Mitchell that this account should be adjusted, if he would consent that his said indebtedness should be paid out of the sums allowed, and that the control of the money should not be given up until those claims were satisfied. He assented, and a draft was prepared accordingly. Mitchell failed to satisfy the claims, and the assignee of his claim to the draft applied for a mandamus to compel the Secretary of the Treasury to deliver the draft to him before he had made the agreed payments, but the application was denied. *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811. So where the Secretary of the Interior had granted a land patent in pursuance of an act of Congress, it was held that the courts could not review his proceedings by mandamus upon the application of a claimant to the land who contended that the statute was unconstitutional.

Re Emblen, 161 U. S. 52, 40 L. ed. 613. An application for a mandamus to compel the Secretary of State to pay a certain award under the Mexican Claims Commission, under the act of June 18, 1878, was denied. *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. ed. 183. See also *U. S. ex rel. Angarica v. Bayard*, 127 U. S. 251, 259, 32 L. ed. 159, 162; *Frelinghuysen v. Key*, 110 U. S. 63, 28 L. ed. 71. So was an application for the writ to require the Secretary of the Interior to approve the selection of land allotted to such tribe, by one who claimed to be an adopted member of the same, in a case where the Secretary was of the opinion that the applicant had not been duly adopted. *U. S. ex rel. West v. Hitchcock*, 205 U. S. 80, 51 L. ed. 718. The writ of mandamus to the Secretary of the Treasury is not a legal remedy to try the title of the relator to an office claimed by him. *U. S. ex rel. Goodrich v. Guthrie*, 17 How. 284, 305, 15 L. ed. 102, 106. But upon a writ of error to the Supreme Court of the Territory of New Mexico it was held that in case of a disputed election to a municipal office, mandamus may issue to compel the recognition by another municipal officer of the *de facto* officer, whose title is disputed, until the rights of the parties can be determined on *quo warranto*. *Re Delgado*, 140 U. S. 586, 590, 35 L. ed. 578, 580. See also *U. S. ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 39 L. ed. 160; *U. S. ex rel. Mutual Messenger Co. v. Wright*, 15 App. D. C. 463.

³ *U. S. ex rel. Dunlap v. Black*,

imposed upon a public officer; even the head of an executive department, a mandamus may be issued to compel him to do such duty, if there is no other adequate remedy.⁴ A mandamus

128 U. S. 40, 48, 32 L. ed. 354, 357; U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 644, 34 L. ed. 811, 814; U. S. ex rel. Boynton v. Blaine, 139 U. S. 306, 319, 35 L. ed. 183, 187; U. S. v. Lamar, 116 U. S. 423, 29 L. ed. 677; *infra*, note 4.

⁴Stockton & Stokes, mail contractors, had certain claims against the government for extra services, which they insisted should be granted in their accounts, and a controversy arose as to this between them and the Post-office Department. Congress passed an act for their relief; by which the Solicitor of the Treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon full examination of all the evidence might seem to be equitable and right; and the Postmaster-General was directed to credit them with whatever sums the Solicitor should decide to be due them. The Solicitor, after investigation, made his report, and stated the sums due to Stockton & Stokes on the claims made by them, but the Postmaster-General refused to give them credit as directed by the law. This, the court held he could be compelled to do by a mandamus, because it was simply a ministerial duty to be performed, and not an official act requiring any exercise of judgment or discretion. *Kendall v. U. S. ex rel. Stokes*, 12 Pet. 524, 613, 614, 9 L. ed. 1181, 1216, 1217.

McBride claimed a patent for land under a right of pre-emption. The regular proceedings had taken

place in the Department of the Interior; the right of the applicant had been affirmed; the patent had been made out in the Land Office, signed by the President, sealed with the Land Office seal, counter-signed by the Recorder of the Land Office, recorded in the proper book, and transmitted to the local land officers for delivery; but delivery had been refused, because instructions had been received from the Commissioner to return the patent. Upon an application for a mandamus, the defense was that it had been discovered that the land belonged to a town site. The court held that this defense was insufficient; that the title had passed to the applicant; that he was entitled to the patent subject to any equity which other parties might have to the land, or subject to a proceeding to set the patent aside; and that the duty of the Commissioner and of the Secretary of the Interior had become a mere ministerial duty to deliver the instrument. A mandamus was granted accordingly. *U. S. v. Schurz*, 102 U. S. 407, 26 L. ed. 175.

Upon an application for a patent in the case of interference, the Commissioner of patents had decided in favor of Gill, and adjudged that a patent should issue to his assigns accordingly. An appeal was taken to the Secretary of the Interior, and he reversed the decision of the Commissioner. The latter for that reason refused to issue a patent. Upon an application for a mandamus, the Supreme Court held that no appeal lay from the decision of

may issue to compel the Treasurer to pay a judgment of the Court of Claims.⁵ No mandamus will issue to enforce specific performance of a contract with the United States which has been repudiated by an act of Congress.⁶ It has been held that a writ of mandamus, addressed to the Commissioner of Patents,

the Commissioner to the Secretary of the Interior; that "the latter officer had no jurisdiction in the matter;" that the patent ought to be issued to Gill's assigns in accordance with the decision of the Commissioner. A mandamus to compel the issue of such a patent was granted accordingly. *Butterworth v. Hoe*, 112 U. S. 50, 28 L. ed. 656. The Commissioner of Pensions had refused to grant an application for an increase of a pension. The applicant appealed to the Secretary of the Interior, who overruled the decision of the Commissioner, and held that the applicant was entitled to an increase of his pension. The Commissioner refused to carry out the Secretary's decision and to grant the increase requested. It was held that the Commissioner could be compelled by a mandamus to grant the increase of the pension for which the application had been made, in accordance with the decision of the Secretary of the Interior. *U. S. ex rel. Dunlap v. Black*, 128 U. S. 40, 50, 52, 32 L. ed. 354, 358, 359, per Bradley, J. See also *U. S. ex rel. Hufty v. Trimble*, 14 App. D. C. 414. The writ will issue to compel the Interstate Commerce Commission to entertain a complaint which it has dismissed under the belief that it is beyond its jurisdiction. *Interstate Commerce Commission v. U. S. ex rel. Humboldt Steamship Co.*, 224 U. S. 474, 56 L. ed. 849. The writ of mandamus was granted to compel the Secre-

tary of the Interior to erase the marks and notations, made by his predecessor, striking the name of the relator from the enrollment of an Indian nation. *Garfield v. U. S. ex rel. Goldsby*, 211 U. S. 249, 53 L. ed. 168.

⁵ *Roberts v. U. S.*, 176 U. S. 221, 44 L. ed. 443. There is a dictum by Mr. Justice Daniel to the effect that no mandamus will issue "to command the withdrawal of a sum or sums of money from the Treasury of the United States to be applied in satisfaction of disputed or controverted claims against the United States." *U. S. ex rel. Goodrich v. Guthrie*, 17 How. 284, 303, 15 L. ed 102, 105. In an English case, Lord Chief Justice Denman said: "If, as has been suggested, it should on any occasion be unsafe with reference to the public service to make a payment of this kind, the fact may be stated on return to the mandamus. There might perhaps be occasions on which the Lords Commissioners would be bound to apply the money to particular purposes of a more pressing nature." *The King v. The Lord Com'rs of the Treasury*, 4 Ad. & El. 286, 295; cited by Lamar, J., in *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636, 644, 34 L. ed. 811, 814.

⁶ *U. S. ex rel. Levey v. Stockslager*, 129 U. S. 470, 478, 32 L. ed. 785, 787.

is the proper remedy to compel the transmission to the Board of Examiners in Chief of an appeal, which the primary examiners has refused to allow; and that, in such a case, a writ should not issue to the Court of Appeals for the District of Columbia, which has dismissed, for want of jurisdiction, an appeal in the case.⁷ The writ of mandamus issues to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act.⁸ There are cases in which the writ of mandamus will not be issued to compel the performance of even a purely ministerial act. "In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake."⁹ A mandamus will not issue in a case of doubtful right.¹⁰ A mandamus will not issue in a case where the relator has another adequate remedy, and the grant of the writ may affect the rights of persons who are not parties to the proceedings, or where it will be attended with manifest hardship and difficulties.¹¹ It has been held that in a case where the application is not made by a person claiming a beneficial interest in sustaining or defeating a bill, no court should interfere by mandamus to correct the record of a legislative body,¹² and that the Governor of a State cannot be compelled by mandamus to return a fugitive from labor or justice.¹³

§ 459. Practice on application for mandamus. In the Supreme Court of the United States, the usual practice on an

⁷ *Ex parte Frasch*, 192 U. S. 566, 48 L. ed. 564.

⁸ U. S. ex rel. *Boynton v. Blaine*, 139 U. S. 306, 319, 35 L. ed. 183, 187; *Brownsville v. League*, 129 U. S. 493, 501, 32 L. ed. 780, 783.

⁹ U. S. ex rel. *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. ed. 811, 814, per Lamar, J., citing U. S. v. *Schurz*, 102 U. S. 378, 26 L. ed. 167.

¹⁰ U. S. ex rel. *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. ed. 811, 814, per Lamar, J., citing *Life & Fire Ins. Co. v. Wilson's Heirs*, 8 Pet. 291, 302, 8 L. ed. 949, 953.

¹¹ U. S. ex rel. *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. ed. 811, 814, per Lamar, J., citing *People v. Forquer*, Breese (1 Ill.), 68 (2d ed. 104); *Van Rensselaer v. Sheriff of Albany*, 1 Cowen (N. Y.), 501, 512; *Oaks v. Hill*, 8 Pick. (Mass.) 46. See U. S. v. *Com'rs*, 5 Wall. 563, 18 L. ed. 692.

¹² *Clough v. Curtis*, 134 U. S. 361, 33 L. ed. 945.

¹³ *Kentucky v. Dennison*, 24 How. 63, 16 L. ed. 717.

application for a mandamus is to issue a rule addressed to the judge or judges of the lower court calling on him or them to show cause why the writ should not issue against him.¹ The rule may also be addressed to the lower court itself.² The rule is only issued upon a petition verified by affidavit, showing an apparent right to the writ.³ The party at whose relation the writ is issued must show an interest in the relief sought;⁴ and should allege his citizenship.⁵ He is not obliged to obtain the intervention of the Attorney-General or a district attorney.⁶ It is the safer practice to move *ex parte* for leave to file the petition.⁷ The return cannot be amended on the motion of a person to whom the writ is not addressed.⁸ An application for a mandamus to enforce payment of a judgment of a court of the United States is ancillary to the original action and within the jurisdiction of the Federal court, irrespective of the citizenship of the parties.⁹

It has been held that, upon an application based upon a statute of the United States, the State practice should not be followed, but that the practice remains substantially as at common law.¹⁰ It is, however, safer to comply also with the regulations of the State practice.¹¹ A State statute forbidding a mandamus

§ 459, 1 Postmaster-General v. Trigg, 11 Pet. 173, 9 L. ed. 676; *Ex parte* Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161; *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853.

² Hollon Parker, Petitioner, 131 U. S. 221, 33 L. ed. 123.

³ Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161; *Ex parte* Taylor, 14 How. 3, 14 L. ed. 302; Postmaster-General v. Trigg, 11 Pet. 173, 9 L. ed. 676.

⁴ *Ex parte* Fleming, 2 Wall. 759, 17 L. ed. 924; Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945; People v. Colorado Cent. R. Co., 42 Fed. 638.

⁵ People v. Colorado Cent. R. Co., 42 Fed. 638, 641.

⁶ U. P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; s. c. as Hall v. Union P. R. Co., 3 Dill. 515; U. S.

v. U. P. R. Co., 91 U. S. 72, 23 L. ed. 224.

⁷ Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Farmers' L. & Tr. Co., Petitioner, 129 U. S. 206, 32 L. ed. 656.

⁸ *Ex parte* Harmon, 131 U. S. Appendix, lxvii.

⁹ Tucker v. Hubbert, C. C. A., 196 Fed. 849.

¹⁰ U. S. v. U. P. R. Co., 2 Dill. 527.

¹¹ Wisdom v. Memphis, 2 Flip. 285; Stewart v. Justices of St. Clair Co. Court, 47 Fed. 482, 484, quoted *supra*, § 455, note 8. The rule in the State of Washington that, in case of the refusal of the treasurer of a municipal corporation to pay a warrant, the holder cannot sue the municipality, but his sole remedy is a mandamus to

to enforce a judgment against a municipal corporation has been held not to deprive the Federal court of jurisdiction.¹² Where mandamus is sought to compel the payment of a judgment against a municipal corporation, performance should be first made of all conditions precedent required by State statutes, such as the issue of an execution and its return unsatisfied.¹³ and service of the judgment upon such officers as the State statute requires.¹⁴ It seems that a formal demand for payment of the judgment is, except when the statutes of the State require it, not a condition precedent to the issue of the writ.¹⁵ Laches is a defense to the application.¹⁶ It has been held that a mandamus will not issue to enforce a judgment after the judgment has become dormant according to the State law through the lapse of time, and no execution can issue thereunder.¹⁷ It is no defense to the application that the duties sought to be commanded do not include all the acts requisite to a full satisfaction of the judgment.¹⁸ It is proper to unite, as respondents to the pro-

compel the levy of a tax, does not bind the Federal courts there held, and the holder of the warrant may recover a judgment at law as preliminary to an application for a mandamus. *First Nat. Bank of Central City v. City of Port Townsend*, Wash., C. C. A., 184 Fed. 574.

¹² *Hart v. New Orleans*, 12 Fed. 292; *New Orleans v. Morris*, 3 Woods, 103, 115. "A mandamus to collect a tax for the payment of a judgment is process in execution, and nobody heretofore has ever questioned the power of a court to control its own process." *Memphis v. Brown*, 97 U. S. 300, 24 L. ed. 924, per Story, J.

¹³ *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *Weber v. Lee County*, 6 Wall. 210; 18 L. ed. 781; *Lansing v. County Treasurer*, 1 Dill. 522; *Laird v. Mayor of De Soto*, 25 Fed. 76.

¹⁴ *Moran v. Elizabeth*, 9 Fed. 72.

¹⁵ *U. S. v. Elizabeth*, 9 Rep. 232; *U. S. v. Auditors of Brooklyn*, 8

Fed. 473; *U. S. v. New Orleans*, 17 Fed. 483. The filing of a certificate of the judgment with a city clerk in Montana was held to be a sufficient demand. *Mayor, etc., of Helena v. U. S. ex rel. Helena Waterworks*, C. C. A., 104 Fed. 113. A demand for payment of a judgment is equivalent to a demand for the levy of a tax to pay the same. *U. S. ex rel. Masslich v. Saunders*, C. C. A., 124 Fed. 124.

¹⁶ *Matter of Eastern Cherokees*, 220 U. S. 83, 55 L. ed. 379, where an application to require the Court of Claims to modify its decree was denied because delayed until after the fund had been distributed.

¹⁷ *U. S. v. Oswego*, 28 Fed. 55; *Brockway v. Oswego*, 40 Fed. 612; *McAleer v. Clay County*, 42 Fed. 665; *Stewart v. Justices of St. Clair Co. Court*, 47 Fed. 482. But see *Amy v. Galena*, 7 Fed. 163.

¹⁸ *Rose v. McKie*, C. C. A., 145 Fed. 584, affirming 140 Fed. 145.

ceedings for the writ, all the officers whose action is necessary to the levy of the tax, although some of them have not refused to act.¹⁹ The application for a mandamus should be by a verified petition, which may be also termed an information or complaint.²⁰ Such petition should state the citizenship of the petitioner.²¹ A peremptory writ should not be issued without notice of the application.²² The alternative writ should state the averments of title or right which form the inducement of the writ, and should be in conformity with the legal obligation of the respondent.²³ "If a *prima facie* case is presented warranting the relief prayed, the alternative writ issues commanding the respondent forthwith to do the act required, or to show cause why it should not be done. After the granting of the writ three courses are open to the respondent: first; he may do the thing required; second, he may in most of the States demur; and third, he may make return."²⁴ A demurrer may be filed to the return.²⁵ By the common law the return was not traversable.²⁶ By the statute 9 Anne, ch. 20, a traverse was allowed to the return to a writ of mandamus in proceedings against persons claiming to hold public offices instituted by any person to obtain admission or restoration to office or to the franchises of being burgesses or freemen. The issues must be tried by a jury,²⁷ and the proceedings must be in accordance with the practice at common law.²⁸ A reference to a master of the issues,

¹⁹ McKie v. Rose, 140 Fed. 145, affirmed C. C. A., 145 Fed. 584.

²⁰ Poultney v. Lafayette, 12 Pet. 472, 9 L. ed. 1161; U. S. v. Union P. R. Co., 2 Dill. 527. See High on Extr. Rem., Part I, ch. viii.

²¹ People v. Colorado Cent. R. Co., 42 Fed. 638, 641.

²² Fairbanks v. Amoskeag Nat. Bank, 30 Fed. 602.

²³ People v. Colorado Cent. R. Co., 42 Fed. 638, 644.

²⁴ High on Extr. Rem., § 459.

²⁵ U. S. ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. ed. 165. There, the relators set forth insufficient notice of a motion to strike their names from an enrollment of mem-

bers of an Indian tribe and the return set forth, upon information and belief, that the relators were not entitled to be placed upon the enrollment. A general demurrer to this answer was overruled, since, if the return was true, the grant of the writ would have been properly followed by a second order of the secretary, on due notice, striking the names of the relators from the roll.

²⁶ Enfield v. Hills, 2 Lev. 236, 238; Lunt v. Davison, 104 Mass. 498; High on Extr. Rem., § 457.

²⁷ Cleveland v. U. S. ex rel. Cunningham, C. C. A., 127 Fed. 667.

²⁸ Ibid.

or of the return and the exceptions to the same, is error.²⁹ A peremptory writ of mandamus will rarely be issued without notice.³⁰ The writ and other proceedings upon an application for a mandamus to compel the levy of a tax under a judgment against a public corporation should ordinarily be addressed by name to the officers whose duty it is to act, and also describe them in their official capacity.³¹ A mandamus is sufficient when merely addressed to a public officer by his official title without naming him,³² although the corporation has another title under which its charter gives it power to be suit.³³ The writ may also be addressed to the corporation itself, as in the case of a county.³⁴ When a State statute provides that service of process against a public board may be made upon its clerk, service of the writ upon that clerk will be sufficient to justify punishment of the individual members of the board for contempt if they disobey.³⁵ Amendments of the proceedings including the return may be allowed,³⁶ but not such an amendment as would make an entirely new case.³⁷ It has been held that an amendment cannot be allowed after the reversal by the Supreme Court of an order

²⁹ Ibid.

³⁰ *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. 60. In New Mexico, one may issue to compel a Board of County Commissioners to comply with a judgment. *Commissioners of Santa Fe County v. Territory of New Mexico ex rel. Coler*, 215 U. S. 296.

³¹ *Thompson v. U. S.*, 103 U. S. 480, 484, 26 L. ed. 521, 523; *The Mayor v. Lord*, 9 Wall. 409, 19 L. ed. 704; for a form of the mandatory part of the writ see *Cleveland v. U. S.*, C. C. A., 111 Fed. 341, 349.

³² *Thompson v. U. S.*, 103 U. S. 480, 26 L. ed. 521; *The Mayor v. Lord*, 9 Wall. 409, 19 L. ed. 704. As to the form of the writ, see *State v. Sullivan*, 50 Fed. 593.

³³ *The Mayor v. Lord*, 9 Wall. 409, 19 L. ed. 704.

³⁴ *Commissioners v. Sellev*, 99 U.

S. 624, 25 L. ed. 333. Where parts of a county have been detached by a statute providing that they bear their respective proportions of its indebtedness, the counties to which those portions are annexed are not necessary parties to an application for a mandamus to compel the commissioners of the original county to levy a tax to pay the same. *Commissioners of Santa Fe County v. Territory of New Mexico ex rel. Coler*, 215 U. S. 296, 54 L. ed. 202.

³⁵ *Commissioners v. Sellev*, 99 U. S. 624, 25 L. ed. 333. But see *U. S. v. Labette County*, 7 Fed. 318.

³⁶ *Supervisors v. Durant*, 9 Wall. 736, 19 L. ed. 813; *U. S. v. Union Pac. R. Co.*, 4 Dill. 479; s. c. as *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428.

³⁷ *People v. Colorado Cent. R. Co.*, 42 Fed. 638, 644.

granting the writ, when pending the writ of error the judgment has become dormant by the lapse of time under the State statute.³⁸ The writ of mandamus may direct the performance of a series of acts by different persons.³⁹ A writ of mandamus to compel the levy of a tax may direct the distribution of the tax over a number of years, in order to relieve the taxpayers from hardship.⁴⁰ It seems that *certiorari* and mandamus cannot be joined in one writ.⁴¹ It is error to refuse the relator permission to discontinue his application at any time before the final order, even after the return to an alternative writ.⁴²

Where the duty sought to be enforced is one neglected by a public corporation or a court,⁴³ and not the purely personal default of a public officer, the death, resignation, or expiration of the term of office of the officer against whom the proceedings are directed will not abate them, and the writ may be issued or enforced against his successor.⁴⁴ When the writ or application is based upon the personal default of a public officer, according to the former rule the proceeding would abate upon his death or his retirement from office;⁴⁵ and in such case, if the application is granted, costs will be awarded to the relator, although the public officer acted in good faith under an erroneous view of the law.⁴⁶ By statute it is provided: "That no suit, action, or other proceeding lawfully commenced by or

³⁸ *Brockway v. Oswego*, 40 Fed. 612.

³⁹ *Labette County Com'rs v. U. S.*, 112 U. S. 217, 28 L. ed. 698; *Hicks v. Cleveland, C. C. A.*, 106 Fed. 459.

⁴⁰ *City of Cleveland, Tenn. v. U. S.*, 166 Fed. 677.

⁴¹ *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. 602.

⁴² *U. S. ex rel. Coffman v. Norfolk & W. Ry. Co.*, C. C. A., 118 Fed. 554.

⁴³ *Commissioners v. Sellew*, 99 U. S. 624, 25 L. ed. 333; *Thompson v. U. S.*, 103 U. S. 480, 485, 26 L. ed. 521, 523; *Hollon Parker, Petitioner*, 131 U. S. 221, 33 L. ed. 123.

⁴⁴ *Secretary v. McGarrahan*, 9

Wall. 298, 19 L. ed. 579; *U. S. v. Boutwell*, 17 Wall. 604, 21 L. ed. 721; *Thompson v. U. S.*, 103 U. S. 480, 484, 485, 26 L. ed. 521, 523. *Contra*, *People ex rel. La Chicotte v. Best*, 187 N. Y. 1, 116 Am. St. Rep. 586. The writ may be addressed to the officers and to their successors in office whom it will bind. *Hicks v. Cleveland, C. C. A.*, 106 Fed. 459.

⁴⁵ *Secretary v. McGarrahan*, 9 Wall. 298, 19 L. ed. 579; *U. S. v. Boutwell*, 17 Wall. 604, 21 L. ed. 721; *Thompson v. U. S.*, 103 U. S. 480, 484, 26 L. ed. 521, 523.

⁴⁶ *U. S. v. Schurz*, 102 U. S. 407, 26 L. ed. 175.

against the head of any department or bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs."⁴⁷ It has been held that this authorizes the continuance of a proceeding, upon an application for a mandamus, against the successor in office of the original respondent.⁴⁸

It is no defense to an application for a mandamus to compel the levy of a tax that, since the suit in which was entered the judgment sought to be enforced, a State court has enjoined the levy.⁴⁹ Evidence that a special tax has been levied to pay the relator's claim, and that all claims except those of the same class have been granted, is irrelevant to an application for a mandamus to compel the issue of bonds to liquidate his judgment.⁵⁰ The pendency of a previous application for the same relief, in the same jurisdiction and between the same parties, may be pleaded in abatement.⁵¹ An order awarding the writ, which declares that it is for the collection of the amount specified in a judgment, is not fatally defective for failure to specify the amount to be collected.⁵²

Disobedience to the writ is punished by attachment for contempt.⁵³ Directions in the writ for the performance of acts not authorized by law are void,⁵⁴ and disobedience thereto is

⁴⁷ Act of February 8, 1899, c. 121; 30 St. at L. 822.

⁴⁸ *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 442, 49 L. ed. 540, 544; *supra*, § 216.

⁴⁹ *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768.

⁵⁰ *U. S. ex rel. Fisher v. Board of Liquidation, etc. of New Orleans*, 60 Fed. 387.

⁵¹ *U. S. ex rel. Coffman v. Norfolk & W. Ry. Co.*, 114 Fed. 682.

⁵² *Estill County, Ky. v. Embry*, C. C. A., 144 Fed. 913.

⁵³ *Commissioners v. Sellev*, 99 U. S. 624, 25 L. ed. 333; *U. S. v. Lee County*, 2 Biss. 77.

⁵⁴ *U. S. v. Sup'rs of Labette County*, 7 Fed. 318; *President v. Mayor, etc. of Elizabeth*, 40 Fed.

consequently not punishable.⁵⁵ Upon an application for a mandamus to enforce a judgment, no question adjudicated in that judgment can be questioned.⁵⁶ Where a county had appeared and contested the regularity and sufficiency of proceedings for the issue of bonds in aid of a railroad, first in a State court in a suit brought to compel their issue, and again in the Federal court in a suit to recover the amount of coupons upon the same, brought by a privy to the plaintiff; it was held that the county was estopped from thereafter contesting the validity thereof, in a proceeding to compel the levy of a tax to pay them,⁵⁷ unless "where application is made to collect judgment by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded;"⁵⁸ but it is competent to show that the judgment is void.⁵⁹ An alternative writ of mandamus commanding certain designated officials and "such persons as may be elected to fill vacancies in the board of revision and assessment" to do certain acts was held bad on demurrer, as showing that some against whom it was directed had no notice and were not ascertained.⁶⁰ Ordinarily, upon a petition for a mandamus against a judge, costs will not be taxed against him if the same is granted, although they may be against such other adverse parties as appear and resist the application on the merits.⁶¹ The proceeding should

799; *People v. Colorado Cent. R. Co.*, 42 Fed. 638, 644.

⁵⁵ *U. S. v. Sup'rs of Labette County*, 7 Fed. 318; *President v. Mayor, etc., of Elizabeth*, 40 Fed. 799; *People v. Colorado Cent. R. Co.*, 42 Fed. 638, 644.

⁵⁶ *Harshman v. Knox County*, 122 U. S. 306, 30 L. ed. 1152; *Kaill v. Board of Directors of St. Landry Parish, La.*, C. C. A., 194 Fed. 73; *Tucker v. Hubbert*, C. C. A., 196 Fed. 849. It was held to be no defense to an application for a mandamus to compel the payment of a judgment by a parish, that the funds to be collected by it were dedicated by law to educational purposes and were insufficient to maintain the schools. *Kaill v.*

Board of Directors of St. Landry Parish, La., C. C. A., 194 Fed. 73.

⁵⁷ *Estill County, Ky. v. Embry*, C. C. A., 144 Fed. 913.

⁵⁸ *Brownsville v. Loague*, 129 U. S. 493, 505, 32 L. ed. 780, 784.

⁵⁹ *Moore v. Edgefield*, 32 Fed. 498.

⁶⁰ *U. S. v. City of Elizabeth*, 42 Fed. 45.

⁶¹ *Re Haight & Freese Co.*, C. C. A., 164 Fed. 686, where the adverse parties were relieved from costs because they merely appeared and moved to dismiss upon the ground that the order complained of had been vacated subsequent to the application and the writ had become unnecessary.

be reviewed by writ of error, not by appeal.⁶² The issue of a mandamus to compel a railway company to comply with the Interstate Commerce Law does not bar an independent application to the court or Interstate Commerce Commission, by a person similarly situated with the relator, to secure similar relief, although he contributed to the expense of the former application.⁶³

§ 460. **Writs of certiorari.** The writ of *certiorari* is a writ issued from a superior to an inferior court, ordering the latter to certify to the former certain proceedings before it.¹ At common-law, the writ was issued for two purposes; as an appellate proceeding for the re-examination of some action of an inferior tribunal; and as auxiliary process to enable a court to obtain further information in respect to some matter already before it for adjudication.² The writ can be issued from a Federal court other than the Supreme Court and perhaps the Circuit Court of Appeals, only for the latter purpose.³ The Supreme Court, and possibly the Circuit Court of Appeals may grant the writ of *certiorari*, when the circumstances imperatively demand that form of interposition at common law to correct excesses of jurisdiction and in furtherance of justice.⁴ It has been held that a Circuit Court of Appeals cannot issue a writ of *certiorari* to review an order of the Circuit Court, which

⁶² *Muhlenberg County v. Dyer*, C. C. A., 65 Fed. 634.

⁶³ *Merchants' Coal Co. v. Fairmont Coal Co.*, C. C. A., 160 Fed. 769.

§ 460. ¹ U. S. v. *Young*, 94 U. S. 258, 259, 24 L. ed. 153. See *Harris v. Barber*, 129 U. S. 366, 369, 32 L. ed. 697, 699.

² U. S. v. *Young*, 94 U. S. 258, 259, 24 L. ed. 153.

³ U. S. R. S., § 716; U. S. v. *Young*, 94 U. S. 258, 260, 24 L. ed. 153; *Ex parte Van Orden*, 3 Blatchf. 166; *Re Martin*, 5 Blatchf. 303; *Fowler v. Lindsey*, 3 Dall. 411, 1 L. ed. 658.

⁴ *Am. Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.

S. 372, 380, 37 L. ed. 486, 489; *Re Chetwood*, 165 U. S. 443, 461, 462, 41 L. ed. 782, 788; *Re Tampa Suburban R. R. Co.*, 168 U. S. 583, 42 L. ed. 589; *Whitney v. Dick*, 202 U. S. 132, 140, 50 L. ed. 963, 966. The power of the Supreme Court to issue writs of *certiorari* to the Circuit Court of Appeals is not limited to the provisions of the Evarts Act as subsequently re-enacted in the Judicial Code; but it may issue the writ under U. S. R. S., § 716, as re-enacted in Jud. Code, § 262, 36 St. at L. 1087. For a case where the suit was referred when sought to retain a bill of exceptions, see *Keerch v. U. S.*, C. C. A., 171 Fed. 365.

is not appealable;⁵ but that a District Court may similarly review proceedings pending before a United States commissioner without the writ of *habeas corpus*.⁶ The Supreme Court has no original jurisdiction to issue a writ of *certiorari* to examine the proceedings of a military commission.⁷ A District Court of the United States cannot thus bring before it the proceedings before a commissioner which it is not authorized to correct.⁸ Any court of the United States may issue a writ of *certiorari* as ancillary to a writ of *habeas corpus*,⁹ but its refusal so to do is not the subject of review.¹⁰ A District Court has power to issue the writ of *certiorari* to a State Court requiring the latter to make return of the record in a suit which has been removed from the latter to the former.¹¹ In case of a removal of a civil suit or criminal prosecution against a revenue officer of the United States, the clerk of the District Court must issue the writ for the same purpose.¹² If the record sent up on appeal or writ of error is incomplete, it may be corrected by *certiorari*.¹³ It has been said that proceedings that have taken place since the appeal or writ of error cannot be thus removed,¹⁴ but the Supreme Court has thus reviewed proceedings to punish a person for contempt in suing out a writ of error and an order forbidding the fur-

⁵ U. S. ex rel. Montana O. P. Co. v. Circuit Court, C. C. A., 126 Fed. 169.

⁶ U. S. v. Berry, 4 Fed. 779.

⁷ *Ex parte* Vallandigham, 1 Wall. 243, 17 L. ed. 589; *Re* Videl, 179 U. S. 126, 45 L. ed. 118. Nor, it seems, when an inferior tribunal has been abolished. *Ibid.*

⁸ *Ex parte* Van Orden, 3 Blatchf. 166. See *Patterson v. U. S.*, 2 Wheat. 221, 4 L. ed. 224.

⁹ *Ex parte* Burford, 3 Cranch, 448, 2 L. ed. 495; *Ex parte* Bollman, 4 Cranch, 75, 2 L. ed. 554; *Re* Martin, 5 Blatchf. 303; *Ex parte* Stupp, 12 Blatchf. 501. See *infra*, § 466.

¹⁰ *Hyde v. Shine*, 199 U. S. 62, 80, 50 L. ed. 90, 97.

¹¹ 18 St. at L. 470; 25 St. at L. 433; *infra*, § 551.

¹² *State v. Sullivan*, 50 Fed. 593. It has been held that the writ may be issued in vacation by the deputy clerk in the absence of his principal, and that its address to the United States marshal directing him to make known to the clerk of the State court the removal of the cause, and that such court is required to send a transcript of its record to the Circuit Court, does not invalidate the writ. *Ibid.*

¹³ *U. S. v. Gomez*, 1 Wall. 690, 17 L. ed. 677; *The Rio Grande*, 19 Wall. 178, 22 L. ed. 60; *Field v. Milton*, 3 Cranch, 514, 2 L. ed. 516.

¹⁴ *U. S. v. Young*, 94 U. S. 258, 24 L. ed. 153; *U. S. v. Adams*, 9 Wall. 661, 19 L. ed. 808.

ther prosecution of the writ of error.¹⁵ Perhaps, other contempt proceedings may be thus reviewed.¹⁶ An omission to make a finding cannot be thus corrected.¹⁷ The Supreme Court may by order require the Court of Claims to find a specific fact.¹⁸ An error in a bill of exceptions cannot be thus corrected; ¹⁹ although the judge who settled the same may himself do so.²⁰

The Supreme Court may order by *certiorari* or otherwise any case in which the decision of the Circuit Court of Appeals is made final "to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."²¹ Such a *certiorari* has been granted after the decision of the Circuit Court of Appeals.²² In an extraordinary case, it may issue to review the decision of the lower court upon an appeal from an interlocutory order.²³ This was done where one of the judges below was disqualified from sitting in the case.²⁴ "This branch of our jurisdiction should be exercised sparingly, and with great caution."²⁵ The inquiry upon such an application is "whether the matter is of sufficient importance in itself and sufficiently open to controversy" to justify the writ.²⁶ The Supreme Court has the same power to review decisions of the Court of Appeals of the District of Columbia.²⁷ It may be that the Supreme Court of the District

¹⁵ *Re Chetwood*, 165 U. S. 443, 453, 462, 41 L. ed. 782, 785, 788.

¹⁶ *Ibid.*

¹⁷ *U. S. v. Adams*, 9 Wall. 661, 19 L. ed. 808.

¹⁸ *U. S. v. Adams*, 9 Wall. 661, 19 L. ed. 808.

¹⁹ *Stimpson v. Westchester R. Co.*, 3 How. 553, 11 L. ed. 722. But see *Morgan v. Curtenius*, 19 How. 8, 15 L. ed. 576.

²⁰ *Stimpson v. Westchester R. Co.*, 3 How. 553, 11 L. ed. 722; *infra*, § 479.

²¹ *Jud. Code*, § 240, 36 St. at L. 1087, re-enacting 26 St. at L., § 6, p. 828. See *infra*, chapter on Writs of Error and Appeals.

²² *Lau Ow Bew, Petitioner*, 141

U. S. 583, 35 L. ed. 868, per Fuller, C. J.

²³ *Amer. Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 387, 388, 37 L. ed. 486, 492. But see *Re Tampa Suburban R. Co.*, 168 U. S. 583, 42 L. ed. 589.

²⁴ *Amer. Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 37 L. ed. 486.

²⁵ *Lau Ow Bew, Petitioner*, 141 U. S. 583, 589, 35 L. ed. 868, 870, per Fuller, C. J.

²⁶ *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587, 35 L. ed. 868, 869, per Fuller, C. J.

²⁷ *Code Dec.* 234; 29 St. at L. 692; *Winston v. U. S.*, 171 U. S. 690; s. c., 172 U. S. 303, 43 L. ed.

of Columbia has power to review by *certiorari* in a proper case a decision of a quasi-judicial nature made by an executive officer of the United States at Washington.²⁸

It seems that *certiorari* and mandamus cannot be joined in one writ,²⁹ but the petition may pray for these writs in the alternative.³⁰ Upon a petition for a writ of *certiorari* or mandamus, and a motion thereon argued on a notice, where the right to a writ of *certiorari* was doubtful, the Supreme Court directed the entry of a rule to show cause why the writ should not issue for a single purpose only.³¹ The grant of the writ depends on the discretion of the court.³² A preliminary inquiry into a jurisdictional fact may be directed by the court before passing on the application for the writ.³³ The issue of the writ operates as a supersedeas from the time of its service or formal notice of its issue until the court of review has finally disposed of the proceeding.³⁴ The return to the writ of *certiorari* should be by the clerk under his hand and the seal of the court.³⁵ The return need not be signed by the judge.³⁶ Where an appeal and a petition for a writ of *certiorari* were both pending before the court, and the appeal was dismissed, but the writ allowed; the record on appeal was treated as a return to the *certiorari*.³⁷ "A writ of *certiorari*, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up, after judgment, the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, is in the nature of a writ of error. Although the granting of the writ of *certiorari* rests in

456; *Sinclair v. District of Columbia*, 192 U. S. 16, 21, 48 L. ed. 322, 325.

²⁸ *Alexandria C. R. & Br. Co. v. District of Columbia*, 5 Mackey (D. C.), 376; *Wood v. District of Columbia*, 6 Mackey (D. C.), 142; *Foster & Abbott on the Federal Income Tax*, 238.

²⁹ *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. 602.

³⁰ *Amer. Const. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 37 L. ed. 486.

³¹ *Ibid.*

³² *Ex parte Hitz*, 111 U. S. 766, 28 L. ed. 592.

³³ *Re Baiz*, 135 U. S. 403, 431, 34 L. ed. 222, 231, per Fuller, C. J., citing *Ex parte Hitz*, 111 U. S. 766, 28 L. ed. 592.

³⁴ *Waskey v. Hammer*, C. C. A., 179 Fed. 273.

³⁵ *Fennemore v. U. S.*, 3 Dall. 357, 360, all note, 1 L. ed. 634, 635.

³⁶ *Stewart v. Ingle*, 9 Wheat. 526, 6 L. ed. 151.

³⁷ *Farrell v. O'Brien*, 199 U. S. 89, 50 L. ed. 101.

the discretion of the court, yet after the writ has been granted and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error."³⁸

§ 461. **Writs of habeas corpus in general.** The writ of *habeas corpus* is a high prerogative writ known to the common law, directing the production of a prisoner before a court or magistrate, the great object of which is the liberation of those who may be imprisoned without sufficient cause.¹ It is then termed a writ of *habeas corpus ad subjiciendum*.² There were also by the common law four other writs of *habeas corpus*: the *habeas corpus ad respondendum*; *ad satisfaciendum*; and *ad faciendum et recipiendum*, which removed a prisoner for debt from an inferior to a superior court for further proceedings in the same or a subsequent action;³ and the *habeas corpus ad prosequendum, testificandum, deliberandum*, which removed a prisoner for debt or crime in order to prosecute or testify in another court.⁴ The *habeas corpus cum causa* is used in the removal of criminal proceedings from the State courts to the Circuit Courts of the United States.⁵ The Supreme Court, and the District Courts of the United States have power to issue the writ of *habeas corpus*.⁶ A Circuit Court of Appeals has no such power, except, perhaps, as an incident to some case otherwise before it.⁷ Except in cases affecting ambassa-

³⁸ Gray, J., in *Harris v. Barber*, 129 U. S. 366, 369, 32 L. ed. 697, 699; *Amer. Const. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387, 37 L. ed. 486, 492.

§ 461. ¹*Ex parte* Watkins, 3 Pet. 193, 202, 7 L. ed. 650, 653.

² 3 Bl. Com. 131.

³ 3 Bl. Com. 129, 130; *Ex parte* Bollman and *Ex parte* Swartwout, 4 Cranch, 75, 97, 2 L. ed. 554, 562.

⁴ 3 Bl. Com. 130; *Ex parte* Bollman and *Ex parte* Swartwout, 4 Cranch, 75, 97, 2 L. ed. 554, 562; *Re* Leo Hem Bow, 47 Fed. 302; *Ex parte* Peck, 3 Blatchf. 123; U. S. v. Tilden, 10 Ben. 566; *supra*, § 343.

⁵ U. S. R. S., §§ 642, 643; Vir-
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ginia v. Paul, 148 U. S. 107, 37 L. ed. 386; *infra*, §§ 551, 552. In certain cases the clerk, and even, it has been held, his deputy can issue such a writ without an order of the court. *State v. Sullivan*, 50 Fed. 593.

⁶ U. S. R. S., § 751.

⁷ *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963. It has been held that a Circuit Court of Appeals has no jurisdiction to issue a writ of *habeas corpus* for service outside of the Circuit in which it sits, although its jurisdiction is invoked to thus review the decision of the District Court of a Territory within its circuit. *Re* Boles, 48 Fed. 75.

dors, other public ministers, or consuls, or possibly upon the application of a State, the Supreme Court can only issue the writ of *habeas corpus* for a review of the judicial decision of some inferior officer or court.⁸ Consequently, the Supreme Court cannot issue the writ to inquire into the legality of an arrest by a municipal police officer under a warrant issued by a State or municipal police judge.⁹ Any Justice or judge of any of those courts has power to issue a writ of *habeas corpus* for the purpose of an inquiry into the cause of a restraint of liberty within his jurisdiction.¹⁰ A Justice of the Supreme Court may grant the writ and hear argument on the return in any part of the United States.¹¹

No Federal court or judge has power to discharge by a writ of *habeas corpus* a prisoner in jail, unless such prisoner is in custody under or by color of the authority of the United States; or is committed for trial before some court of the United States; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or a law or treaty of the United States; or, being a revenue officer of the United States, is in custody on account of any act done or omitted under color of his office or under color of any revenue law; or, being a subject or citizen of a foreign State and domiciled therein, is in custody for an act done or omitted under an alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign State or under color thereof, the validity and effect of which depends upon the law of nations; or unless the writ is necessary to bring the prisoner into court to testify.¹² When the law permits the use of his

⁸ *Ex parte Hung Hang*, 108 U. S. 552, 27 L. ed. 811; *Ex parte Barry*, 2 How. 65, 11 L. ed. 181.

⁹ *Ex parte Hung Hang*, 108 U. S. 552, 27 L. ed. 811.

¹⁰ U. S. R. S., § 752.

¹¹ *Ex parte Clarke*, 100 U. S. 399, 401, 25 L. ed. 715, 716.

¹² U. S. R. S., §§ 753, 641, 643. See also 18 St. at L. 157.

For the history of this legisla-

tion, see *Re Burrus*, 136 U. S. 586, 589, 34 L. ed. 500, 501, per Miller, J.; and a note by Ex-Judge S. D. Thompson, 18 Fed. 70. It has been held that upon a petition for the writ of *habeas corpus* to release a United States marshal from custody under State process, the Federal court cannot inquire into the truth or justice of the charges against him, but is limited to the

deposition taken at the place of his incarceration the writ will ordinarily be denied.¹³ An officer of the United States may be released by the writ of *habeas corpus* when he has been indicted¹⁴ or convicted in a State court for a violation, in the discharge of his official functions, of a State statute which, so far as it applied to him, the State had no power to enact.¹⁵ Where a Federal court had enjoined the enforcement of a State statute regulating railroad rates, and in its order prescribed conditions for the sale of tickets at prices in excess of those fixed by the act; it was held that a ticket agent imprisoned for the sale of tickets at such prices in the manner prescribed by the order was in custody for an act done in obedience to an order of a court of the United States.¹⁶ A person imprisoned pursuant to a Territorial law is not in custody under, or by virtue of, the authority of the United States; and upon a writ of *habeas corpus* from a Federal court he is in no better position in this respect than a prisoner convicted by a State court for the violation of a State law.¹⁷ It has been held that an act done by an officer of the United States in the discharge of his official duty is done in pursuance of a law of the United States, although there is no express statutory authority for the same.¹⁸

question whether his alleged unlawful acts were done in pursuance of a law of the United States, *Re Marsh*, 51 Fed. 277; and that where deputy marshals are imprisoned by State authorities on a charge of murder, and for the killing of a person while resisting arrest on process from a Federal court, the latter court has jurisdiction to issue a writ of *habeas corpus*, and on the return to summarily hear evidence and finally dispose of the charges against such deputies. *Kelly v. Georgia*, 68 Fed. 652; *Re Laing*, 127 Fed. 213.

As to a soldier see *U. S. v. Lewis*, 200 U. S. 1, 50 L. ed. 343; *Ex parte Schlaffer*, 154 Fed. 921; *U. S. v. Lipsett*, 156 Fed. 65.

¹³ *Re Thaw*, 170 Fed. 288, October, 1906.

¹⁴ *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699; *Re Fair*, 100 Fed. 149.

¹⁵ *Re Waite*, 81 Fed. 359.

¹⁶ *Hunter v. Wood*, 209 U. S. 205, 52 L. ed. 747; affirming 155 Fed. 190.

¹⁷ *Connella v. Haskill*, C. C. A., 158 Fed. 285; *Low Wah Suey v. Backus*, 225 U. S. 460, 472, 56 L. ed. 1165, 1169.

¹⁸ *Re Neagle*, 135 U. S. 1, 34 L. ed. 55. See *U. S. ex rel. Drury v. Lewis*, 129 Fed. 823; *Re Leaken*, 137 Fed. 680.

The writ of *habeas corpus ad subjiciendum* cannot be issued in favor of a person unless he is actually restrained of his liberty, or is threatened with such restraint by a person with the present means of enforcing it.¹⁹ Mere moral duress is insufficient.²⁰ The validity of his conviction of crime cannot be thus tested by a person who has been pardoned and is not restrained of his liberty, although he has refused to accept such pardon.²¹ The writ will be denied, where the relator is at large on bail,²² where it appears that the applicant was surrendered by his bail, who acted in collusion with him, merely for the purpose of suing out the writ, his restraint being merely nominal;²³ when he has given an undertaking and is on the jail limits, which comprise an entire county;²⁴ and where it appears to the satisfaction of the court that the arrest was made by collusion with him, for the purpose of summarily testing a question of jurisdiction.²⁵ It has been held, however, that an appeal from an order denying the writ will not be dismissed because the petitioner, pending the appeal, was admitted to bail.²⁶

The writ of *habeas corpus* cannot be used to correct errors and irregularities, however flagrant, committed within the sphere of the authority of the court.²⁷ But a party imprisoned under

¹⁹ *Wales v. Whitney*, 114 U. S. 564, 572, 29 L. ed. 277.

²⁰ Thus, when the party seeking the writ was a naval officer in Washington, and the basis of his application was a letter from the Secretary of the Navy inclosing charges against him, together with a notice of the session of a court-martial to consider them, and concluding, "You are hereby placed under arrest, and you will confine yourself to the limits of Washington;" it was held that the petitioner was not under such restraint as to warrant the issue of the writ. *Wales v. Whitney*, 114 U. S. 564, 29 L. ed. 277.

²¹ *Re Callicot*, 8 Blatchf. 89.

²² *Sibray v. U. S. ex rel. Kupples*, C. C. A., 185 Fed. 401. See

Johnson v. Hoy, 227 U. S. 245, 57 L. ed. —.

²³ *Re Gow*, 139 Cal. 242, 73 Pac. 145. *Contra, Re Grice*, 79 Fed. 627.

²⁴ *People ex rel. Smith v. Biggart*, 25 App. Div. 20.

²⁵ *Ex parte Simon*, 208 U. S. 144, 52 L. ed. 429.

²⁶ *MacKenzie v. Barrett*, C. C. A., 141 Fed. 964.

²⁷ *Ex parte Terry*, 128 U. S. 289, 304, 32 L. ed. 405, 408; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Curtis*, 106 U. S. 371, 27 L. ed. 232; *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005; *Carter v. McClaughry*, 183 U. S. 365, 46 L. ed. 236; *U. S. v. Lair*, C. C. A., 195 Fed. 47. After judgment of conviction, a prisoner can-

an order made by a court of the United States, where it does not possess jurisdiction of either the person or the subject-matter, can review that order by such a writ.²⁸ It has been

not be released by a writ of *habeas corpus* upon the ground that the facts charged in the indictment do not constitute a crime within the meaning of the statute, *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Watkins*, 3 Pet. 193, 203, 7 L. ed. 650, 653; *Ex parte Yarbrough*, 110 U. S. 651, 654. But see *Re Mayfield*, 141 U. S. 107, 116, 35 L. ed. 635, 638; nor because of a slight lack of certainty in the indictment, *U. S. v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631; nor because of its duplicity in violation of a Territorial statute, *Connellá v. Haskell*, C. C. A., 158 Fed. 285; nor because an improper person sat on the grand jury which indicted him, *Ex parte Harding*, 120 U. S. 782, 30 L. ed. 824; *Kaizo v. Henry*, 211 U. S. 146, 53 L. ed. 125. See *Re Wilson*, 140 U. S. 575, 35 L. ed. 513; nor because of an error in sustaining or overruling a challenge to a juror, *Re Schneider*, No. 2, 148 U. S. 162, 37 L. ed. 406; *Ex parte Murray*, 66 Fed. 297; nor because the court improperly consolidated indictments, *De Bara v. U. S.*, C. C. A., 99 Fed. 942; *Howard v. U. S.*, C. C. A., 34 L.R.A. 509, 75 Fed. 986; nor because the court refused to assign him counsel and forced him to trial without sufficient time to prepare his defense, *Re McKnight*, 52 Fed. 799; nor because he was convicted upon insufficient evidence, *Re Harkell*, 52 Fed. 195; *Harlan v. McGourin*, 218 U. S. 442, 54 L. ed. 1101; nor for errors committed in the course of his trial,—even, it has been held, if these errors were infractions of the Consti-

tution, such as a refusal to sustain a plea of a former conviction for the same cause, *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005; *Ex parte Ulrich*, 43 Fed. 661; provided the infringement of the Constitution does not clearly appear upon the record, *Nielsen, Petitioner*, 131 U. S. 176, 33 L. ed. 118; nor because he was deaf and the testimony was not read to him through his ear trumpet, *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689; nor because he was refused compulsory process for the attendance of witnesses on his behalf, *Ex parte Harding*, 120 U. S. 782, 30 L. ed. 824. See *Re Wilson*, 140 U. S. 575, 35 L. ed. 513; nor because he was tried by a *de facto* State judge who had no legal title to the office, *Ex parte Ward*, 173 U. S. 452, 43 L. ed. 765; nor because he was convicted upon an information filed by a *de facto* State prosecutor who was not an officer *de jure*, *Re Humason*, 46 Fed. 388; nor because he was denied bail pending a writ of error in a State court, *Ibid*; nor because his petition for a removal was denied, *Ex parte Murray*, 66 Fed. 297. Nor, in bankruptcy, when committed for contempt before a referee, who has not certified to the District Court the disobedience of the relator. *U. S. v. Henkel*, 185 Fed. 553. Nor, it has been held, because the judge insisted on proceeding in the case after an affidavit of prejudice had been filed by the relator. *Ex parte Glasgow*, 195 Fed. 780.

²⁸ *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex*

held: that a prisoner will not be discharged by a court of the United States where he has been committed for contempt of a

parte Rowland, 104 U. S. 604, 26 L. ed. 861; *Re* Ayers, 123 U. S. 443, 485, 31 L. ed. 216, 223; *Re* Sawyer, 124 U. S. 200, 221, 31 L. ed. 402, 409; *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117; *Ex parte* Wilson, 114 U. S. 417, 29 L. ed. 89. This may be done when he is imprisoned after conviction by a court martial composed of officers in the regular army, which had no jurisdiction over him, a volunteer officer, although the objection was not raised at the trial. *McClaghry v. Deming*, 186 U. S. 49, 46 L. ed. 1049; affirming C. C. A., 113 Fed. 639, 650. The rule that, unless the contrary appears on the record, a cause is deemed to be without the jurisdiction of a District Court of the United States, has no application where the judgment of such a court is attacked collaterally by *habeas corpus*, *Cuddy*, Petitioner, 131 U. S. 280, 285, 33 L. ed. 154, 156; or otherwise, *Kempe's Lessee v. Kennedy*, 5 Cranch, 173, 185, 3 L. ed. 70, 73; *McCormick v. Sullivan*, 10 Wheat. 192, 199, 6 L. ed. 300, 302; *Galpin v. Page*, 18 Wall. 350, 365, 21 L. ed. 959, 962. A person imprisoned for contempt of an order of a Federal court, where the record shows no Federal jurisdiction in the suit where such order was made, is not for that reason entitled to discharge. *Re* Eaton, 51 Fed. 804; *Re* Lennon, 166 U. S. 548, 41 L. ed. 1110. *Cf.* *Re* Swan, 150 U. S. 637, 37 L. ed. 1207; *Re* Debs, 158 U. S. 564, 39 L. ed. 1092; *Re* Tyler, 149 U. S. 164, 37 L. ed. 689; *Toy Toy v. Hopkins*, 212 U. S. 542, 53 L. ed. 644. where the relator was an al-

lottee Indian, who objected to the jurisdiction of the Federal Court in a criminal case for that reason. Where the District Court erroneously decided that the offense was committed within its territorial jurisdiction, the convict cannot be discharged by *habeas corpus*, but is confined to a remedy by writ of error. *U. S. v. Lair*, C. C. A., 195 Fed. 47. It has been said that "if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction or because it is rendered under a law clearly unconstitutional, or because it is senseless, and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on *habeas corpus*." Mr. Justice Bradley in *U. S. v. Patterson*, 29 Fed. 775, 778. For a case holding a penal statute void for uncertainty, see *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457. A prisoner was discharged by a writ of *habeas corpus*, when he had been convicted in a court of the United States of a capital or infamous crime upon an information without an indictment. *Ex parte* Wilson, 114 U. S. 417, 29 L. ed. 89. A crime is considered infamous when punishable by imprisonment in a State prison or penitentiary with or without hard labor. *Ex parte* Wilson, 114 U. S. 417, 29 L. ed. 89; *Mackin v. U. S.*, 117 U. S. 348, 29 L. ed. 909. A prisoner may be discharged by *habeas corpus* when his conviction was in a court

of the United States, under an indictment, the body of which was amended by the court. *Ex parte* Bain, 121 U. S. 1, 30 L. ed. 849. Or under an indictment found by a grand jury unauthorized by law. But see *Re Wilson*, 140 U. S. 575, 35 L. ed. 513; *Ex parte* Harding, 120 U. S. 782, 30 L. ed. 824. Or under a statute, State or Federal, Medley, Petitioner, 134 U. S. 160, 33 L. ed. 835; *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699; *Re Waite*, 81 Fed. 359; *Re Fair*, 100 Fed. 149; which is repugnant to the Federal Constitution, *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte* Clarke, 100 U. S. 399, 25 L. ed. 715; *Ex parte* Curtis, 106 U. S. 371, 27 L. ed. 232. Or when he is held by any court, State or Federal, under process based upon a city ordinance, *Stockton Laundry Case*, 26 Fed. 611. State or Federal, which is repugnant to the Federal Constitution. "Though the law itself be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U. S. 356, 368, 30 L. ed. 220, 225; or a statute, *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte* Clarke, 100 U. S. 399, 25 L. ed. 715; *Ex parte* Curtis, 106 U. S. 371, 27 L. ed. 232; Medley, Petitioner, 134 U. S. 160, 33 L. ed. 835. But see *Ex parte* Crowder, 171 Fed. 250. Or when held by a State court under a charge of a crime exclusively within the jurisdiction of the Federal courts, *Re Loney*, 134 U. S. 372, 33 L. ed. 949;

Re Neagle, 135 U. S. 1, 34 L. ed. 55. *Of. Ex parte* Thompson, 1 Flippin, 507; *U. S. v. McClay*, 4 Cent. L. J. 255; or of a consul of a foreign country, *Ex parte* Anderson, 184 Fed. 114. A prisoner who is held in custody under a conviction of a Federal court may, after his pardon by the President of the United States, be released by *habeas corpus*, *Greathouse's Case*, 2 Abb. U. S. 382. Or, it seems, if in custody under sentence by a State or Federal court without a trial upon a plea of not guilty, *Re Converse*, 42 Fed. 217, 219 or it seems if, when indicted for one crime, he has pleaded guilty of another, and is held in custody under sentence for either. *Re Converse*, 42 Fed. 217, 219. But see *Re Maldonado*, 63 Fed. 825. Or under a judgment imposing a second penalty or different penalty from that previously imposed upon the same party for the same offense; although the former judgment was entered at the same term as the latter. *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Nielsen, Petitioner*, 131 U. S. 176, 33 L. ed. 118. Or under a judgment entered upon a conviction under several indictments, and imposing more than one punishment for a continuous offense. *Re Snow*, 120 U. S. 274, 30 L. ed. 658; *Munson v. McClaughry*, C. C. A., 198 Fed. 72. Where part of the sentence is unlawful, the petitioner will not be discharged until he has performed such part thereof as was legally imposed. *Re Swan*, 150 U. S. 637, 37 L. ed. 1207; *U. S. v. Pridgeon*, 153 U. S. 48, 63, 38 L. ed. 631, 637; *Ex parte Davis*, 112 Fed. 139. A prisoner will be thus discharged when confined under a judgment confining him in a penitentiary for a crime punishable by imprison-

State court in refusing to answer a question, his sole objection being that an answer will tend to criminate him;²⁹ nor when in a State prison under State process the only ground urged for his release being a dispute as to his identity with an escaped convict;³⁰ nor when under arrest for a contempt of a house of a State legislature which it is contended acted beyond its jurisdiction.³¹ In one case a Federal court granted a writ of *habeas corpus* because a State judge had exercised powers not given him by the State statute.³² It is doubtful whether a

ment in a jail only, *Re Bonner*, 151 U. S. 242, 38 L. ed. 149. *Cf. Re Burns*, 113 Fed. 987. But see *Re Terrill*, C. C. A., 144 Fed. 616; or even, it has been held, when sentenced to imprisonment without hard labor in a house of correction for a crime punishable by imprisonment with hard labor in the same place of confinement. *Re Christian*, 82 Fed. 199. Or for contempt of a court of the United States by disobedience to an order beyond the power of such court. *Ex parte Rowland*, 104 U. S. 604, 26 L. ed. 861; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117; *Re Ayres*, 123 U. S. 443, 31 L. ed. 216; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402; *Cuddy*, Petitioner, 131 U. S. 280, 33 L. ed. 154. Or for contempt of a court of the United States for an act not committed in the presence of the court, when the prisoner has been given no hearing. *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405. Or for disobedience to an order when the prisoner was not a party to the suit, nor named in the order, nor bound by the same. *Re Reese*, C. C. A., 107 Fed. 942. But see *supra*, § 341. Or for contempt of a Federal court because of his refusal to answer a question that might tend to criminate him. *Ex parte Irvine*, 74 Fed. 954. See *Re Counselman*

v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110; *Butler v. Fayerweather*, C. C. A., 91 Fed. 458. Or, before conviction, when held under a warrant issued by a United States judge or commissioner, under a complaint which does not state an offense under a statute of the United States; *Ex parte Bollman* and *Ex parte Swartwout*, 4 Cranch, 75, 2 L. ed. 554; *Ex parte Watkins*, 3 Pet. 201, 7 L. ed. 652; *Ex parte Jenkins*, 2 Wall. C. C. 521, 528; *Re Martin*, 5 Blatchf. 303. See *Ex parte Carll*, 106 U. S. 521, 27 L. ed. 288; but see *Price v. McCarty*, 89 Fed. 84; nor an offense of which such judge or commissioner has jurisdiction, *Re Perez*, 7 Blatchf. 34; *Re Cross*, 20 Fed. 824; U. S. *v. Rogers*, 23 Fed. 658; *Re Kelley*, 25 Fed. 268; even after indictment in another district to remove the prisoner to which the warrant is issued, *Re Terrell*, 51 Fed. 213; *Re Greene*, 52 Fed. 104.

²⁹ *Ex parte Munn*, 140 Fed. 782.

³⁰ *Ex parte Moebus*, 148 Fed. 39.

³¹ *Re Lawrence*, 80 Fed. 99; *Carter v. Caldwell*, 200 U. S. 293, 50 L. ed. 488; reversing 138 Fed. 487.

³² *Re Monroe*, 46 Fed. 52. But see *Re Duncan*, 139 U. S. 449, 35 L. ed. 219; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225; *Ex parte Brown*, 140 Fed. 460; *MacKenzie v.*

District Court has any authority to release by *habeas corpus* a prisoner held under the judgment of another court of the United States.³³ The District Courts of the United States may take jurisdiction by *habeas corpus* when there is no controversy arising under the Constitution or laws of the United States, but there is a difference of citizenship between the parties; but it has been held that they can then inquire into the legality of the imprisonment, but cannot exercise any discretion in the capacity of *paréns patriæ* as to the place or character of the confinement.³⁴ It has been held that the right to the custody of a child may be thus determined when the necessary difference of citizenship exists.³⁵ But not where a proceeding previously instituted is pending to determine the same question in a State court of competent jurisdiction.³⁶ An Indian may obtain the writ in a proper case.³⁷ A proceeding upon an application for the writ of *habeas corpus* cannot be removed from a State to a Federal court.³⁸ A State court has not the power to grant a writ of *habeas corpus* to a person held under color of authority from the United States.³⁹ When such a writ is issued by a State court, the person to whom it is directed should make a return stating that he holds the prisoner under the authority of the United States, but otherwise disregard the writ.⁴⁰ A State court may by a writ of *habeas corpus* examine the legality of the detention of a prisoner by a person appointed by the governor of a State in extradition proceedings.⁴¹

Barrett, C. C. A., 144 Fed. 954.
See *Re King*, 46 Fed. 905, 906-911,
per Hammond, J.

³³ *Re Eaton*, 51 Fed. 804, 806.

³⁴ *King v. McLean Asylum of
Mass. Gen. Hospital*, C. C. A., 26
L.R.A. 784, 64 Fed. 331.

³⁵ *Bennett v. Bennett, Deady*,
299; *U. S. v. Savage*, 91 Fed. 490.
See also *U. S. v. Green*, 3 Mason,
482; *U. S. ex rel. Wheeler v. Will-
iamson*, 4 Am. L. Reg. 5; *Re Bur-
rus*, 136 U. S. 586, 593, 597, 34 L.
ed. 500, 503, 514. *Contra, Ex parte*
Evert, 1 Bond, 197; *Re Barry*, 42
Fed. 113; s. c., 2 How. 65, 11 L.
ed. 181; cited in argument of coun-

sel in *Barry v. Mercein*, 5 How. 103,
104, 12 L. ed. 70, 71; *Clifford v.*
Williams, 131 Fed. 100.

³⁶ *Hoadley v. Chase*, 126 Fed. 818.

³⁷ *U. S. v. Cook*, 5 Dillon, 453.

³⁸ *Kurtz v. Moffitt*, 115 U. S. 487,
29 L. ed. 458.

³⁹ *Ableman v. Booth*, 21 How.
506, 16 L. ed. 169; *Tarble's Case*,
13 Wall. 397, 20 L. ed. 597.

⁴⁰ *Ableman v. Booth*, 21 How.
506, 16 L. ed. 169.

⁴¹ *Robb v. Connolly*, 111 U. S.
624, 28 L. ed. 542; *Roberts v.*
Reilly, 116 U. S. 80, 94, 29 L. ed.
544, 548.

§ 462. **Habeas corpus to review proceedings for extradition.** The writ of *habeas corpus* will issue to review proceedings for extradition to another State, or to another Federal district, or to a foreign country,¹ where the prisoner is held under a complaint or an indictment which does not charge an extraditable offense,³ or which is founded upon a State statute that is unconstitutional;³ or, in the case of interstate extradition, where it appears that the prisoner is not a fugitive from justice.⁴ Insanity, which arose subsequent to the commission of the offense, is no ground for the discharge;⁵ nor, it has been held, is a previous dismissal of criminal proceedings,⁶ or extradition proceedings,⁷ because of inability to procure the evidence, which was subsequently secured. In the case of extradition to a foreign country, in the absence of a special provision in the treaty to the contrary, the prisoner will be discharged where it appears that, at the time of the commission of the offense, he was not within the territorial jurisdiction of the country to which it is sought to extradite him;⁸ upon an application for his removal from one Federal District to another, where, upon the hearing before the commissioner, he was denied the right to offer evidence to rebut the facts charged in the indictment;⁹ or because he was denied some other right under the Constitution of the United States;¹⁰ or because, after extradition into the United States from a foreign country, he is held in violation of a treaty, under a different charge from that upon which the extradition was based.¹¹ The issue of the

§ 462. ¹ *Re Geissler*, D. C. N. Y., 1912, 196 Fed. 168, where the writer was counsel. In the case of an extradition to another Federal district, the writ will be dismissed when the indictment charges any offense within the jurisdiction of the court in which it was returned. *Ex parte Hyde*, 194 Fed. 207.

² *Re Ferez*, 7 Blatchf. 34; *Re Kelley*, 25 Fed. 268; *Ex parte Lane*, 6 Fed. 34; *Re Fitton*, 45 Fed. 471; but see *Ex parte Whitten*, 67 Fed. 230.

³ *Re Murphy*, 87 Fed. 549; but

see *Pearce v. Texas*, 155 U. S. 311, 39 L. ed. 164.

⁴ *People of Illinois ex rel. McNichols v. Pease*, 207 U. S. 100, 52 L. ed. 121.

⁵ *Ex parte Charlton*, 185 Fed. 880.

⁶ *Tiberg v. Warren*, C. C. A., 192 Fed. 458.

⁷ *Ex parte Schorer*, 195 Fed. 334.

⁸ *Re Taylor*, 118 Fed. 196.

⁹ *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689.

¹⁰ *Ibid.*

¹¹ *Cosgrove v. Winney*, 174 U. S.

warrant is *prima facie* evidence that the petitioner is a fugitive from justice.¹² By a *certiorari*, accompanying the writ of *habeas corpus*, the evidence can be brought before the court in such a case;¹³ but the court will not review the decision of a disputed question of fact;¹⁴ nor discharge a prisoner for errors in the admission or exclusion of evidence;¹⁵ nor for irregularities or errors not affecting the jurisdiction;¹⁶ nor because the complaint does not state the offense with the certainty and definiteness requisite for an indictment, unless it is so vague and definite in its terms as not sufficiently to apprise the person arrested of the charge, with respect of which he is to be examined.¹⁷ Nor because there is evidence of malice or an ulterior purpose on the part of the prosecuting witness.¹⁸ Nor because the prisoner was illegally brought within the United States and there regularly arrested.¹⁹ Nor because by fraud and connivance between the executive authorities of two States he was deprived of any opportunity to apply before his surrender to the courts of the State where he was arrested.²⁰ Nor, it seems, because the extradition was obtained through the use of false affidavits.²¹ Where, after the decision of the commissioner, the accused gave

64, 43 L. ed. 897; U. S. v. Ruenschel, 119 U. S. 407, 30 L. ed. 425. Cf. *Re Rowe*, C. C. A., 77 Fed. 161; *Re Miller*, 23 Fed. 32.

¹² *Tiberg v. Warren*, C. C. A., 192 Fed. 458.

¹³ U. S. v. Peckham, 143 Fed. 625, 627.

¹⁴ *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234; *Re Fowler*, 4 Fed. 303; *Re Byron*, 18 Fed. 722; *Re Roberts*, 24 Fed. 132; *Re Morris*, 40 Fed. 824; *Orteiza v. Jacobus*, 136 U. S. 330, 34 L. ed. 464; *Ex parte Bryant*, 167 U. S. 104, 42 L. ed. 94; *Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250; *Sternaman v. Peck*, C. C. A., 80 Fed. 883; *McNamara v. Henkel*, 226 U. S. 520, 57 L. ed. —.

¹⁵ *Benson v. McMahon*, 127 U. S. 457, 461, 32 L. ed. 223, 236; *Re*

Cortes, 136 U. S. 330, 34 L. ed. 464; such as a defect in the certification of depositions, *McNamara v. Henkel*, 226 U. S. 520, 57 L. ed. —.

¹⁶ *Savin*, Petitioner, 131 U. S. 267, 279, 33 L. ed. 150, 154; *Stevens v. Fuller*, 136 U. S. 468, 478, 34 L. ed. 461, 463; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689; *Re Adutt*, 55 Fed. 376.

¹⁷ *Re Herskovitz*, 136 Fed. 713.

¹⁸ *Re Herskovitz*, 136 Fed. 713.

¹⁹ *Ex parte Ker*, 18 Fed. 167; *Ker v. Illinois*, 119 U. S. 437, 30 L. ed. 421; *Mahon v. Justices*, 127 U. S. 700, 32 L. ed. 283; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934.

²⁰ *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148.

²¹ *Re Moore*, 75 Fed. 821; *Contra, Tennessee v. Jackson*, 1 L.R.A. 370, 36 Fed. 258.

bail to appear before a court in another district and there answer the charge against him, it was held that, upon his surrender, he could not question the validity of the decision: that a crime had been committed; that the defendant was the person charged with the commission thereof; and that there was reasonable cause and ground to believe him guilty.²² A prisoner was discharged, after the expiration of his sentence, by a Federal court, when, before such expiration, he had been delivered by the marshal to the marshal of another district and there tried, convicted and sentenced for another crime.²³ A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error.²⁴ If the commissioner has jurisdiction of the subject-matter and of the person, and the offense charged is within the terms of a treaty, and in arriving at a decision to hold the accused, the commissioner has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused; for the purposes of extradition such decision cannot be reviewed by any court, on *habeas corpus*, either originally or upon appeal.²⁵

§ 463. *Habeas corpus* for immigrants. The Act of August 18, 1894 provides: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officer, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."¹ The Act of September 13, 1888, which seems to be still in force, provides: "The collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise."² These statutes

²² U. S. v. Peckham, 143 Fed. 625, 628.

²³ *Re Jennings*, 118 Fed. 479.

²⁴ *Re Cortes*, 136 U. S. 330, 334, 34 L. ed. 464, 466; *Ex parte Rickelt*, 61 Fed. 203.

§ 463. 128 St. at L. 290, 3 Fed. St. Ann. 313, Comp. St. 1303.

² 25 St. at L. 476, § 12, 1 Fed.

St. Ann. 768, Comp. St. 712, Pierce's Fed. Code, § 4816. An Act to prohibit the coming of Chinese laborers to the United States, approved September 13, 1888, 25 St. at L. 476, 1 Fed. St. Ann. 768, Comp. St. 1312, Pierce's Fed. Code, §§ 4817, 4818, p. 870, provides: "§ 13. That any Chinese person, or

person of Chinese descent, found unlawfully in the United States or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district, or any officer having authority of a marshal under the provisions of this section. And in all such cases the person who brought or aided in bringing such person into the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers." § 14. That the preceding sections shall not apply to Chinese diplo-

matic or consular officers or their attendants, who shall be admitted to the United States under special instructions of the Treasury Department, without production of other evidence than that of personal identity." The practice upon such appeals is explained *infra*, Chapter on Writs of Error and Appeals. "An Act to prohibit the coming of Chinese persons into the United States, approved May 5, 1892," 27 St. at L. 25, 1 Fed. St. Ann. 762, Comp. St. 1319, Pierce's Fed. Code, §§ 4820, 4822, 4824, pp. 870, 871, provides: (§ 4820) "That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act." (§ 4821) "§ 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: Provided, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China." (§ 4822) "§ 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged

to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." (§ 4824) "§ 5. That after the passage of this act on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay." § 6, as amended November 3, 1893, 28 St. at L. 7, 1 Fed. St. Ann. 764, Comp. St. 1321, Pierce's Federal Code, § 4825, p. 871: "And it shall be the duty of all Chinese laborers within the limits of the United States who were entitled to remain in the United States before the passage of the act to which this is an amendment to apply to the collector of internal revenue of their respective districts within six months after the passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act and the act to which this is an amendment, or who, after the expiration of said six months, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it

shall be to order that he be deported from the United States, as provided in this act and in the act to which this is an amendment, unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of said United States judge, and by at least one credible witness other than Chinese, that he was a resident of the United States on the fifth of May, eighteen hundred and ninety-two; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court; and any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge; and that no proceedings for a violation of the provisions of said section six of said act of May fifth, eighteen hundred and ninety-two, as originally enacted, shall hereafter be instituted, and that all proceedings for said violation now pending, are hereby discontinued: Provided, That no Chinese person heretofore convicted in any court of the States or Territories or of the United States of a felony shall be permitted to register under the provisions of this act; but all such persons

who are now subject to deportation for failure or refusal to comply with the act to which this is an amendment shall be deported from the United States as in said act and in this act provided, upon any appropriate proceedings now pending or which may be hereafter instituted." "§ 2. . . . Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing. Such order of deportation shall be executed by the United States Marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States Marshal, and shall not be admitted to bail." Pierce's Fed. Code, § 4826, pp. 871, 872. An Act supplementary to the Act of 1892, just quoted, approved March 3, 1901, 31 St. at L. 1093, 1 Fed. St. Ann. 759, Comp. St. 1327, Pierce's Fed. Code, § 4832, pp. 872, 873, provides: "§ 3. That no warrant of arrest for violations of the Chinese-exclusion laws shall be issued by United States commissioners excepting upon the sworn com-

plaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

The rules promulgated by the Secretary of Commerce and Labor, under section 2, Acts of April 29, 1902, 32 St. at L. 176, as amended and re-enacted April 27, 1904, 33 St. at L. 394, provided: "Rule 3. Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating laws relating to the exclusion of Chinese. As the immigration act relates to aliens in general, the status of Chinese applying for admission must *first* be determined in accordance with the terms of that law and of the regulations drawn in pursuance thereof; then, if found admissible under such law and regulations, their status under the Chinese-exclusion laws and regulations shall be determined. In order to avoid inconvenience, delay, or annoyance to Chinese applicants arising through misunderstanding, and in the interest of good administration, examination under both sets of laws and regulations shall be made, in the order stated, only at the ports named and in the manner specified in Rule 1 hereof. Rule 4 (a) Upon the arrival of Chinese persons at any inspection port mentioned in Rule 1 they shall be ex-

are constitutional.³ The latter act deprives the court of the power to determine by the writ of *habeas corpus*, whether the

amined touching their right to admission, and those proving such right shall be promptly landed: *Provided*, That nothing contained in these regulations shall be construed to authorize the boarding of vessels of foreign navies arriving at ports of the United States for the purpose of enforcing the provisions of the Chinese-exclusion laws. (b) The said examination shall be separate and apart from the public, in the presence of government officials and such other witnesses only as the officer in charge shall designate, except that, during so much of the examination as relates exclusively to applicant's status under the Chinese-exclusion laws, he shall be allowed to have counsel and an interpreter present to observe, but not take part in, the examination. All witnesses appearing in behalf of any applicant shall be fully heard. Rule 5. (a) If upon the conclusion of the hearing the Chinese applicant is adjudged to be inadmissible, he shall be advised of his right to appeal to the Secretary of Commerce and Labor by a notice in the Chinese language. If the rejected applicant elects to appeal, written notice thereof must be served on the officer in charge within five days, exclusive on Sundays and legal holidays, after rejection. (b) Applicant's counsel shall be permitted, after notice of appeal has been duly filed, to examine and make copies of the evidence upon which the excluding decision is based. If there is a consular officer of China at the port where examination is held, he also shall be notified in writing

that the said Chinese applicant has been refused a landing, and shall be permitted to examine the record.

(c) The notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Commerce and Labor; and, within ten days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Secretary of Commerce and Labor by the officer in charge at the port of arrival, accompanied by his views thereon in writing. If, on appeal, evidence in addition to that brought out at the hearing is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report. (d) Additional time for the preparation of cases will be allowed only when, in the judgment of the officer in charge, a literal compliance herewith would occasion injustice to the appellant or the risk of defeat of the purposes of the law. The reasons for the extension of time shall in every instance be stated in writing and forwarded with the appeal.

³ U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040; criticised Harv. L. Rev., xix, 61; Fok Yung Yo v. U. S., 185 U. S. 296, 46 L. ed. 917. *Of*: Lee Gon Yung v. U. S., 185 U. S. 306, 46 L. ed. 921; Lee Lung v. Patterson, 186 U. S. 168, 46 L. ed. 1108; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. —.

Chinese immigrant belongs to one of the excluded classes.⁴ It has been held by a divided court that the courts have no power to determine, by the writ of *habeas corpus*, whether the Chinese excluded from admission is a citizen of the United States, and that the decision of administrative authorities upon the subject, when affirmed upon an appeal to the Secretary of Commerce and Labor, is conclusive.⁵ The general immigration law of February 20, 1907 provides: "In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor; but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this Act."⁶ It has been held that this section of the statute does not apply to the deportation of aliens, not Chinese, who have

⁴ U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040; U. S. v. Wong Choy, C. C. A., 108 Fed. 376. Cf. Li Sing v. U. S., 180 U. S. 486, 45 L. ed. 634; Lem Moon Sing v. U. S., 158 U. S. 538, 39 L. ed. 1082; *Re* Way Tai, 96 Fed. 484; *Re* Ota, 96 Fed. 487; *Re* Lea, 126 Fed. 234; U. S. ex rel. Turner v. Williams, 126 Fed. 253; U. S. v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917. For the former rule see *Ekiu v. U. S.*, 142 U. S. 651, 35 L. ed. 1146; *Fong Yue Ting v. U. S.*, 149 U. S. 698, 37 L. ed. 905.

⁵ U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040; criticised Harv. L. Rev., XIX, 61; *Wong Sang v. U. S.*, C. C. A., 144 Fed. 968; affirming 143 Fed. 147.

⁶ 34 St. at L. 898, § 25, Pierce's Fed. Code, § 4721. The decision of the appeal is none the less that of the Secretary because communicated by a telegram by the Assistant Secretary, which is later verified by a letter from the Department.

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Tang Tun v. Edsell, 223 U. S. 673, 682, 56 L. ed. 606. "An Act to regulate the immigration of aliens into the United States, approved February 20, 1907," 34 St. at L. 898, provides: § 2 (as amended March 26, 1910, 36 St. at L. 263, 3 Ann. Fed. St. Supp. p. 292) "That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical

defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude." See *U. S. v. Williams*, 203 Fed. 155; "polygamists, or persons who admit their belief in the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled; those who have been, within one year from the date of application for admission to the United States, deported as having been induced or solicited to migrate as above described; any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes and that said ticket or passage was not paid

for by any corporation, association, society, municipality, or foreign government, either directly or indirectly; all children under sixteen years of age unaccompanied by one or both of their parents, at the discretion of the Secretary of Commerce and Labor or under such regulations as he may from time to time prescribe: Provided, That nothing in this Act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude." See *U. S. v. Uhl*, 203 Fed. 152. "Provided further, That the provisions of this section relating to the payments for tickets or passage by any corporation, association, society, municipality, or foreign government shall not apply to the tickets or passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory: And provided further, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: And provided further, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants." See *Zakonaite v. Wolf*, 226 U. S. 272. For the sufficiency of a return that the petitioner was held under a decree of deportation as an alien prostitute, see *Stretton v. Rudy*, C. C. A., 176 Fed. 727. Ann. Fed. St. Supp. 1912, § 3 (as amended March 26, 1910, 36 St. at L. 264): ". . . Any alien who shall be found an inmate of or con-

connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who, shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. . . . This makes the time for deportation unlimited. U. S. v. Weis, 181 Fed. 860; U. S. v. Prentis, 182 Fed. 834; U. S. v. No. G. Lloyd S. S. Co., 185 Fed. 158. It has been held to apply to aliens within the United States before its enactment, provided that the offense was subsequently committed. U. S. v. Williams, 183 Fed. 904; Sira v. Berkshire, 185 Fed. 967; Ladoux v. Berkshire, 185 Fed. 971. This part of the statute has been held to be constitutional, (U. S. v. Williams, 183 Fed. 904; Cf. U. S. v. Weis, 181 Fed. 860) although that part of the former statute which made it a felony to harbor, in a house of prostitution, an alien woman within three years after her entry, was unconstitutional. Keller v. U. S., 213 U. S. 138, 29 Sup. Ct. 470, 53 L. ed. 737. "§ 10. That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a

loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act." It has been held: that this does not apply to aliens domiciled in the United States, and that they may be discharged by the writ of *habeas corpus* in case of their detention under the statute; and that such a resident alien has the right to appeal to the Secretary of Commerce and Labor from the decision of the board of special inquiry; and that, where the right of appeal is denied, he can procure the discharge of his children by the writ of *habeas corpus*. Rodgers v. U. S. ex rel. Cachigan, C. C. A., 157 Fed. 381. See U. S. v. Nakashima, C. C. A., 160 Fed. 842. § 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the 'immigrant fund' provided for in section one of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such

aliens respectively came: Provided, That pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States." Pierce's Fed. Code, § 4716, p. 849. "§ 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Commerce and Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section nineteen of this Act: Provided, That when in the opinion of the Secretary of Commerce and Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the ex-

pense incident to such service shall be defrayed in like manner." "§ 24. . . . Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence; and any person to whom such an oath has been administered under the provisions of this Act who shall knowingly or wilfully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes. The decision of any such officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry." "§ 25. That such boards of special inquiry shall be appointed by the commissioner of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner-General of Immigration, with the approval of the

Secretary of Commerce and Labor, shall from time to time designate as qualified to serve on such boards: Provided, That at ports where there are fewer than three immigrant inspectors, the Secretary of Commerce and Labor, upon the recommendation of the Commissioner-General of Immigration, may designate other United States officials for service on such board of special inquiry. Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearing before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings, and of all such testimony as may be produced before them; and the decision of any two members of a board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of Commerce and Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry: Provided, That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary

of Commerce and Labor; but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this Act."

§ 26. That any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Commerce and Labor upon the giving of a suitable and proper bond or undertaking, approved by said Secretary in such amount and containing such conditions as he may prescribe, to the people of the United States, holding the United States or any State, Territory, county, municipality, or district thereof harmless against such alien becoming a public charge. The admission of such alien shall be a consideration for the giving of such bond or undertaking. Suit may be brought thereon in the name and by the proper law officers either of the United States Government or of any State, Territory, district, county, or municipality in which such alien becomes a public charge."

"§ 31. That for the preservation of the peace and in order that arrests may be made for crimes under the laws of the States and Territories of the United States where the various immigrant stations are located, the officers in charge of such stations, as occasion may require, shall admit therein the proper State and municipal officers charged with the enforcement of such laws, and for the purpose of this section the jurisdiction of such officers and of the local courts shall extend over such stations."

"§ 36. That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may, from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this Act: Provided, That nothing contained in this section shall affect the power conferred by section thirty-two of this Act upon the Commissioner-General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico.

"§ 37. That whenever an alien shall have taken up his permanent residence in this country, and shall have filed his declaration of intention to become a citizen, and thereafter shall send for his wife, or minor children to join him, if said wife or any of said children shall be found to be affected with any contagious disorder, such wife or children shall be held, under such regulations as the Secretary of Commerce and Labor shall prescribe, until it shall be determined whether the disorder will be easily curable, or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable or that they can be permitted to land without danger to other persons, they shall, if otherwise admissible, thereupon be admitted."

"§ 38. That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition

to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his, or their official character, shall be permitted to enter the United States, or any territory or place subject to the jurisdiction thereof; This section shall be enforced by the Secretary of Commerce and Labor under such rules and regulations as he shall prescribe."

IMMIGRATION RULE 17.

SUBDIVISION 1. *Informing alien as to right of appeal.*—Where an appeal lies the alien shall be clearly informed of his right thereto and the fact that he has been so informed entered in the minutes.

SUBD. 2. *Appeals, how filed.*—An alien desiring to appeal may do so individually or through any society admitted to an immigrant station or through any relative or friend or through any person, including attorneys, permitted to practice before the immigration authorities. Where a valid appeal has been taken any further appeal shall be disregarded. Appeals purporting to be filed on behalf of an alien, but without his knowledge or consent previously obtained, may be ignored.

SUBD. 3. *Time for filing appeals.*—Appeals must be filed promptly. The immigration officer in charge may refuse to accept an appeal filed after the alien has been removed from an immigrant station for deportation, provided the alien had a reasonable opportunity to appeal before such removal. Any appeal filed more than 48 hours after the time of exclusion may be rejected by the immigration officer in charge in his discretion.

SUBD. 4. *Where no appeal lies.*—No appeal lies where the decision of a board of special inquiry, based

solely upon the certificate of the examining medical officer, rejects an alien because either (1) he is afflicted with tuberculosis or a loathsome or dangerous contagious disease, or (2) he is an idiot or an imbecile or an epileptic or is insane or feeble-minded, or (3) he has been insane within five years previously or has had two or more attacks of insanity at any time previously, or (4) he had any mental defect which may affect his ability to earn a living or render him likely to become a public charge.

SUBD. 5. *Where no appeal lies, but admission on bond may be requested.*—No appeal lies where a decision of a board of special inquiry, based solely upon the certificate of the examining medical officer, rejects an alien because he is suffering from some physical defect other than tuberculosis or a loathsome or dangerous contagious disease. But in such a case, notwithstanding exclusion, the alien may, if otherwise admissible, apply for admission on bond. (Sec. 26.) In a case of this character he shall, after exclusion, be notified of his right to apply for admission on bond and may file his application within the time mentioned in subdivision 3 hereof.

SUBD. 6. *Bonds under section 26.*—Where the landing of an alien under bond is authorized the bond shall, unless different instructions are given, be in the sum of \$500, and the alien shall not be released until it has been furnished and the immigration official in charge has satisfied himself of the responsibility of the sureties. If within a reasonable time after landing under bond is authorized a satisfactory bond is not furnished, instructions shall be requested of the Bureau.

SUBD. 7. *Forwarding appeal record.*—The complete appeal record shall be forwarded promptly to the Bureau with the views in writing of the immigration officer in charge.

IMMIGRATION RULE 22.

Arrest and Deportation on Warrant.

SUBDIVISION 1. Investigation and

report of cases.—Officers shall make thorough investigation of all cases where they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found to be.

SUBD. 2. *Application for warrant of arrest.*—The application must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained. The application must be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where landing occurred) or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained.

SUBD. 3. *Proof in cases which have become public charges from prior causes, physical or mental.*—The application in such cases must be accompanied by a medical certificate containing the following:

(a) An explicit statement that the alien is a public charge, where and how, and, if in an institution, the date of admission thereto.

(b) A full and accurate statement of the alien's disabilities, mental or physical; also whether or not a complete cure is possible; and if yes, when; and if not, whether partial cure may be expected; and to what extent the alien will thereafter be self-supporting. Also, in insane cases, recovered or apparently recovered from the attack, whether new attacks are to be expected.

(c) Whether or not the disabilities described constitute the sole causes why the alien is a public charge; any other causes to be stated.

(d) Whether the causes which

render the alien a public charge existed prior to landing or arose subsequent thereto, and in the former case the reasons in detail justifying such a conclusion.

Where the Bureau so directs, the application must be further accompanied by a complete copy of the clinical or general history of the case as shown by the hospital records, including the statements of relatives and friends. If deemed advisable by the local immigration officer, it may be further accompanied by the certificate of an officer of the Public Health and Marine-Hospital Service in relation to the alien's condition.

SUBD. 4. Execution of warrant of arrest and hearing thereon.—(a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. In the discretion of the immigration officer in charge he may, pending determination of his case, be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that an alien confined in an institution shall, in the absence of special instructions, not be removed therefrom until a warrant of deportation has been issued.

(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompany-

ing brief. If during the hearing new facts are proved which constitute a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to such facts and reason, and he shall be given an opportunity to show cause why he should not be deported therefor.

(c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue.

(d) The record of the hearing accorded an alien who is suffering from any physical or mental disability shall be supplemented by a medical certificate showing (1) whether such alien is in condition to be deported without danger to life; (2) whether he will require special care and attention on the ocean voyage.

SUBD. 5. Release under bond.—The amount of any bond under which an arrested alien may be released shall be \$500, unless different instructions are given by the Department, which also shall, prior to release, approve the bond, except that the approval of the local United States attorney as to form and execution shall be sufficient where, to avoid delay, the immigration officer in charge deems it proper to submit the bond to such attorney for approval. Aliens who are unable to give bail shall be held in jail only in case no other secure place of detention can be found.

SUBD. 6. Warrant for deportation and deportation thereon.—Upon receipt of a warrant of deportation, the alien shall be taken into the custody of the immigration officials (if this has not already occurred) for deportation. Thereafter he shall be deported, previous notice of deportation being given the steamship company concerned, together with a brief description of the alien and any other appropriate data, including the cause of deportation, physical and mental condition, and destination.

been already admitted into the United States.⁷ In such cases, the court upon *habeas corpus* may determine whether the petitioner belongs to one of the classes subject to deportation,⁸ and,

IMMIGRATION RULE 25.

Holding Aliens as Witnesses.

Where the deportation of an alien is stayed so that he may testify concerning violations of the immigration law, the case must be promptly reported to the United States attorney with request that if he decides to institute proceedings he either take the deposition of the alien or secure a court order for his detention as a witness. In either event the Bureau shall be promptly informed as to any action taken hereunder.

IMMIGRATION RULE 31.

Attorneys and Other Representatives.

SUBDIVISION 1. Admission to practice.—Every person desiring to appear on behalf of an alien may be required to submit proof to show that he is a person of good character and reputation, and if such proof fails to satisfy the immigration officer in charge, he shall forward it to the Bureau for determination as to whether or not such person shall be permitted to practice before the immigration authorities. Any unseemly or unprofessional conduct on the part of an attorney shall be similarly reported to the Bureau.

SUBD. 2. Change of representative.—Pending an appeal or warrant proceedings no alien shall change his representative except upon such reasonable terms as the immigration officer in charge shall prescribe nor shall such change be permitted to delay the conduct or deposition of the matter pending.

SUBD. 3. Fees of attorneys, etc.—Attorneys and persons appearing in behalf of aliens applying for admission shall not charge a sum exceeding \$10 in each case unless the immigration officer in charge shall in writing allow an additional com-

pensation. A family or party of aliens traveling together shall be regarded as constituting a single case within the meaning hereof. If an attorney deems himself entitled to a larger fee or if it is necessary for him to incur expenses, he shall report the facts to the immigration officer in charge when applying for the privilege of charging an additional fee or claiming reimbursement for expenses. If permission be granted, he shall collect such additional fee and expenses only through the immigration officer in charge.

SUBD. 4. Disbarment of attorneys, etc.—Anyone charging an alien a fee prior to his detention, or charging or receiving from an alien or his relatives or friends a fee, gift, or compensation for his services in excess of the above rate except in the manner provided, or who shall deprive an alien of any part of his chattels or effects in lieu of or as security for said fee, will, if unable after a fair opportunity to answer the complaint, be disbarred by the Department (to which a full report of the matter shall be made) from practicing at any immigration station of the United States.

⁷ Redfern v. Halpert, C. C. A., 186 Fed. 150; *Ex parte* Koerner, 176 Fed. 478; Botis v. Davies, 173 Fed. 996. *Contra*, Prentis v. Di Giacomo, C. C. A., 192 Fed. 467; Prentis v. Stathakos, C. C. A., 192 Fed. 469.

⁸ *Ibid*. Where the claim of citizenship was not raised before the Commissioner of Immigration, nor certified to, nor passed upon by the Secretary of Commerce and Labor, it was held that the decision was not final, and the prisoner was discharged. *U. S. ex rel. Fisher v. Rodgers*, 144 Fed. 711.

it has been said; may inquire into the whole case.⁹ The court may inquire by *habeas corpus* to determine whether there is sufficient evidence to establish that the person sought to be excluded or deported is in fact an alien.¹⁰ It has been held that in all cases, except where the immigrant is Chinese, the court may upon *habeas corpus* inquire into the fact whether there was any evidence before the administrative officers to show that he is one of the excluded classes,¹¹ but not to determine the weight of evidence.¹² *Habeas corpus* will also lie where a right of appeal to the Secretary of Commerce and Labor has been denied;¹³ but the writ will not issue to review the decision of the examining officers when there has been no such appeal.¹³ It has been held that the writ may issue pending such an appeal where, on the admitted facts, there is no warrant of law for the deportation or restraint of liberty.¹⁵ Otherwise, it seems that in no case can the finding of the Secretary be reviewed,¹⁶

⁹ *Redfern v. Halpert*, C. C. A., 186 Fed. 150. *Contra*, *Prentis v. Di Giacomo*, C. C. A., 192 Fed. 467; *Prentis v. Stathakes*, C. C. A., 192 Fed. 469.

¹⁰ *Gonzales v. Williams*, 192 U. S. 1, 48 L. ed. 317. But see *De Bruler v. Gallo*, C. C. A., 184 Fed. 566.

¹¹ *Gonzales v. Williams*, 192 U. S. 1, 48 L. ed. 317; *Rodgers v. United States ex rel. Buchsbaum*, C. C. A., 152 Fed. 346; *Sprung v. Morton*, 182 Fed. 330; *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. ed. —; *Ex parte Peterson*, 166 Fed. 536; U. S. ex rel. *Rosen v. Williams*, C. C. A., 200 Fed. 538.

¹² *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. ed. —; U. S. ex rel. *Rosen v. Williams*, C. C. A., 200 Fed. 538.

¹³ *Rodgers v. United States ex rel. Cachigan*, C. C. A., 157 Fed. 381. The exclusion from the record of material testimony taken upon the hearing is, in substance, a denial of the right of appeal and entitles the appellant to obtain a

hearing by *habeas corpus*. *Re Can Pon*, C. C. A., 168 Fed. 479. The submission to the Secretary of additional testimony as to the qualifications of the alien, taken pending an appeal, does not affect the validity of his decision, provided that the immigrant had an opportunity for cross-examination. U. S. ex rel. *Falce v. Williams*, 191 Fed. 1001.

¹⁴ *Mok Chung v. U. S.*, C. C. A., 133 Fed. 166; *Ex parte Wong Sang*, 143 Fed. 147; *aff'd Wong Sang v. U. S.*, 144 Fed. 968.

¹⁵ *Ex parte Koerner*, 176 Fed. 478.

¹⁶ *Tang Tun v. Edsell*, Chinese Inspector, 223 U. S. 673, 56 L. ed. 606; *Low Wah Suey v. Backus*, 225 U. S. 480, 56 L. ed. 1165; *Ex parte Watchorn*, 160 Fed. 1014; *Ex parte Lee Kow*, 161 Fed. 592; *Ex parte Chow Chok*, 161 Fed. 627; *Re Tang Tun*, C. C. A., 168 Fed. 488; *Ex parte Long Lock*, 173 Fed. 208; *Ex parte Chin Hen Lock*, 174 Fed. 282; *United States ex rel. Boulbol v. Fielding*, 175 Fed. 290; *United*

except to see whether the proceedings were in conformity with the statute,¹⁷ and the immigrant had a fair hearing.¹⁸ The petition for the writ should set forth the proceedings before the

States, ex rel. Chanin v. Williams, C. C. A., 177 Fed. 689; Haw Moy v. North, C. C. A., 183 Fed. 89; United States ex rel. Canfora v. Williams, 186 Fed. 354; *Ex parte* Avakian, 188 Fed. 688; United States ex rel. Glavas v. Williams, 190 Fed. 686; United States v. Rodgers, C. C. A., 191 Fed. 970; Frick v. Lewis, C. C. A., 195 Fed. 693; Prentis v. Cosmas, C. C. A., 196 Fed. 372; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. —; U. S. ex rel. Rosen v. Williams, C. C. A., 200 Fed. 538.

A preliminary examination of an alien without counsel is permitted by the statute. *Low Wah Suey v. Backus*, 225 U. S. 460, 56 L. ed. 1165. See *De Bruler v. Gallo*, C. C. A., 184 Fed. 567. The immigrant has no right to compulsory process from any executive officer to compel the attendance of witnesses on his behalf. *Low Wah Suey v. Backus*, 225 U. S. 460, 56 L. ed. 1165. The charge that an admission of alienage was obtained through plying with liquor and threats, was held to be a question of fact for the executive authorities, whose decision was not reviewed by the court. U. S. ex rel. Glavas v. Williams, 190 Fed. 686. It is no objection to an order of deportation that the alien is charged with "having entered the United States without inspection," instead of "being lawfully within the United States." *Ex parte* Hamaguchi, 161 Fed. 185.

¹⁷ The warrant of arrest must contain a statement of the facts showing the inadmissibility of the alien and not mere conclusions of law. U. S. v. Sibray, 178 Fed. 144;

U. S. ex rel. Huber v. Sibray, 178 Fed. 150. The mere statement that the alien entered the United States for an immoral purpose is not sufficiently specific. *Ibid.* The alien cannot be excluded or deported upon ground different from those stated in the warrant. *Davies v. Manolis*, C. C. A., 179 Fed. 818. *Cf.* U. S. ex rel. Huber v. Sibray, 178 Fed. 150. Where the petition alleged that the immigrants were illegally detained and the return alleged no facts, but simply the conclusion of law that the respondent had the right to detain the petitioners; it was held to be insufficient. *Stretton v. Shaheen*, C. C. A., 176 Fed. 735. Where an alien not entitled to enter the United States was held under an illegal warrant directing his deportation to a country other than that whence he came, he was released upon habeas corpus. U. S. v. Redfern, 186 Fed. 603.

¹⁸ *Chin Yow v. U. S.* 208 U. S. 8, 52 L. ed. 369; *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. ed. —; U. S. ex rel. Rosen v. Williams, C. C. A., 200 Fed. 538; *Re Tang Tun*, 161 Fed. 618; *Davies v. Manolis*, C. C. A., 179 Fed. 818; *Ex parte* Wing You, C. C. A., 190 Fed. 294. The alien, before his deportation, is entitled to inspect the warrant; also, it seems, the papers upon which the same was issued. *Ex parte* Avakian, 188 Fed. 688. An alien is not entitled to be represented by counsel before a special board of inquiry. (U. S. ex rel. Buccine v. Williams, 190 Fed. 897; U. S. ex rel. Falco v. Williams, 191 Fed. 1001), unless he claims to be a citizen of the United

administrative officer.¹⁹ If the petitioner is unable to annex a complete copy of the record, he must state the reasons of his inability and annex as complete a copy or abstract as it is within his power to furnish.²⁰ Where it is claimed that the evidence was insufficient or illegal, the evidence should be annexed to the petition or set forth in the same,²¹ and the petition should contain an averment that this is all the evidence upon the point.²² Otherwise, the evidence will be presumed to be sufficient.²³ It is the safer practice to have the evidence certified.²⁴ If the petitioner was arrested under a warrant, a copy of the same must be thereto annexed or substantially stated therein,²⁵ unless that is impracticable, when sufficient cause for its omission must be set forth.²⁶ The warrant should state the country from which the petitioner came and to which he is to be deported, and should also state facts showing under what statute the proceedings were instituted;²⁷ but where the warrant is defective, the order should direct that the prisoner be not discharged until a reasonable time thereafter, without prejudice to the right of the United States to issue a sufficient warrant and detain and deport the petitioner there-

States (*Re Tang Tun*, 161 Fed. 618), or in deportation proceedings (*Ex parte Loung June*, 160 Fed. 251; *Bosny v. Williams*, 185 Fed. 598.) Where the aliens were intimidated and thus persuaded not to exercise their right to be represented by counsel, the court discharged them. *U. S. ex rel. Bosny v. Williams*, 185 Fed. 598. The officers must take the testimony or such witnesses as the applicant produces, provided that it is pertinent. *Re Can Pon*, C. C., 168 Fed. 479. The examination of witnesses in the absence of the alien is a fatal defect in the proceedings. *U. S. ex rel. Huber v. Sibray*, 178 Fed. 150; *U. S. v. Sibray*, 178 Fed. 144. So is a refusal to allow him the right to cross-examine. *U. S. v. Sibray*, 178 Fed. 144. The fact that a case is quickly decided, for example, two days after its submission to the

Secretary, does not show a denial of due process of law. *Tang Tun v. Edsell*, 223 U. S. 673, 682, 56 L. ed. 606, 610.

¹⁹ *Low Wah Suey v. Backus*, 225 U. S. 460, 472, 56 L. ed. 1165, 1169; *Haw Moy v. North*, C. C. A., 183 Fed. 89.

²⁰ *Low Wah Suey v. Backus*, 225 U. S. 460, 56 L. ed. 1165.

²¹ *Ex parte Yabucanin*, 199 Fed. 365.

²² See §. 479, *infra*.

²³ *Ex parte Yabucanin*, 199 Fed. 365.

²⁴ *Ibid*.

²⁵ *Haw Moy v. North*, C. C. A., 183 Fed. 89. See *Low Wah Suey v. Backus*, 225 U. S. 460, 56 L. ed. 1165.

²⁶ *Low Wah Suey v. Backus*, 225 U. S. 460, 56 L. ed. 1165.

²⁷ *Ex parte Yabucanin*, 199 Fed. 365.

upon.²⁸ If the petitioner is discharged, an appeal may be taken by the United States to the proper court of review, which is usually the Circuit Court of Appeals.²⁹ If the writ is denied or vacated, the petitioner has the right to appeal.³⁰ The court of review has the right to decide anew all questions of fact that were open to consideration by the court of original jurisdiction.³¹ It seems that pending the decision upon a writ of *habeas corpus*, except perhaps in Chinese cases, the petitioner may be released on bail.³² If the relator is at large on bail at the time of the application for the writ, it will be denied.³³

§ 464. Discharge of soldiers from the army by the writ of *habeas corpus*. A minor, under the age of eighteen, who has not deserted, may, upon the petition of his father,¹ or, in case of the father's death, upon the petition of his mother,² or guardian, or person to whom the parents have given the right to the minor's custody,³ be discharged from the army or navy by means of the writ of *habeas corpus*, because his enlistment was unlawfully made without the consent of his parents or guardian,⁴ but not, it is held, when he is under arrest upon the charge of fraudulent enlistment by misrepresentation of his age,⁵ or of desertion,⁶ before or after⁷ conviction. When the parent or guardian does not apply for relief, a minor cannot be discharged while he is under arrest, either before,⁸ or after

²⁸ *Ex parte Yabucanin*, 199 Fed. 365, holding that ten days is sufficient.

²⁹ *Tang Tun v. Edsell*, 223 U. S. 673, 682, 56 L. ed. 606, 610.

³⁰ *Wong Heung v. Elliott*, C. C. A., 179 Fed. 110.

³¹ *Ibid.*

³² This was done in *Re Crawford*, 165 Fed. 830; U. S. ex rel. *Castro v. Williams*, S. D. New York, February, 1913.

³³ *Sibray v. U. S. ex rel. Kupples*, C. C. A., 185 Fed. 401.

§ 464. ¹ *Re Carver*, 103 Fed. 624; *Ex parte Reaves*, 121 Fed. 848; *Ex parte Houghton*, 129 Fed. 239.

² *Doane v. Burkman*, C. C. A., 190 Fed. 541.

³ *Ibid.*; U. S. ex rel. *Hendricks v.*

Pendleton, 167 Fed. 690; *Ex parte Hubbard*, 182 Fed. 76.

⁴ See U. S. R. S., § 1117.

⁵ *Re Miller*, C. C. A., 114 Fed. 838. *Contra*, *Re Carver*, 103 Fed. 624.

⁶ *Re Kaufman*, 41 Fed. 876; *Re Miller*, C. C. A., 114 Fed. 838; U. S. v. *Reaves*, C. C. A., 126 Fed. 127, 60 C. C. A. 675; reversing 121 Fed. 848; *Dillingham v. Booker*, C. C. A., 18 L.R.A. (N.S.) 956, 163 Fed. 696; *McConologue's Case*, 107 Mass. 154, 170; *Re Morrissey*, 137 U. S. 157, 34 L. ed. 644. But see *Ex parte Bakley*, 148 Fed. 56.

⁷ *Re Cosenow*, 37 Fed. 668; *Re Carver*, 142 Fed. 623.

⁸ *Solomon v. Davenport*, C. C. A., 87 Fed. 318.

conviction by a court marshal,⁹ for desertion because he enlisted without their consent; nor can a deserter, after conviction, be discharged upon the ground that, when he voluntarily enlisted, he was above the legal age.¹⁰ Where there was no proof of the enlistment by the prisoner, while a minor, without his parents' consent, except by an *ex parte* affidavit, attached to the petition; and the return, alleging due enlistment for an unexpired term, desertion, surrender, commitment and confinement under pending charges for the desertion was not traversed; it was held that the writ was properly denied.¹¹ Documentary evidence of the date of birth, by a certified copy of such public record as there may be upon the subject, should usually be furnished.¹²

§ 465. Suspension of writ of habeas corpus. The Constitution provides that "the Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."¹ During the civil war the question as to the department of the government in which the right of suspension rests was much debated, but never authoritatively decided. President Lincoln claimed that he had the authority to suspend the writ, and many arrests were made in accordance with this ruling.² Subsequently Con-

⁹ *Re Morrissey*, 137 U. S. 157, 34 L. ed. 644; *Re Cosenow*, 37 Fed. 668; *Re Spencer*, 40 Fed. 149.

¹⁰ *Re Grimley*, 137 U. S. 147, 34 L. ed. 644; *Ex parte Hubbard*, 182 Fed. 76.

¹¹ *Moore v. U. S.*, C. C. A., 159 Fed. 701.

¹² *Re Carver*, 103 Fed. 624.

§ 465. ¹ Const., art. 1, § 9.

² See, for a highly colored enumeration of such arrests, *The American Bastille*, by John A. Marshall, Phila. In 1871 Governor Holden of North Carolina was removed by impeachment for doing this. *Foster's Commentaries on the Constitution*, vol. I, p. 676. According to General Schuyler Hamilton, during 1861 the filing of the return to a writ of *habeas corpus*,

issued by Mr. Justice Wayne of the Supreme Court of the United States, in the matter of a private in Colonel Willett Gorman's regiment of Minnesota volunteers, was prevented by the colonel's taking the clerk of the court out of town under guard by the latter's consent, after the clerk had given orders that no papers should be filed until he had enforced them. Subsequently, the Justice quashed the writ, deciding in favor of the Government the question involved, holding that the President had the right under the Constitution to call out volunteers as militia. The writ was locked in the safe of the State Department, but has since disappeared.—*N. Y. World*, February, 1891. On the morning appointed

gress by statute suspended the writ, and sought to validate the arrests previously made.³ Mr. Justice Miller inclined to the view that so much of the statute as validated an arrest previously made was constitutional, and deprived the party arrested of the right to damages for false imprisonment.⁴ A number of pamphleteers, amongst them Horace Binney, defended the position of the President. Other pamphleteers, amongst them Ex-Judge Benjamin R. Curtis, claimed that the writ could only be suspended by Congress. Chief Justice Taney held this, in an opinion upon an application for the writ of *habeas corpus*, but his decision was not obeyed.⁵ Judge Hall held that the right to suspend the writ was vested in the courts, and that a necessity for the suspension had arisen when the arrest reviewed by him was made.⁶ Judge Smalley held that the War Department had no power to suspend the writ.⁷ When the application for the writ was denied, because the writ had

for the execution of Mrs. Surratt for complicity in the assassination of President Lincoln, Judge Wylie of the Supreme Court of the District of Columbia issued a writ of *habeas corpus* directed to the commander of the military district, directing him to produce Mrs. Surratt in court at ten o'clock on that morning, and show legal cause why she was held in custody. The President issued the following order: "Executive Office, July 7, 1865, 11 o'clock a. m. To Major-Gen. W. S. Hancock, commanding, &c.: I, Andrew Johnson, President of the United States, do hereby declare that the writ of *habeas corpus* has been heretofore suspended in such cases as this, and I do hereby especially suspend this writ and direct that you proceed to execute the order heretofore given upon the judgment of the military commission, and you will give this order in return to this writ. Andrew Johnson, President." Judge Wylie acquiesced in the suspension of the

writ, and he declined to take any further proceedings, and Mrs. Surratt was executed.

³ 12 St. at L. 755; 14 St. at L. 482. See the proclamation of President Lincoln, 14 St. at L. 734. A bill to suspend the writ of *habeas corpus* passed the Senate January 23, 1807, and was defeated in the House by John Randolph of Roanoke on January 26, 1807. 8 Benton's Abr. 414. See also *Re Boyle* (Idaho, 1899), 57 Pac. 706; and Foster's Commentaries on the Constitution, vol. II.

⁴ *Re Murphy*, 1 Woolw. 141. To the same effect is *McCall v. McDowell*, 1 Abb. U. S. 212.

⁵ *Ex parte Merryman*, Taney, 246. *Contra, Ex parte Field*, 5 Blatchf. 63; *Ex parte Vallandigham*, U. S. D. C., D. Ohio, per Leavitt, J.

⁶ Judge Hall, in the Matter of the Petition of Oliver P. Thomas, in behalf of Joel McKee, U. S. D. C., Judicial District of Colorado, Oct. 14, 1861.

⁷ *Ex parte Field*, 5 Blatchf. 63.

been suspended, and thereafter, before the allowance of an appeal, the suspension was revoked, the Supreme Court refused to decide the validity of the suspension, since the question had ceased to be of any practical importance.⁸ "The suspension of the privilege of the writ does not bar the writ. The writ issues as a matter of course, and on the return made the court decide whether the party applying is denied the right of proceeding any further with it."⁹

⁸ *Fisher v. Baker*, 203 U. S. 174, 51 L. ed. 142.

⁹ *Ex parte Milligan*, 4 Wall. 2, 131; 18 L. ed. 281, 298. On the subject treated in this section, see *Ex parte Merryman*, Taney, 246; *Re Benedict*, Hall, J., 4 West. L. Month. 449; *McCall v. McDowell*, 1 Abb. U. S. 212; *Ex parte McQuillon*, 3 West. L. Month. 440; s. c., 9 Pitts. L. J. 29; *Griffin v. Wilcox*, 21 Ind. 370; *Kemp v. State*, 16 Wis. 359; *Re Dunn*, 25 How. Pr. (N. Y.) 467; *Ex parte Field*, 5 Blatchf. 63; *Ex parte Vallandigham*, U. S. D. C., D. Ohio, by Leavitt, J. This judge had so much doubt about the correctness of his decision that, as his grandson informed the writer, he prayed to Heaven for guidance before he made it. *Re Fagan*, 2 Spr. 91; *Commonwealth v. Frink*, 4 Am. Law Reg. (N. S.) 700, Philadelphia. 1882. Opinion of Attorney-General Cushing on Martial Law, 8 Op. A. G. 365; *Ex parte Milligan*, 4 Wall. 2, 131. Opinion of Attorney-General Bates on the Suspension of the Writ of *Habeas Corpus*, 10 Op. A. G. 74. *Habeas Corpus* and Martial Law. A review of the opinion of Chief Justice Taney in the Case of John Merryman. By Joel Parker, 1861. Judge Parker here argues that in time of war, whether foreign or domestic, there may be justifiable refusals to obey the com-

mand of the writ, without any act of Congress, or any order or authorization of the President, or any State legislation for that purpose. This, he says, does not arise from the President's power to suspend the writ, which he cannot constitutionally do, but from the co-ordinate jurisdiction of the military authorities. The Privilege of the Writ of *Habeas Corpus* under the Constitution. By Horace Binney. Second edition, Philadelphia; C. Sherman & Son, 1862. In this pamphlet Mr. Binney argues that there is nothing in the constitutional clause which, either directly or by any fair or reasonable implication, gives or confines the authority to suspend the writ to Congress, or takes it from the executive (p. 31) and he makes an elaborate reply to Chief Justice Taney's opinion in Merryman's case, *supra*. A "Second Part" to the same pamphlet was published by Mr. Binney, in the same year, by John Campbell of Philadelphia. The object of this publication was to "confront a doctrine of certain writers, that the *habeas corpus* clause in the Constitution does not give power to anybody to suspend the privilege of the writ, but is only restrictive of the otherwise plenary power of Congress!" This pamphlet is a reply to the answers which Mr. Binney's first pamphlet drew forth. A

"Third Part" of Horace Binney's discussion, was published by Sherman & Co., Philadelphia, 1867. Review of Mr. Binney's Pamphlet on the Privilege of the Writ of *Habeas Corpus* under the Constitution. By J. C. Bullitt. Philadelphia, Sherman & Co., 1862. Remarks on Mr. Binney's Treatise. By George M. Wharton. Philadelphia, 1862. Answer to Mr. Binney's Reply to "Remarks," in his treatise on the *Habeas Corpus*. By G. M. Wharton. Philadelphia, 1862. *Habeas Corpus* the Law of War and Confiscation. By S. S. Nicholas. Bradley & Gilbert, Louisville, 1862. In these pamphlets the position that the President has no right on his own motion to suspend the writ, is maintained with great force. It is not, at the same time, claimed that a return by a military officer, in time of war, that the relator is in military custody, is not a sufficient discharge. The Writ of *Habeas Corpus* and Mr. Binney, by John T. Montgomery. John Campbell, Philadelphia, 1862. Personal Liberty and Martial Law, Philadelphia, 1862. By Edward Ingersoll. *Habeas Corpus*. By D. A. Mahoney, Prisoner of State, 1863. The Suspending Power and the Writ of *Habeas Corpus*. By James F. Johnson. John Campbell, Philadelphia, 1862. Martial Law: What is it, and who can declare it? By Tatlow Jackson. John Campbell, Philadelphia, 1862. Authorities Cited Antagonistic to Mr. Binney's Conclusions. By Tatlow Jackson. Philadelphia, 1862. *Habeas Corpus*. A Response to Mr. Binney, by S. S. Nicholas. Bradley & Gilbert, Louisville, 1862. Martial Law, by S. S. Nicholas, 1862. Presidential Power over Personal Liberty, a Review of Horace Binney's Fed. Prac. Vol. II.—95.

essay on the writ of *Habeas Corpus* imprinted for the author; Anon., dated February 12, 1862. Judge Curtis on Executive Power; reprinted 2 Curtis' Works, 309. Compare 1 Curtis' Life, 240, 349. Opinions of Founders of Republic on Habeas Corpus, &c. Washington, 1864. Facts and Authorities on the Suspension of Writ of *Habeas Corpus*, 1864. Anon. The Privilege of the Writ of *Habeas Corpus* under the Constitution of the United States. In what it consists. How it is allowed. How it is suspended. It is the regulation of the law, not the authorization of an exercise of legislative power. Philadelphia, 1862. A Reply to Horace Binney's Pamphlet on the *Habeas Corpus*, by C. H. Gross. Philadelphia, 1862. Reply to Horace Binney, on the Privilege of the Writ of *Habeas Corpus* under the Constitution, by a Member of the Philadelphia Bar. James Challen & Son, Philadelphia, 1862. A Treatise on the Martial Power of the President of the United States. By Daniel Gardner, Jurist. War Power of the President. By J. Hermans; Loyal Publication Society, No. 32. C. S. Westcott & Co., Printers, 1863. Argument of John A. Bingham, Special Judge Advocate, on the Constitutionality of the Trial of the Assassins of President Lincoln by a Military Commission, in Mrs. Surratt's Trial; also republished in pamphlet form. Speech of Senator R. S. Field, of New Jersey, in the United States Senate, January 7th, 1863. Towers & Co., Washington, 1863. An Undelivered Speech on Executive Arrests, by C. R. Ingersoll. Philadelphia, 1862. Several of these pamphlets may occasionally be brought bound together, under the title of "Campbel's Pamphlets,"

"Martial Law and *Habeas Corpus*," &c. Incomplete sets may be found in the libraries of Harvard University in that of the author of this work, who has a collection formerly owned by Charles O'Connor; and in some of the book stores at Washington. Dr. Francis Wharton, says, in his *Criminal Pleading and Practice*, 9th Ed., § 979, note 2, after enumerating some, but not all of the above named works: "The following conclusions may now be ventured on the topics discussed in the foregoing publications: First: The President of the United States has no constitutional power to suspend the writ of *habeas corpus*. Second: On the return by a general military officer, in time of war, that he holds the relator either as a military subordinate, or as a spy, or as deserter, or as a prisoner of war, an attachment should be refused. *Infra*, § 996. Third: When a person, not in military service, or a prisoner of war, or charged with being a spy or deserter, is arrested by any authority whatsoever, he should be discharged by a Federal judge on *habeas corpus*, unless there is evidence produced against him at the hearing sufficient to justify an indictment to be found against him by a grand jury. See *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281. Fourth: If the return be that the relator is held under Federal authority, the revision by a writ of *habeas corpus* is vested exclusively in the Federal courts." According to Judge Curtis. "Military law is that system of laws enacted by the legislative power for the government of the army and navy of the United States, and of the militia when called into the actual service of the United States. It has no control whatever over any person or any

property of any citizen. It could not even apply to the teamsters of an army save by force of express provisions of the laws of Congress making such persons amenable thereto. The persons and property of private citizens of the United States are as absolutely exempted from the control of military law as they are exempted from the control of the laws of Great Britain. But there is also martial law. What is this? It is the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends. . . . In time of war, without any special legislation, not the Commander-in-Chief only, but every Commander of an expedition or of a military post, is lawfully empowered by the Constitution and laws of the United States to do whatsoever is necessary to accomplish the lawful objects of his command. . . . But when the Military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. . . . He has no more lawful authority to hold all the citizens of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edicts, than he has to hold all the property of the country subject to his military requisitions." 21 Curtis Life and Works, 327. Compare authorities cited in Lawrence's *Wheaton*, 516-520, as to distinction between martial and military law, and the right to suspend the writ of *habeas corpus*. Between martial law and military law the distinction is this:

§ 466. Practice on application for habeas corpus. The application for a writ of *habeas corpus* should be made by a written complaint addressed to the court or judge from whom the writ is sought; and sworn to by the complainant; setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known.¹ A father may thus apply when his child is illegally restrained.² It was held that a deputy United States marshal, with a warrant for the extradition of a person arrested under State civil process, had the right to apply for the writ.³ A party who had a suit pending in a court was allowed the writ where a judge of that court was arrested.⁴ It seems that the writ may be granted at the request of a stranger who has no legal interest in the matter and whom the prisoner has not authorized to represent him.⁵ It was held where

Martial law is the law adopted by civilized belligerents in matters connected with army discipline; military law is the law a conqueror imposes in a subjugated province to determine matters of State. See Whart. Com. Am. Law, §§ 37, 38; *Ex parte* Mason, 105 U. S. 696, 26 L. ed. 1213. See, also, *Waters v. Campbell*, 5 Sawyer, 17. Charles Sumner, in his speech in the Senate June 27, 1862, took the ground that the power of Congress in this relation was supreme. See also *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery*, by William Whiting. Tenth edition, Boston, 1862.

§ 466. ¹ U. S. R. S., § 754.

² U. S. v. Anderson, Cooke (Tenn.), 143; U. S. v. Green, 3 Mason, 482; *Bennett v. Bennett*, Deady, 299; *supra*, § 461, note 25. See as to the former right of a master to thus obtain a slave, U. S. ex rel. *Wheeler v. Williamson*, 4 Am. Law Reg. 5. By the Rules of U. S. D. C., S. D. N. Y., "In any

action or proceeding any order, whether known in practice as a Court order or Judge's order, may be made and entered by any judge."

³ *Re Mineau*, 45 Fed. 188.

⁴ *Ex parte* Des Rochers, 1 McAll. 68.

⁵ *Ex parte* Des Rochers, 1 McAll. 68; *Re Hoyle*, 12 Chic. L. N. 279; s. c., 9 Am. L. Rec. 65; *Re Ferrens*, 3 Ben. 445; *The Hottentot Venus*, 13 East, 194; *Wheeler v. Williamson*, 14 Am. Law Reg. 5; *People v. Mercein*, 3 Hill, 399, 407; 38 Am. Dec. 644. But see *Re Poole*, 2 McA. (D. C.) 583; *Ex parte* Dorr, 3 How. 103, 11 L. ed. 514. In *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, the petition was by the Governor of West Virginia. There seems to have been no objection taken to this; but immediately thereafter another petition was presented by a citizen of West Virginia, and subsequently the name of the party restrained was substituted for that of the petitioner, and the proceedings on the petition were conducted in his name. At

the proceedings had been instituted on behalf of an alleged lunatic by his next friend, that the court might supersede his next friend by the appointment of a guardian *ad litem*, who should investigate the facts and might recommend that the proceeding be abandoned. Pending such an investigation the proceeding was stayed.⁶ An appeal in that case was entertained although taken by the next friend who had been removed.⁷ It is the safer practice in such a case to show some good reason for not obtaining the consent of the party detained. Neither an Indian agent, nor, except perhaps under extraordinary circumstances, the United States, can sue out the writ to restore an Indian child to the custody of its mother.⁸ When the prisoner has been committed to jail by a public officer, the complaint should be accompanied by a copy of the commitment, or an affidavit that the jailer has refused a copy.⁹ The petition must show the jurisdiction of the court or judge to grant the writ.¹⁰ A general averment that the petitioner is detained in violation of the Constitution and laws of the United States, and that the court below had "no jurisdiction or authority to try and sentence him in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment."¹¹ The proceedings under which the petitioner is imprisoned must be

what particular stage of the proceedings the substitution of the name was made does not appear; but there seems to have been no objection taken to the petition being signed by the citizen or by the Governor. See *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386; *infra*, § 388. See learned articles on the subject by Theodore Connolly, Esq., in N. Y. L. J., June 5, 1890; Hon. S. D. Thompson, in 18 Fed. 68; and the Jurisdiction of the Federal Courts in *Habeas Corpus* Cases, 12 Crim. Law Mag. 193.

⁶ *King v. McLean Asylum of Mass. Gen. Hospital*, C. C. A., 26 L.R.A. 784, 64 Fed. 331, 353.

⁷ *Ibid.* C. C. A., 64 Fed. 325.

⁸ *Re Celestine*, 114 Fed. 551.

⁹ *Harrison's Case*, 1 Cranch, C. C. 159; *U. S. v. Bollman*, 1 Cranch, C. C. 373. See § 463, *supra*.

¹⁰ *Ex parte Milburn*, 9 Pet. 704; note, 9 L. ed. 280. See *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406; *King v. McLean Asylum of Mass. Gen. Hospital*, C. C. A., 26 L.R.A. 784, 64 Fed. 331; *Howard v. U. S.*, 34 L.R.A. 509, 75 Fed. 988.

¹¹ *Re Cuddy*, 131 U. S. 280, 286, 33 L. ed. 154, 157, per Mr. Justice Harlan.

set forth with sufficient detail that their invalidity may appear.¹² A copy of the record of the proceedings which are attacked must be supplied by the petitioner¹³ or a reasonable excuse for its omission must be set forth.¹⁴ And, in the latter case, the petitioner must comply with the rule so far as is in his power.¹⁵ The petitioner may state facts outside of and not inconsistent with the record, showing that the court under the process of which the prisoner is held has no jurisdiction over his person, or in respect to the subject with which he is charged.¹⁶

When the proceedings of an inferior tribunal are reviewed by a writ of *habeas corpus*, a writ of *certiorari* issues with it and should be asked in the petition.¹⁷ The facts may thus be reviewed.¹⁸ It is improper to submit a bill of exceptions setting forth the proceedings of the court whose commitment is sought to be reviewed.¹⁹ The court or judge to whom such an application is made, if his jurisdiction appears, should forthwith grant a writ of *habeas corpus*, unless it appears from the

¹² *Anderson v. Treat*, 172 U. S. 24, 43 L. ed. 351; *Craemer v. Washington*, 168 U. S. 124, 42 L. ed. 407. For the necessary averments in a petition after an order for extradition, see *Re Count de Toulouse Lautrec*, 102 Fed. 878.

¹³ *Craemer v. Washington State*, 168 U. S. 124, 42 L. ed. 407; *Low Wah Suey v. Backus*, 225 U. S. 460, 472, 56 L. ed. 1165, 1169.

¹⁴ *Low Wah Suey v. Backus*, 225 U. S. 460, 472, 56 L. ed. 1165, 1169; per Day, J.: "The reasons given for failure to comply with this rule, as stated in the petition, are that the record is too voluminous to be made a part thereof, that to incorporate a copy of the entire proceedings would burden the petition and cloud the issue, that the petitioner was not in the possession of the entire record and was unable to secure it in time to file it with his petition, and that the Commissioner of Immigration had a copy of the

record which he could produce with the body of Li A. Sim. It does not appear that a copy of the essential part of the proceedings was not in the possession of the petitioner or could not be had, and so far as it was within his power he should have complied with the rule"

¹⁵ *Low Wah Suey v. Backus*, 225 U. S. 460, 472, 56 L. ed. 1165, 1169.

¹⁶ *Re Mayfield*, 141 U. S. 107, 116; *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154.

¹⁷ *Ex parte Barford*, 3 Cranch, 448, 2 L. ed. 495; *Ex parte Bollman*, 4 Cranch, 75, 2 L. ed. 554; *Ex parte Martin*, 5 Blatchf. 303; *Re Stupp*, 12 Blatchf. 501. See *supra*, § 460.

¹⁸ *Re Watts & Sachs*, 190 U. S. 1, 47 L. ed. 933; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 334, 48 L. ed. 997, 1004.

¹⁹ *Ex parte Harlan*, 180 Fed. 119, 131.

petition that the party is not entitled thereto,²⁰ or that his right is doubtful, in which latter case an order to show cause may be issued.²¹ The writ is a writ of right;²² but it does not issue as of course. Some ground for it must be shown.²³ Instead of issuing the writ in the first instance the court may enter a rule to show cause why it should not issue,²⁴ and the rights of the petitioner may be determined upon the merits upon a hearing on the application.²⁵ The Supreme Court will ordinarily refuse to issue the writ in a case of which a District Court of the United States has jurisdiction, unless it is intended to review a decision of such District Court.²⁶ The Supreme Court²⁷ and the inferior courts of the United States will ordinarily refuse to discharge by *habeas corpus* a prisoner held under indictment by a State court before trial of the indictment,²⁸ and even after his conviction, or, in the case of an alleged lunatic after his commitment, if he has still a remedy by writ of error or appeal,²⁹ or otherwise in the courts of such State,³⁰ or by a writ of error from the Supreme Court of the United States;³¹ ex-

²⁰ U. S. R. S., § 755; *Re Haskell*, 52 Fed. 795.

²¹ *Re King*, 51 Fed. 434, 435.

²² *Re King*, 51 Fed. 434, 435; *Re Durrant*, 169 U. S. 39.

²³ *Ex parte Milburn*, 9 Pet. 704, note, 9 L. ed. 280; *Trial of Vallandigham*, 45. See *Re Durrant*, 84 Fed. 317; *Erickson v. Hodges*, C. C. A., 179 Fed. 177.

²⁴ *Ex parte Mirzan*, 119 U. S. 584, 30 L. ed. 513; *Ex parte Royall*, 117 U. S. 254, 29 L. ed. 872; *Wales v. Whitney*, 114 U. S. 564, 29 L. ed. 277; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519; *Re Huntington*, 137 U. S. 63, 34 L. ed. 567; *Riggins v. U. S.*, 199 U. S. 547, 50 L. ed. 303.

²⁵ *Ex parte King*, 200 Fed. 622; *Ex parte Hyde*, 194 Fed. 207.

²⁶ *Ex parte Royall*, 117 U. S. 254, 29 L. ed. 872; *Ex parte Clark*, 128 U. S. 395, 32 L. ed. 487; *Ex parte Fonda*, 117 U. S. 516, 29 L. ed. 994.

²⁷ *Urquhart v. Brown*, 205 U. S. 179, 51 L. ed. 760.

²⁸ *Ex parte Royall*, 117 U. S. 241, 254, 29 L. ed. 868, 872; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934; *New York v. Eno*, 155 U. S. 89, 39 L. ed. 80; *Pepke v. Corilari*, 155 U. S. 100, 39 L. ed. 84; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748; *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406; *Re Matthews*, 122 Fed. 248, 259 and citations; *Ex parte Roach*, 166 Fed. 344.

²⁹ *Ex parte Frederick*, 149 U. S. 70, 37 L. ed. 653; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845; *Ex parte Reanick*, 118 Fed. 928. But see *Ex parte Green*, 114 Fed. 959.

³⁰ *Ex parte Collins*, 154 Fed. 980.

³¹ *Urquhart v. Brown*, 205 U. S. 179, 51 L. ed. 760; *Re Lincoln*, 202 U. S. 178, 50 L. ed. 984, where the sentence was imprisonment for a specified term and until a fine of

cept when the prisoner is an officer or employee of the United States,³² or perhaps, in the case of an alien who claims under a treaty,³³ or who is in custody for an act done or omitted under a right claimed under the color of a commission, order or sanction of a foreign State.³⁴ In a case where, upon a similar question, the State courts had decided erroneously, the court granted the writ and discharged the prisoner before trial.³⁵ Where a District Judge had upon the trial decided adversely to the claim of the petitioner, the Circuit Judge refused to review the question collaterally by *habeas corpus*.³⁶ The Supreme Court will ordinarily refuse to entertain a petition for a *habeas corpus* by a prisoner held under an indictment found in a court of the United States or of the District of Columbia, when no motion to quash or proceeding to test the sufficiency of the indictment has been taken in the District Court;³⁷ or

\$100 and costs were paid, nothing in the record showing whether the fine was collected on execution, as the record authorized, and if not collected the petitioner could shortly be discharged upon taking the poor debtor's oath. *Ex parte Chadwick*, 159 Fed. 576.

³² *Ohio v. Thomas*, 173 U. S. 276, 285, 43 L. ed. 699, 702; *Boske v. Conmignore*, 177 U. S. 459, 44 L. ed. 846; *Re Turner*, 119 Fed. 231; *West Virginia v. Laing*, C. C. A., 133 Fed. 887.

³³ *Cohn v. Jones*, 100 Fed. 639; *Ex parte Royall*, 117 U. S. 241, 254, 29 L. ed. 868, 872.

³⁴ *Ex parte Bartlett*, 197 Fed. 98. See § 461, *supra*. Buse see *Ex parte Collins*, 149 Fed. 573.

³⁵ *Re Reinitz*, 4 L.R.A. 236, 39 Fed. 204. But see as to Supreme Court of District of Columbia, *Re Chapman*, 156 U. S. 211, 39 L. ed. 401. The writ was denied where the petitioner alleged that the State Supreme Court had decided that the statute under which he was arrested was constitutional, and that

he could not obtain a review of a decision against him by the Supreme Court of the United States until the sentence that would be imposed had expired, since the State court had the power to impose a fine as a punishment and to order his enlargement pending an appeal. *Ex parte Bartlett*, 197 Fed. 98.

³⁶ *Re Simmons*, 45 Fed. 241. But see *Re Johnson*, 46 Fed. 477. In a case where, upon demurrer to an indictment, the Circuit Court was equally divided, and certified the question to the Supreme Court, which remanded the case without any decision as to the sufficiency of the indictment, a District Judge subsequently discharged the assured upon *habeas corpus* when held under a second and different indictment for the same acts. *Re Benson*, 58 Fed. 962, 972.

³⁷ *Allen v. Black*, 43 Fed. 228.

"If the questions are of such a character that it is thought desirable that the opinion of an appellate court should be obtained, such

after conviction where there is a remedy by writ of error or appeal.³⁸ It may do so after an affirmance of a conviction, when there is no right to an appeal or writ of error.³⁹ The writ will be denied by the Supreme Court when it is impossible to dispose of it before the term of imprisonment expires.⁴⁰ The prisoner will not be discharged if his present confinement is legal, although he has also been sentenced to a further illegal term, which has not yet begun.⁴¹ When the application is made to a judge, he may decline to grant it if there is a doubtful question of law involved, since there is no appeal from his decision.⁴²

The writ when issued from the court, like other writs issued out of the Federal courts, must bear the seal of the court, be signed by the clerk, and bear teste of the presiding Justice of the Supreme Court when issued therefrom, and when issued from a District Court, of the judge thereof, or when that office is vacant, of the clerk thereof.⁴³ The writ must be directed to the person in whose custody the prisoner is detained.⁴⁴ When the writ is issued in the case of an alien prisoner domiciled in a foreign State to which he owes allegiance, who is in custody by or under the law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect of which depend on the law of nations; notice of the said proceeding, to be prescribed by the court or judge issuing the writ, must be served on the Attorney-General or other officer prosecuting the pleas of said State;

a proceeding as this is the more appropriate way in which to raise them, for a decision adverse to the government is reviewable by appeal, but a similar decision on the trial is final, as the government cannot appeal from a criminal judgment." Lacombe, J., in *Re Terrell*, 51 Fed. 213, 214.

³⁸ *Anderson v. Treat*, 172 U. S. 24, 43 L. ed. 351. See *Re Lincoln*, 202 U. S. 178, 50 L. ed. 984.

³⁹ *Matter of Heff*, 197 U. S. 488, 49 L. ed. 848.

⁴⁰ *Re Baez*, 177 U. S. 378, 44 L. ed. 813.

⁴¹ *Re Swan*, 150 U. S. 637, 37 L. ed. 1207.

⁴² U. S. R. S., §§ 911, 912; *Matter of Kaine*, 14 How. 103, 119, 14 L. ed. 345, 351.

⁴³ U. S. R. S., §§ 911, 912.

⁴⁴ U. S. R. S., § 755.

and due proof of such service must be made to the court or judge before the hearing.⁴⁵ Otherwise, such notice is not necessary, although the prisoner is confined under the judgment or order of a State court or magistrate;⁴⁶ but the courts frequently require it.⁴⁷

The person to whom the writ is directed must make a due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond the distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.⁴⁸ The return must be in writing, signed by the person to whom the writ is directed,⁴⁹ and certifying the true cause of the prisoner's detention.⁵⁰ The person making the return must at the same time bring the body of the prisoner before the judge who granted the writ,⁵¹ but where the petition is addressed to the court and not to any particular judge thereof, any judge of the court may hear a motion to quash the same,⁵² and it seems that the writ may be returnable to the court, instead of to the judge who grants the same.⁵³ A failure to do this or to make a return may be punished by attachment.⁵⁴ A false return may be similarly punished.⁵⁵ If the prisoner is no longer under the control of the person to whom the writ is addressed, the latter must declare, so far as he knows, what has become of him.⁵⁶

Pending the hearing upon the return to a writ of *habeas corpus* the prisoner is in the custody of the court or judge that

⁴⁵ U. S. R. S., § 762.

⁴⁶ Matter of Leary, 10 Ben. 197. But see U. S. v. Jailer of Fayette County, 2 Abb. U. S. 265.

⁴⁷ U. S. v. Jailer of Fayette County, 2 Abb. U. S. 265.

⁴⁸ U. S. R. S., § 756.

⁴⁹ Seavey v. Seymour, 3 Cliff. 439.

⁵⁰ U. S. R. S., § 757. The return is not defective if a material fact not stated therein appears in the petition. *Re Ah Toy*, 45 Fed. 795.

⁵¹ U. S. R. S., § 758.

⁵² *Re Thaw*, C. C. A., 166 Fed. 71.

⁵³ This was the course pursued in *Re Geissler*, S. D. N. Y., 196 Fed.

168, in which the writer was counsel.

⁵⁴ U. S. v. Bollman, 1 Cranch, C. C. 373; U. S. v. Green, 3 Mason, 482.

⁵⁵ U. S. v. Davis, 5 Cranch, C. C. 622; U. S. v. Williamson, 3 Am. L. Reg. 729; s. c., 4 Am. L. Reg. 5.

⁵⁶ U. S. v. Williamson, 4 Am. L. Reg. 5. It was held that a State judge acted within his jurisdiction in punishing a parent for disobedience to the writ when the child whose production was ordered had been removed from the State. *Ex parte Young*, 50 Fed. 526.

issued the writ, and may be admitted to bail or remanded to the jail from which he came, or placed in the custody of the marshal.⁵⁷ This is forbidden upon applications for the writ by Chinese seeking to land in the United States.⁵⁸ He cannot, while in such custody, be arrested on a second warrant.⁵⁹ When the writ is returned, a day must be set for the hearing of the cause not exceeding five days after the return, unless the party petitioning requests a longer time.⁶⁰ When the writ is granted by a Justice of the Supreme Court in a case of which that court has jurisdiction, and the proceeding is in its nature appellate, that is to review the proceedings of an inferior court, the Justice may postpone the hearing until a session of the whole court.⁶¹ The applicant for the writ or the party imprisoned or restrained may deny under oath any of the facts set forth in the return, or may allege any other material facts.⁶² In case of a conviction for a contempt of court, the petitioner may supplement the record by alleging such additional facts as tend to show that his misbehavior was not in contempt.⁶³ Only distinct and unambiguous statements of fact not denied by the return nor controverted by other evidence will be presumed to be admitted.⁶⁴ The court or judge may allow the return, and all suggestions against it, to be amended before or after the same are filed.⁶⁵ The return is deemed to import verity unless impeached.⁶⁶ The court or judge, upon the day set for the hearing, must proceed in a summary way to determine the facts, by hearing the testimony and arguments, and

⁵⁷ *Matter of Kaine*, 14 How. 103, 14 L. ed. 345. See 27 St. at L., ch. 60, p. 25; *Re Farez*, 7 Blatchf. 345.

⁵⁸ Act of May 5, 1892, c. 60, § 5; 27 St. at L. 25. *Re Chin Yuen Sing*, 65 Fed. 571, 572, 788; *Re Ong Lung*, 125 Fed. 813; holding that this section of the earlier statute was not repealed by the provision, in Sundry Civil Appropriation Bill of August 18, 1894, § 301, 28 St. at L. 390, that decisions of immigration officers, when adverse to the immigrant, should be final.

⁵⁹ U. S. R. S., § 759.

⁶⁰ *Ex parte Clarke*, 100 U. S. 399,

403, 25 L. ed. 715, 716. But see *Matter of Kaine*, 14 How. 103, 14 L. ed. 345.

⁶¹ U. S. R. S., § 760.

⁶² U. S. R. S., § 760.

⁶³ *Cuddy*, Petitioner, 131 U. S. 280, 33 L. ed. 154; *Ex parte O'Neal*, 125 Fed. 967.

⁶⁴ *Whitten v. Tomlinson*, 160 U. S. 231, 242, 40 L. ed. 406, 412; *Kohl v. Lehbock*, 160 U. S. 293, 40 L. ed. 432.

⁶⁵ U. S. R. S., § 760.

⁶⁶ *Crowley v. Christensen*, 137 U. S. 86, 94, 34 L. ed. 620, 624; *Stretton v. Rudy*, C. C. A., 176 Fed. 727.

thereupon make an order discharging the prisoner, or remanding him to the custody from which he was removed by the writ.⁶⁷ The petitioner has the burden of proving that the allegations in the return are false.⁶⁸ If the writ is returned to the court that entered the judgment under which the petitioner is held, the sentence may be corrected *nunc pro tunc* and the prisoner held under the same as modified.⁶⁹

The present rule seems to be that the petitioner will ordinarily not be discharged if at the time of the return his imprisonment is lawful, although the application was made at a time when he was unlawfully restrained.⁷⁰ The petitioner was discharged when his imprisonment was lawful when the writ was allowed, but illegal at the time of its return.⁷¹ The order for a discharge may provide that ten days' notice thereof be given to the prosecuting officer,⁷² or to the immigration authorities,⁷³ or that the discharge may be delayed a reasonable time sufficient to afford an opportunity for the correction of a judgment under which the prisoner is held,⁷⁴ or that the decision be without prejudice to the right of the government to take any lawful measures to have a new and valid sentence imposed by the trial court;⁷⁵ or when the court finds that the imprisonment is illegal, it seems that it may in a proper case, instead of ordering a discharge, direct that the prisoner be delivered to the marshal of the district⁷⁶ or to a representative of a foreign nation.⁷⁷ The order of discharge may be vacated at the term

⁶⁷ U. S. R. S., § 761. See U. S. v. Fowkes, C. C. A., 53 Fed. 13; s. c., 49 Fed. 50; *Re* Gut Lun, 83 Fed. 141; *Ex parte* Lennon, 166 U. S. 548, 41 L. ed. 1110. In *Ex parte* Harlan, 180 Fed. 119, 125, the court admitted all evidence offered, reserving decision upon its relevancy and materiality until it decided upon the merits.

⁶⁸ *Tiberg v. Warren*, C. C. A., 192 Fed. 458.

⁶⁹ *Ex parte* Harlan, 180 Fed. 119, where the words "at hard labor" were stricken out upon the return.

⁷⁰ *Iasigi v. Van de Carr*, 166 U. S. 391, 41 L. ed. 1045. Cf. *Ekin v.*

U. S., 142 U. S. 651, 35 L. ed. 1146. *Contra*, *Re* Doo Woon, 18 Fed. 898.

⁷¹ U. S. v. Patterson, 29 Fed. 775.

⁷² *Re* Medley, 134 U. S. 160, 175, 33 L. ed. 835, 841; *Re* Savage, 134 U. S. 176, 177, 33 L. ed. 842.

⁷³ *Ex parte* Yabucanin, 199 Fed. 365.

⁷⁴ *Re* Bonner, 151 U. S. 242, 259-262, 38 L. ed. 149, 152, 153.

⁷⁵ *Re* Bonner, 151 U. S. 242, 38 L. ed. 149.

⁷⁶ *Re* Gut Lun, 84 Fed. 323; *Re* Mineau, 45 Fed. 188.

⁷⁷ *Motherwell v. U. S. ex rel Alexandroff*, C. C. A., 107 Fed. 437;

at which it was entered,⁷⁸ and a supplemental return after its entry may be permitted to support a motion for that purpose.⁷⁹ The order of discharge is *res adjudicata* as to all questions therein determined.⁸⁰ And when an officer of the United States is discharged after an indictment by a State court, it seems that no further prosecution for the same cause can be maintained against him in the courts of such State.⁸¹ The doctrine of *res adjudicata* does not apply to denials of the application for the writ, and successive petitions may be presented to different judges, who have power to entertain the same, after the same prayer has been previously denied.⁸² The fact

440. But see *Re Fitton*, 45 Fed. 471.

⁷⁸ *Tiberg v. Warren*, C. C. A., 192 Fed. 458.

⁷⁹ *Ibid.*

⁸⁰ *U. S. v. Chung Lee*, 71 Fed. 277; s. c. in C. C. A., 76 Fed. 951; *Re White*, 45 Fed. 237.

⁸¹ *Re Neagle*, 135 U. S. 1, 34 L. ed. 55; *Kelly v. Georgia*, 68 Fed. 652.

⁸² *Ex parte Kaine*, 3 Blatchf. 1. But see s. c., 14 How. 103, 14 L. ed. 345; *Ex parte Robinson*, 6 McLean, 355; *Ex parte Cuddy*, 40 Fed. 62; *Ex parte Jugiro*, 44 Fed. 754; *Carter v. McClaughry*, 105 Fed. 614; *King v. McLean Asylum of Mass. Gen. Hospital*, C. C. A., 26 L.R.A. 784, 64 Fed. 331, 350; *Re Kopel*, 148 Fed. 505. But see *Lui Lum v. U. S.*, C. C. A., 166 Fed. 106; *Re Simmons*, 45 Fed. 241, where the petition showed a previous denial of the writ. See *People v. Jugigo*, 128 N. Y. 589, for a case where after two applications for the writ had been denied and taken to the Supreme Court by appeal and there affirmed *Jugiro v. Brush*, 140 U. S. 291, 35 L. ed. 510; s. c., 140 U. S. 686, 35 L. ed. 749. A third was prevented by the absence from New York City of all the Federal judges

during the week preceding the executions. In Wood's case, after two similar applications and appeals (*Wood v. Brush*, 140 U. S. 278, 35 L. ed. 505; s. c., 140 U. S. 370, 35 L. ed. 510) there was a similar judicial absence. The counsel for Wood found Judge Lacombe at his country residence, and applied for an order denying the application for the writ, and an allowance of an appeal from such order to the Supreme Court of the United States. Judge Lacombe took the papers, and subsequently sent them to the clerk of the Circuit Court for the Southern District of New York, with instructions to erase his signature from the allowance of the appeal and the citation if it appeared that the name of the counsel who made the application was not on the roll of members of the bar of that court. This was done by the clerk against the protest of Wood's counsel, who was a member of the bar of the Supreme Court of the United States, and as such claimed the right to practice in all courts of the United States. See *supra*, § 168. For a defense of the Lawyer's conduct, see 14 Abb. L. J. 21. Judge Lanning, of the District of New Jersey, has directed an en-

that the same petition has been denied by a State court will not, consequently, prevent the Federal courts from entertaining the same.⁸³ The trial and acquittal of the petitioner in the State court, after the writ was issued, was held to be no ground for dismissing the same.⁸⁴ After the writ, however, has been refused by one Federal judge, it is customary, upon subsequent applications, for other Federal judges to deny the same, leaving the party to his remedy by appeal from the first order of denial.⁸⁵ A State court has held: that a proceeding to obtain the custody of a child is in the nature of a private suit, in which the public is not concerned; and that, consequently, an order upon an application therein for the writ of *habeas corpus* is *res adjudicata* between the parties so long as the conditions have not changed.⁸⁶

§ 467. Appeals in habeas corpus proceedings. Before the Evarts Act of March 3, 1891, an appeal might be taken to the Supreme Court from the final decision of a Circuit Court of the United States, upon an application for a writ of *habeas corpus*, or upon such writ when issued, in the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States; and in the case of a prisoner who, being a subject or citizen of a foreign State and domiciled therein, was committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity and effect whereof

try, upon the minutes of the Circuit Court of the United States for the District of New Jersey, stating that, when future applications for the writ of *habeas corpus* are made in cases of homicide, he would at once consult with his associate, and if the application was, without merit, made with the evident intention of thwarting the ends of jus-

tice, the name of the applicant's attorney would be stricken from the rolls of the court. A recent act of Congress quoted *infra*, § 467, has checked this practice.

⁸³ *Re Kopel*, 148 Fed. 505.

⁸⁴ *Ex parte Martin*, 180 Fed. 209.

⁸⁵ *Ex parte Moebus*, 148 Fed. 39.

⁸⁶ *Cormack v. Marshall*, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077.

depended upon the law of nations, or under color thereof.¹ No appeal lies from a decision of a judge of a District Court of the United States, either to the Supreme Court,² or to a Cir-

§ 467. ¹ U. S. R. S., § 764, as amended by 23 St. at L., ch. 353, p. 437.

² *Carper v. Fitzgerald*, 121 U. S. 87, 30 L. ed. 882. In that case the petition was presented to the Circuit Judge at his chambers in Baltimore. He directed the clerk of the Circuit Court for the Eastern District of Virginia, within which the petitioner was imprisoned, to issue a writ returnable before him at the United States Court House in Baltimore. The writ was accordingly issued, under the seal of the court in the usual form of Circuit Court writs, returnable "before the Honorable Hugh L. Bond, Judge of our Circuit Court of the United States for the Eastern District of Virginia, sitting at the United States Court House in Baltimore, Maryland." Upon a demurrer to the return of the writ, an order of discharge was entered. At the foot of this order was the following: "And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said court. Hugh L. Bond, Circuit Judge." The order was held to be not a court order, but a judge's order, and consequently appealable, although Supreme Court, although it had been docketed there as an appeal from the Circuit Court.

Re Palliser, 136 U. S. 257, 34 L. ed. 514, the following order was held by the Supreme Court to be a court order and not a judge's order, and consequently appealable, although

the Circuit Court which rendered it was of a contrary opinion:

"In the matter of the petition of Charles Palliser for the writ of *habeas corpus*. Upon reading and filing the petition of Charles Palliser, sworn to November 26, 1889, and the writs of *habeas corpus* and *certiorari* thereupon issued, directed to Hon. Martin T. McMahon, marshal for the United States for the Southern District of New York, and the Hon. John A. Shields, United States Commissioner, and returns to said writs made by said marshal and said commissioner; now after hearing Roger Foster, Esq., of counsel for Charles Palliser, in support of an application for the discharge of said Palliser from custody, said Palliser having been produced before this court by said marshal in obedience to said writ of *habeas corpus*; and after hearing Daniel O'Connell, Esq., Assistant United States Attorney, in opposition to said application, and in support of an application to remand said Palliser to custody, and due deliberation having been had, it is

"Ordered that said writ be dismissed, and that said Palliser be, and he hereby is, remanded to the custody of the said Martin T. McMahon, marshal of the United States for the Southern District of New York.

"E. Henry Lacombe."

See also *Carico v. Wilmore*, 51 Fed. 200; *Re King*, 51 Fed. 434, 440.

The order is appealable when the writ was granted at chambers, but

cuit Court of Appeals.³ From the final decision of a justice or judge of the United States inferior to the Circuit Court, upon an application for a writ of *habeas corpus*, or upon such writ when issued, an appeal, before the Evarts Act of March 3, 1891, might be taken to the Circuit Court for the district in which the cause was heard, under the same circumstances as would authorize an appeal from a Circuit Court to the Supreme Court.⁴ The Supreme Court may review an order of a District Court upon an application for the writ of *habeas corpus* when a constitutional⁵ or a jurisdictional⁶ question or a question involving the construction of a treaty is involved.⁷ In the case of a jurisdictional question which does not involve the construction of the Constitution of the United States, that question alone is certified to the Supreme Court by the court below.⁸ It has been held that the Supreme Court of the United States will not take jurisdiction of an appeal from an order of the Supreme Court of a Territory within the United States, which awards the custody of a child, three years of age, to one of several claimants for the same.⁹ In other cases of *habeas corpus* the Circuit Courts of Appeals may review the decisions of the Circuit and District Courts,¹⁰ and perhaps those of the District

the order discharging the prisoner was entered at a stated term of the Circuit Court. *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399. The hearing of the argument in chambers is immaterial when no objection was made upon that ground below and the order is a court order. *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544. The Supreme Court cannot review a decision of a District Court upon an application for the writ because of a certificate of a division between two judges. *Ex parte Fom v. Fong*, 108 U. S. 556, 27 L. ed. 826; *Ex parte Cota*, 110 U. S. 385, 28 L. ed. 172. *Ex parte Jacobi*, 104 Fed. 681.

³ *Ibid.*

⁴ U. S. R. S., § 763.

⁵ *Ekiu v. U. S.*, 142 U. S. 651,

35 L. ed. 1146; *Horner v. U. S.*, 143 U. S. 207, 36 L. ed. 126; *Re Marmo*, 138 Fed. 201; *infra*, Chapter on Writs of Error and Appeals.

⁶ *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633; *supra*, Chapter on Writs of Error and Appeals; *infra*, Chapter on Writs of Error and Appeals.

⁷ Jud. Code, § 250, re-enacting 26 St. at L. 827, § 5; *Wright v. Henkel*, 190 U. S. 40, 47 L. ed. 948; *infra*, Chapter on Writs of Error and Appeals.

⁸ Jud. Code, § 250, re-enacting 26 St. at L. 826, § 4.

⁹ Jud. Code, § 250, re-enacting N. Y. Foundling Hospital v. Gatti, 203 U. S. 429, 51 L. ed. 254.

¹⁰ 26 St. at L. 826, § 5; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 36 L. ed.

Judges at chambers.¹¹ Where there is no question as to the jurisdiction to grant the writ of *habeas corpus*, but the application attacks collaterally another judgment, decree or order of the same or another court, it seems that the appeal lies only to the Circuit Court of Appeals, unless a constitutional or a treaty question is distinctly raised below;¹² or, perhaps, unless in the case of a "prisoner who, being a subject or citizen of a foreign State and domiciled therein, is committed or confined; or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or committed under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity or effect whereof depend upon the law of nations, or under color thereof."¹³ In the latter case the Supreme Court may have jurisdiction to review the decision of the Circuit Court of Appeals upon an appeal from an order of a District Judge as well as from an order of a District Court.¹⁴ Appeals from the judgments and orders of the District Courts and of the District Judges, upon writs of *habeas corpus*, must be taken within six months from the judgment or order of which complaint is made.¹⁵ It may be held that the same limitation applies to appeals from orders or judgments of the Circuit Courts of Appeals which review decisions of the District Courts and District Judges;¹⁶ perhaps to all appeals in *habeas corpus* cases. The Supreme Court may by *certiorari* review any decision of a Circuit Court of Appeals in such a case; and a Circuit Court of Appeals may certify to the Supreme Court any questions or propositions of law arising therein, concerning which it desires instruction.¹⁷ No appeal lies to the Supreme Court from

340; *U. S. v. Fowkes*, 53 Fed. 13; *King v. McLean Asylum of Mass. Gen. Hospital*, C. C. A., 64 Fed. 325; *Tang Tun v. Edsell*, 223 U. S. 673, 56 L. ed. 606.

¹¹ *Webb v. York*, C. C. A., 74 Fed. 753.

¹² *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120; *Dimmick v. Tompkins*, 194 U. S. 540, 48 L. ed. 1110.

¹³ U. S. R. S., § 763.

¹⁴ *Ibid.*

¹⁵ Jud. Code, § 251, re-enacting 27 St. at L. 751; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120.

¹⁶ *Ibid.*

¹⁷ Jud. Code, § 251, re-enacting 26 St. at L. 826, § 6; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 36 L. ed. 340.

a decree, judgment or order of a court of the District of Columbia upon a writ of *habeas corpus*.¹⁸ Where the petition was based upon the ground that excessive bail was required, and before the decision below the bail was furnished, the appeal from the judgment denying the writ was dismissed.¹⁹ Upon an appeal from a decision upon an application for the writ of *habeas corpus*, the appellate court has the power to review the decision below upon the facts as well as the law;²⁰ but not the power to review the decision of disputed questions of fact by a tribunal or magistrate whose decision is brought before it collaterally.²¹ Objections to the form of the petition, not made below, cannot be raised by the appellant for the first time upon the appeal.²² No new evidence can be offered upon such an appeal, except such evidence as was offered and excluded in the court below.²³ Where the record does not show that the petitioner demanded a trial of the issue raised by his traverse to the return, he cannot object upon appeal because the return was made upon hearsay or upon the claim that he was denied a full hearing.²⁴ Pending an appeal from a final decision declining to grant a writ of *habeas corpus*, the custody of the prisoner must not be disturbed.²⁵ Pending an appeal from the denial of the writ, there will be no interference by the Federal court with the requirement by the State authorities that the prisoner perform hard labor.²⁶ This rule does not prevent the reprieve, pending an appeal from an order denying the writ, of a prisoner sentenced to capital punishment.²⁷ After a dismissal of the writ and an actual remand of the prisoner to the custody of the State authorities, he cannot be committed to bail by the Federal court.²⁸ The issue of a writ of error by the Supreme Court of the United States for a review of the decision of

¹⁸ *Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896.

¹⁹ *Johnson v. Hoy*, 227 U. S. 245, 57 L. ed. —.

²⁰ *Re Neagle*, 135 U. S. 1, 42, 34 L. ed. 55, 63; *Wong Heung v. Elliott*, C. C. A., 179 Fed. 110.

²¹ *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234.

²² *U. S. v. Lee Yen Tai*, C. C. A., 113 Fed. 465.

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²³ *Seavey v. Seymour*, 3 Cliff. 439.

²⁴ *Tiberg v. Warren*, C. C. A., 192 Fed. 458.

²⁵ S. C. Rule 34, 117 U. S. 708, U. S. R. S., § 765. But see *King v. McLean Asylum of Mass. Gen. Hospital*, C. C. A., 64 Fed. 325.

²⁶ *Re McKane*, 61 Fed. 28, 205.

²⁷ *Rogers v. Peck*, 199 U. S. 425, 50 L. ed. 256.

²⁸ *Re Bissert*, 113 Fed. 12.

a State Court denying the writ of *habeas corpus*, upon an application involving Federal questions, does not deprive the State Court of jurisdiction to set aside an order made by it, when the writ of error was issued, admitting the prisoner to bail, when no bail has been previously accepted.²⁹ Pending an appeal from a final decision discharging the writ after it has been issued, the prisoner must be remanded to the custody from which he was taken, unless for good cause shown he is detained in the custody of the court or judge that granted the writ, or is enlarged upon recognizance, as described in the next sentence.³⁰ Pending an appeal from the final decision of any court or judge discharging a prisoner upon *habeas corpus*, he must be enlarged upon recognizance for appearance to answer the judgment of the appellate court, with a surety, unless for special reasons surety is not required.³¹ The court cannot apply to the payment of the costs, awarded to successful parties upon an appeal, the proceeds of the forfeiture of such a recognizance, or appeal bond given to the United States pending an appeal from an order for the discharge.³² Pending such proceedings and appeal and until final judgment therein, and after final judgment of discharge, any proceeding for any matter so heard and determined, or in process of being heard and determined, taken in any State court or by or under the authority of any State, against the person whose body is the subject of the writ, is null and void.³³ The next friend of an alleged lunatic was allowed to take an appeal from a judgment remanding him to an insane asylum, and to prosecute the same until a guardian was appointed.³⁴ An appeal can be taken from

²⁹ *Ex parte Collins*, 151 Fed. 358.

³⁰ S. C. Rule 34, 117 U. S. 708; U. S. R. S., § 765. He will not be admitted to bail unless probable cause for an appeal is shown. *Ex parte Green*, 165 Fed. 557.

³¹ S. C. Rule 34, 117 U. S. 708; U. S. R. S., § 765. It has been held that the judge who discharges the writ cannot admit the person to bail. *Re Iasigi*, 79 Fed. 755; *Ex parte Ronchi*, 165 Fed. 558. He will not be admitted to bail unless probable cause for an appeal is shown. *Ex*

parte Green, 165 Fed. 557. In *Ex parte Crawford*, 165 Fed. 830, the district attorney was ordered to give five days notice of the entry of the order dismissing the writ, in order that the petitioner might have an opportunity to appeal.

³² U. S. v. Alexandroff, 148 Fed. 652.

³³ U. S. R. S., § 766. See *Ex parte Jugiro*, 44 Fed. 754.

³⁴ *King v. McLean Asylum of Mass. Gen. Hospital*, C. C. A., 64 Fed. 325.

an order refusing to grant the writ in the same manner as from an order refusing to discharge the prisoner upon the return.³⁵ A Circuit Court refused to allow an appeal from an order denying the writ in a capital case where the conviction had been affirmed by the Supreme Court of the United States and the case was clearly frivolous.³⁶ Security for costs is required upon such an appeal.³⁷ It is more appropriate and orderly for the State court to defer action in such a case until the mandate of the Supreme Court has been issued and filed in the District Court; but after judgment has been entered in the Supreme Court, an order of the State court is not void; although the State court then acts at the risk that its orders may be controlled, and if need be annulled, if the Supreme Court during the term should suspend or set aside its own judgment.³⁸ Other proceedings upon such an appeal, including the time when the transcript is to be filed in the appellate court, are regulated by the court or judge hearing the cause.³⁹ The appeal may thus be heard at a term pending when it is taken.⁴⁰ Even when the case is brought before the Supreme Court upon a certificate of jurisdiction, all the merits of the original application will be considered.⁴¹ No writ of error lies to the order or judgment of a District Court upon an application for a writ of *habeas corpus*.⁴²

A recent act of Congress provides: "That from a final decision by a court of the United States in a proceeding in *habeas corpus* where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall

³⁵ *Ex parte* Snow, 120 U. S. 274, 30 L. ed. 658.

³⁶ *Re* Durrant, 84 Fed. 314. But see *Re* Marano, 138 Fed. 201; *supra*, § 466.

³⁷ *Re* Newman, 79 Fed. 615.

³⁸ *Re* Jugiro, 140 U. S. 291, 296, 35 L. ed. 510, 512; *Lambert v. Barrett*, 159 U. S. 660, 40 L. ed. 296.

³⁹ U. S. R. S., § 768. But see *Ex parte* Jugiro, 44 Fed. 754, cited *supra*, § 466.

⁴⁰ *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544.

⁴¹ *Storti v. Massachusetts*, 183 U. S. 138, 144, 46 L. ed. 120, 124; holding that U. S. R. S., § 761, applies.

⁴² *Re* Morrissey, 137 U. S. 157, 158, 34 L. ed. 644, 645; *Re* Neagle, 135 U. S. 1, 42; 34 L. ed. 55, 63; *Rainbow et al. v. Young*, C. C. A., 154 Fed. 489.

be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.”⁴³

§ 468. Writs of *quo warranto*. The better opinion is that the courts of the United States have original jurisdiction to grant the writ of *quo warranto* only when specifically authorized by statute; and that no writ of *quo warranto* can issue to try the title to the office of President of the United States.¹

The District Courts of the United States have jurisdiction of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.”² The Revised Statutes provide that “whenever any person holds office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution, the district attorney for the district in which such person holds office shall proceed against him by writ of *quo warranto*, returnable to the Circuit or District Court of the United States in such district, and prosecute

⁴³ Act of March 10, 1908. 35 St. at L. 40.

§ 468. ¹ This was the opinion of Hon. David Dudley Field, as expressed before the Electoral Commission. Proceedings of Electoral Commission, pp. 42, 43; ² Field's Speeches and Papers, pp. 404, 405; quoted in Foster's Fed. Pr., 4th Ed. pp. 1240, 1241.

The same opinion was subsequently expressed by Mr. Field in Congress, ² Field's Speeches and Pa-

pers, pp. 414-417; Foster's Fed. Pr. 4th Ed., 1241-1243. Charles O'Connor, it is said, gave to Governor Samuel J. Tilden an opinion to the same effect. Senator Matthew H. Carpenter expressed the opposite view in his argument before the Electoral Commission. (Proceedings of Electoral Commission, pp. 272-273; quoted in Foster's Fed. Pr. 5th Ed., 1241.

² 22 Jud. Code § 24, Subd. 15; 36 St. at L. 1087.

the same to the removal of such person from office.”³ This applied to persons disqualified from holding office by the Fourteenth Amendment, whose disabilities had not been removed. A civil action in the nature of a *quo warranto* to try the right to exist as a corporation or to annul a corporate charter may be removed to the District Court of the United States, if the defendant has a defense founded upon the Constitution or a

³ U. S. R. S., § 186. A former statute which has been repealed, 28 St. at L. 36, provided: “Whenever any person is defeated or deprived of his election to any office, except elector of President or Vice-President, representative or delegate in Congress, or members of a State Legislature, by reason of the denial to any citizen who may offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and the person so defeated or deprived may bring any appropriate suit or proceeding to recover the possession of such office, and in cases where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceedings may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And the circuit or district Court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States, and secured herein.” U. S. R. S.,

§ 2010. It was said that the jurisdiction conferred by this statute was limited to those actions in which the sole question as to the title to an office arose from the denial to citizens of the right to vote on account of their race, color, or previous condition of servitude; *Johnson v. Jumel*, 3 Woods, 69. In *State ex rel. Barker v. Bowen*, 8 Rich. (S. C.) 400, it was held that the writ of *quo warranto* would not lie to determine the title to the office of Presidential Electors, since they were held to be not officers of the State, although the State had the right to appoint them. This case was decided during the contest between Hayes and Tilden for the Presidency. In November, 1872, the Circuit Judge for the District of Louisiana, E. H. Durell, issued an injunction founded upon a bill in equity in the suit of Kellogg, who claimed to be Governor, enjoining certain persons who claimed to be members of the returning board from canvassing the votes, and enjoining McEnery, who claimed to have been elected Governor, from acting as Governor, or setting up any claim to the office. Subsequently the following order was made by the same Circuit Judge:—

“In order to prevent the further obstruction of the proceedings in the cause, and further to prevent the violation of the orders of this court, to the imminent danger of disturb-

statute of the United States.⁴ A writ of error from the Supreme Court of the United States will issue in a case otherwise within its appellate jurisdiction to the judgment of a State court, removing or refusing to remove a person from a State office in an action in the nature of a *quo warranto*, even when the office is that of Governor of such State.⁵ In such a case where a judgment of the State court removes a State officer and thereby vacates the office, and a writ of error from the Supreme Court is allowed for the reversal of the judgment, the person appointed to the vacancy with knowledge of the grant of the writ of error on the part of the State judge making the appointment, but before the filing of the writ in the clerk's office where the record remains, is guilty of no contempt of the Supreme Court in assuming to perform the duties of the office.⁶ It has

ing the public peace; it is hereby ordered, that the marshal of the United States for the District of Louisiana, shall forthwith take possession of the building known as the Mechanics' Institute, and occupy the State House, for the assembling of the Legislature there in the city of New Orleans, and hold the same subject to further order of this court; and meanwhile prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers in contempt and violation of said restraining order. But the marshal is directed to allow the ingress or egress to and from the public office in said building of persons entitled to the same." *Ex parte Warmouth*, 17 Wall. 64, 21 L. ed. 543. An application was made to the Supreme Court for a writ of prohibition against the Circuit Judge. The Supreme Court held that when a final decree had been rendered to the Circuit Court, an appeal would lie to the Supreme Court; but the Su-

preme Court had no right to issue a writ of prohibition until an appeal was taken. *Ex parte Warmouth*, 17 Wall. 64, 21 L. ed. 543. This order was severely condemned by a committee of the Senate, and the judge escaped impeachment by resigning his office. Senate Doc. 42 Cong. 3d Sess. 457.

⁴ *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482; *State of Illinois v. Illinois Cent. R. Co.*, 33 Fed. 721; *State ex rel. Barker v. Bowen*, 8 Rich. (S. C.) 382, held that an action of *quo warranto* to determine the title to the office of Presidential Elector could not be removed from a State to a Federal court upon the ground that it arose under the Constitution and laws of the United States. This decision was made during the contest between Hayes and Tilden for the Presidency.

⁵ *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629; *Boyd v. Nebraska*, 143 U. S. 135, 36 L. ed. 103. See the vigorous dissenting opinion of Mr. Justice Field in the latter case.

⁶ *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629.

been held that an action of *quo warranto* to try the title of a citizen of another State to an office in a corporation of the State where the suit is brought, cannot be removed into a Federal court because of a difference of citizenship between the defendant and the relator.⁷ Orders have been granted by a District Court to compel persons claiming still to be district attorney and marshal to deliver the official books and papers in their possession to others who had been appointed by the President to succeed them, and whose title they disputed.⁸

In an action in the nature of a *quo warranto* to try the title to an office, the amount of salary for the term as to which the dispute exists is the value of the subject-matter in dispute.⁹

The Supreme Court of the District of Columbia has jurisdiction to try the title to a municipal office in the District by an action in the nature of a *quo warranto*.¹⁰ The extent of the jurisdiction of the Supreme Court of the District of Columbia to issue the writ of *quo warranto* is uncertain.¹¹ It has been held that a writ of *quo warranto* to try the title to an office cannot be issued except at the instance of the United States, even by the consent of both parties.¹²

A writ of *quo warranto* in a Territorial court to test the right of the defendant to exercise the functions of a Territorial judge, cannot be brought in the name of the Territory.¹³ It must be brought in the name of the United States.¹⁴

§ 469. Writs of *scire facias*. The Judicial Code provides: "The Supreme Court and the District Courts shall have power to issue writs of *scire facias*."¹ A *scire facias* is a judicial writ founded on some matter of record, as a judgment, recognizance, or letters-patent, on which it lies either to enforce the execution of the same

⁷ *Place v. Illinois*, C. C. A., 69 Fed. 481.

⁸ *Re Parsons*, 150 U. S. 150, 37 L. ed. 1034; *Re Nissinger*, *Ibid*.

⁹ *Gorman v. Havird*, 141 U. S. 206, 35 L. ed. 717.

¹⁰ U. S. v. Addison, 6 Wall. 291, 18 L. ed. 919.

¹¹ See the remarks of Mr. Justice Bradley in the Proceedings before

the Electoral Commission, p. 43, quoted in Foster's Fed. Pr., 4th Ed., § 1241.

¹² *Wallace v. Anderson*, 5 Wheat. 291, 5 L. ed. 91.

¹³ *Territory v. Lockwood*, 3 Wall. 236, 18 L. ed. 47.

¹⁴ *Ibid*.

§ 469. ¹ Jud. Code, § 262, re-enacting U. S. R. S., § 710.

or to vacate or set it aside.² Where a judgment becomes dormant by the expiration of time, it is the proper process to revive same.³ In England a *scire facias* was the usual proceeding to repeal a patent, and was brought in chancery where the patent was of record.⁴ In the United States such a writ of *scire facias* is not in use as a chancery proceeding; and the appropriate method to obtain the vacation of a patent is by a bill in equity brought by the United States.⁵ In one case a writ of *scire facias* to forfeit the title of a corporation to lands was maintained.⁶ Although in strictness a *scire facias* is not an original but is merely a judicial writ, in a certain degree it is in the nature of an original, and is so far an original that the defendant may plead to it, and that in the common law a plea of a release of all causes and executions was a good plea in bar to a *scire facias*, and concluded "if the plaintiff ought to have or maintain his action," &c.⁷ It has been held that a writ of *scire facias* founded upon a claim to a mechanics' lien filed in accordance with the act of March 2, 1883,⁸ may be maintained without any declaration, provided that the writ recites the bill of particulars of the plaintiff's claims as filed;⁹ that a Federal court in Pennsylvania has jurisdiction to grant the writ of *scire facias sur mortgage*, according to the form of

² 2 Sellon's Pr. 187; Winder v. Caldwell, 14 How. 434, 442, 14 L. ed. 487, 491.

³ Davis v. Davis, C. C. A., 174 Fed. 786. The statute of Westminster, II, 13 Ed. W. I. c. 45, extended the remedy to revive a judgment, which theretofore was issued at common law only, as to real actions and writs of annuity, so as to include judgments in personal actions which had not become dead but only dormant by a failure to issue execution within a year and a day. In the Federal courts held in the districts of Pennsylvania, it is the proper remedy to revive a judgment which has ceased to be a lien upon real estate by the expiration of time. Davis v. Davis, C. C. A., 174 Fed. 786.

⁴ Atty. Gen. v. Vernon, 1 Vernon 277, 282; King v. Butler, 3 Levinz, 220; Mowry v. Whitney, 14 Wall. 434, 440, 20 L. ed. 858, 859.

⁵ Mowry v. Whitney, 14 Wall. 434, 20 L. ed. 858; U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 32 L. ed. 450; U. S. v. Stone, 2 Wall. 525, 17 L. ed. 765. See Pennsylvania ex rel. Atty. Gen. v. Boley, 1 Weekly Notes, 302.

⁶ Vermont v. Society for the Propagation of the Gospel, 1 Paine, 652.

⁷ Fenner v. Evans, 1 T. R. 267; Winder v. Caldwell, 14 How. 434, 443, 14 L. ed. 487, 491; 2 Sellon's Pr. 187.

⁸ 4 St. at L. 659.

⁹ Winder v. Caldwell, 14 How. 434, 435, 443, 14 L. ed. 487, 488, 491.

practice prescribed by the State statute;¹⁰ and that in Illinois a writ of *scire facias* will not lie to foreclose a mortgage not duly acknowledged.¹¹ A *scire facias* has been issued to show cause why execution should not be taken *de bonis propriis*;¹² and to enforce the liability of the indorser of a writ for costs.¹³ The right to a writ of mandamus for the enforcement of a judgment is equivalent to the right to issue an execution thereon for the purpose of an application to revive the judgment on *scire facias*.¹⁴ "The writ of *scire facias* is no more an execution than an action of debt would have been."¹⁵ The use of the writ in the revivor of actions at law and suits in equity is hereinbefore described.^{15a} A *scire facias* to show cause why a forfeiture of lands for failure to perform a condition in the grant requiring cultivation should not be enforced, containing an express averment that the lands had not been cultivated, was held sufficient.¹⁶ Averments in such a writ tending to show a violation of its charter by a corporation in matters not affecting the grant of such land, were disregarded as irrelevant, since such matter, it was held, could only be pleaded in a direct proceeding to vacate the charter of the corporation,¹⁷ and a general allegation of non-performance of the conditions of the grant of the lands was construed as having reference to the violations which were specifically pleaded.¹⁸ A demurrer to a writ of *scire facias* to revive a judgment in ejectment raises only questions of law on the facts stated in the writ; and consequently no presumption from lapse of time against the judgment on which the writ was issued can be considered, in a State where there is no Statute of Limitations to the revival of a judgment; and lapse of time can operate as a defense only by way of evidence.¹⁹ The State Statute of Limitations is a

¹⁰ *Black v. Black*, 74 Fed. 978; *Mutual Life Ins. Co. v. Patterson*, 28 Pittsb. Leg. J. (N. S.) 413.

¹¹ *Kenosha & R. R. Co. v. Sperry*, 3 Biss. 309.

¹² *Teasdale v. Branton*, 2 Hayw. 377.

¹³ *Pullman's P. C. Co. v. Washburn*, 66 Fed. 790.

¹⁴ *Wonderly v. Lafayette County*, 74 Fed. 702.

¹⁵ *Deñeale v. Stump*, 8 Pet. 526,

528, 531; 8 L. ed. 1032, 1033, per Marshall, C. J.; *Hatch v. Eustis*, 1 Gall. 160; *McKnight v. Craig's Adm'rs*, 6 Cranch, 183, 3 L. ed. 193.

^{15a} § 220, *supra*.

¹⁶ *Vermont v. Society for Propagation of the Gospel*, 1 Paine, 652.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Lessee of Walden v. Craig's Heirs*, 14 Pet. 147, 152, 10 L. ed. 393, 396.

defense to a *scire facias* to revive an action not founded upon a statute of the United States, or an action by the receiver of a national bank to collect a stockholder's subscription.²⁰ Where there is no declaration, a demurrer will lie to a writ of *scire facias* itself.²¹ The declaration upon a *scire facias* is usually a copy of the writ.²²

The failure of the defendant in a *scire facias* against bail to join in a demurrer interposed to one of his two pleas was held a waiver of such plea.²³ Where the surety upon an appeal bond resided in another Federal district, it was held that an order forfeiting the bond and directing that execution issue to the marshal of both districts, which was entered upon a writ of *scire facias*, service whereof was made upon him only in the district of his residence, could not be enforced in the latter district.²⁴ It has been held that, in a proceeding upon a *scire facias* upon a forfeited recognizance, the defendant is entitled to a trial by jury;²⁵ and that, upon the trial, the record upon which the writ was issued is admissible in evidence to establish the plaintiff's cause of action.²⁶ Where the writ declared that the defendants appeared before the United States District Court, and entered into the recognizance in question on a specified date, and that it was conditioned that the principal should appear before the District Court of the United States at the next term thereof, upon a specified day, while the recognizance itself bore on its face the approval of the judge on the first date, but was also acknowledged before a notary on that day, and conditioned for the appearance at the next term of the court, without specifying the time of such term; it was held that the variances were immaterial.²⁷

²⁰ Butler v. Poole, 44 Fed. 586. So held of a State statute which by its terms was applicable to actions upon a judgment. Browne v. Chavez, 181 U. S. 68, 45 L. ed. 752; *supra*, § 220.

²¹ Vermont v. Society for Propagation of the Gospel, 1 Paine, 652.

²² Ibid.

²³ Mörsehl v. Hall, 13 How. 212, 14 L. ed. 117.

²⁴ Kirk v. U. S., 124 Fed. 324; s. c., 131 Fed. 331; *aff'd* C. C. A., April 19, 1905, 137 Fed. 753; *aff'd* by a divided court, 204 U. S. 668, 51 L. ed. 671.

²⁵ Hollister v. U. S., C. C. A., 145 Fed. 773.

²⁶ Hollister v. U. S., C. C. A., 145 Fed. 773.

²⁷ Hollister v. U. S., C. C. A., 145 Fed. 773, 782.

§ 470. **Attachment of property.** A Federal statute passed June 1, 1872, provides that "in common-law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such Circuit or District Courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process, provided, that similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."¹ Most of the District Courts have adopted by their rules the State laws in force within their respective districts.² It has been held that such a rule need not be in writing; and that the court of review will presume that such a rule has been adopted by the trial court when there is no affirmative showing to the contrary.

These rules and the statute do not give a District Court power thus to acquire jurisdiction over a person not a resident of the district nor served with process therein.⁴ But it has been held: that an attachment thus levied in a suit begun in a State court without personal service will not be vacated for that reason after removal,⁵ although it may be upon other grounds;⁶ and that subsequent service of process by publication, in accordance with the State statute, is sufficient to give

§ 470. ¹ U. S. R. S., § 915; 17 St. at L., ch. 255, p. 197. See *Schunk v. Moline M. L. S. Co.*, 147 U. S. 500, 37 L. ed. 255.

² See, for example, the Common Law Rules of the U. S. D. C., S. D. N. Y.

³ *Logan v. Goodwin*, C. C. A., 104 Fed. 490. See also *Citizens' Bank v. Farwell*, C. C. A., 56 Fed. 570.

⁴ *Sadlier v. Fallon*, 2 Curt. 579; *Nazro v. Cragin*, 3 Dill. 474; *Chittenden v. Darden*, 4 Woods, 437; *Anderson v. Shaffer*, 10 Fed. 266; *Boston El. Co. v. El. G. L. Co.*, 23 Fed. 838; *Harland v. U. L. Tel. Co.*,

6 L.R.A. 252; 40 Fed. 308; *Ex parte Railroad Co.*, 103 U. S. 794, 26 L. ed. 461.

⁵ *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138, modifying *Wells v. Clark*, 136 Fed. 462; *Crocker Nat. Bank v. Pagenstecher*, 44 Fed. 705; *Blumberg v. A. B. & E. L. Shaw Co.*, 131 Fed. 608; *Vermilya v. Brown*, 65 Fed. 149; *Hubbard v. Central of Georgia Ry. Co.*, 135 Fed. 256; *Lebensberger v. Scofield*, C. C. A., 139 Fed. 380.

⁶ *Corbitt v. Farmers' Bank*, 114 Fed. 602.

the Federal court jurisdiction to enter a judgment that can be enforced against the property attached.⁷ In such a case, however, a personal judgment cannot be entered against a defendant who has not made a general appearance.⁸ It is doubtful whether the writ of attachment can be issued in a suit originally instituted in a Federal court, before jurisdiction has been obtained by service of original process.⁹ A suit to enforce the lien of an attachment or garnishee process, by collecting the debt that has been attached or garnisheed, may, if the necessary difference of citizenship exists and the claim exceeds the jurisdictional amount, be brought in a Federal court, which could not have taken jurisdiction of a suit by the original creditor against the defendant.¹⁰ It has been held that the United States court for the Eastern District of New York has power to issue an attachment, and direct the same for service to the marshal of any district in the State.¹¹ As a general rule, actual physical possession is necessary to constitute a valid seizure under a writ of *feri facias* or a writ of attachment, unless there be garnishee process, when service of papers on the garnishee suffices.¹² Where the State statutes provided for successive levies under successive writs in the order in which the writs were received by the sheriff or other officers, and for a reference to ascertain the amounts and priorities of the several attachments, it was held that a writ of attachment in the hands of the marshal of the United States might be levied *sub modo* upon property in the hands of the sheriff under a prior levy, without actual seizure by the marshal, but by a constructive seizure; and that the plaintiff, after sustaining his attachment and suit in the Federal court, might have to go into the court from which the first writ of attachment issued, and intervene to obtain the proper relief, and to assert such priority of lien as the laws of the State respecting attachment might permit.¹³ Where the

⁷ Clark v. Wells, 203 U. S. 164; 51 L. ed. 138; Mercantile Nat. Bank of City of New York v. Barron, 165 Fed. 831.

⁸ Clark v. Wells, 203 U. S. 164, 51 L. ed. 138.

⁹ Chittenden v. Darden, 4 Woods, 437. See Nazro v. Cragin, 3 Dill. 474; Treadwell v. Seymour, 41 Fed. 579.

¹⁰ Brandenstein v. Helvetia Swiss Fire Ins. Co., 159 Fed. 589, § 51. But see § 63, *supra*.

¹¹ Treadwell v. Seymour, 41 Fed. 579.

¹² Brooks v. Fry, 45 Fed. 776.

¹³ Brooks v. Fry, 45 Fed. 776-778. See § 56, *supra*.

State statute permits a writ of attachment to be amended by the addition of a seal, the writ may be so amended by the Federal court after a removal.¹⁴ The Federal court may permit an amendment of the affidavit on which the attachment was issued in a case where the State practice would not permit such an amendment.¹⁵

The decisions of the Supreme Court of a State construing and applying its attachment laws are, in so far as they are constitutional, rules of decisions in the Federal courts in like cases coming from that State.¹⁶ Where the State statute gives the creditor of a non-resident the election either to bring an action at law, supported by an attachment, or to sue out an attachment and bring a suit in equity to establish his claim and enforce the lien, the latter proceeding may, when the non-resident is a citizen of a different State from the plaintiff, be removed to the Federal court and there continued in equity.¹⁷

The Revised Statutes provide: "Whenever any property owned or held by the United States, or in which the United States have or claim an interest, shall, in any judicial proceeding under the laws of any State, district or Territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against such property, the Secretary of the Treasury, in his discretion, may direct the Solicitor of the Treasury to cause a stipulation to be entered into by the proper district attorney for the discharge of such property from such seizure, arrest, attachment, or proceeding, to the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this and the following section. Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial

¹⁴ *Wolf v. Cook*, 40 Fed. 432.

¹⁵ *Erstein v. Rothschild*, 22 Fed. 61; *Booth v. Denike*, 65 Fed. 43; *Bowden v. Burnham*, 59 Fed. 752, 754; *supra*, § 453.

¹⁶ *Price v. Alder G. Con. Co., C. C. A.*, 71 Fed. 151. The Massachusetts statute providing that no trust imposed by law or declared by the parties shall prevent a creditor,

without notice of the same, from attaching the land as if no trust existed, is enforced by the Federal courts there held. *McDermott v. Hayes*, C. C. A., 197 Fed. 129.

¹⁷ *Craddock v. Fulton*, 140 Fed. 426.

process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any Department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim.”¹⁸ “In all cases where a stipulation is entered into under the preceding section, and, in consequence thereof, the property is discharged, and final judgment is afterward given in the court of last resort to which the Secretary of the Treasury may deem proper to cause such proceedings to be carried, affirming the claim for the security or satisfaction of which such proceedings have been instituted, and the right of the person asserting the same to enforce it against such property by means of such proceedings, notwithstanding the claims of the United States thereto, such final judgment shall be deemed, to all intents and purposes, a full and final determination of the rights of such person, and shall entitle such person, as against the United States, to such rights as he would have had in case possession of such property had not been changed. Whenever such claim is for the payment of money, and the same is by such judgment found to be due, the presentation of a duly authenticated copy of the record of such judgment and proceedings shall be sufficient evidence to the proper accounting officers for the allowance thereof; and the same shall thereupon be allowed and paid out of any moneys in the Treasury not otherwise appropriated. The amount so to be allowed and paid shall not, however, exceed the value of the interest of the United States in the property in question.”¹⁹

The Revised Statutes further provide, concerning National Banking Associations, “that no attachment, injunction or execution shall be issued against such association, or its property, before final judgment, in any suit, action or proceeding in any State, County or Municipal Court.”²⁰ No attachment can, consequently, be issued against the property of a national bank before final judgment in a State court,²¹ or in a Federal

¹⁸ U. S. R. S., § 3753.

¹⁹ U. S. R. S., § 3752; U. S. R. S., § 3754. See Opinion of Attorney-General Knox, In the Matter of

Cruiser Galveston, June 19, 1903;

²⁴ Op. A. G. 679.

²⁰ U. S. R. S., § 5242.

²¹ Van Reed v. People's Nat.

court.²² Railroad cars, while in use for Interstate Commerce, may be attached; and sums due a railway company from other companies, as its share of freight collected as the terminal or final carriers on continuous interstate shipments, may be attached or garnished under the laws of another State, where the defendant cannot be personally sued.²³ Payment of the debt under attachment or garnishee process from a State court levied subsequent to the commencement of the suit in the Federal court is no defense to the latter,²⁴ and such attachments and levies have been held inoperative for any purpose.²⁵ Where there is a dispute between the State sheriff and a United States marshal as to the right of possession, the proper remedy is, ordinarily, a petition of intervention *pro interesse suo*, filed by the sheriff in the Federal action.²⁶ It has been held that money paid into the registry of a Federal court cannot be attached, even after the entry of a final decree or order for its distribution.²⁷

It has been held that after an order has been entered in the Federal court directing the marshal to turn over the attached property to a claimant the sheriff may replevy such property while it is still in the marshal's possession.²⁸ Where the marshal's return merely recited that, "in obedience to the annexed writ of attachment, I have attached the following described property, to-wit," &c., without specifying the acts that he had performed, it was presumed that he had obeyed the statute; that the real property was attached by leaving a copy of the writ with the occupant thereof, or, if there was no occupant, in a

Bank, 198 U. S. 554, 49 L. ed. 1161; *Garner v. Second Nat. Bank*, 66 Fed. 369.

²² *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. ed. 567.

²³ *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N.S.) 823, reversing 146 Fed. 403.

²⁴ *Wallace v. McConnell*, 13 Peters, 136, 10 L. ed. 95; *Rosenstein v. Tarr*, 51 Fed. 368.

²⁵ *Mack v. Winslow*, 59 Fed. 316. For the rules regulating the mutual relations of the State and Federal

courts, respecting attachments and garnishee process, see *Menees v. Matthews*, 197 Fed. 633; § 56, *supra*.

²⁶ *Pickett v. Filer & Stowell Co.*, 40 Fed. 313. In *McDermott v. Hayes*, 194 Fed. 902, the attaching party was directed to give a bond for the protection of the intervenor's rights as an alternative to the dissolution of the attachment.

²⁷ *Corbitt v. Farmers' Bank*, 114 Fed. 602. See *supra*, § 56.

²⁸ *Daniels v. Lazarus*, 65 Fed. 718; *supra*, § 56.

conspicuous place thereupon; and that such personal property, as was not capable of manual delivery, was attached by leaving a copy of the writ with the person in possession of the same, in accordance with the statutes then in force.²⁹ A third person claiming ownership of property that has been attached may intervene in the action and assert his claim, by a motion to vacate the attachment as regards such property;³⁰ but, ordinarily his application should not be decided upon *ex parte* affidavits.³¹ A motion to quash an attachment is not equivalent to a general appearance.³² It has been held that a writ of error does not lie to an order quashing an attachment.³³ The Revised Statutes provide: "In all cases where debts are due from defaulting or delinquent postmasters, contractors, or other officers, agents; or employees of the Post-Office Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent, or employee, and his sureties, or either of them, in the following cases: First. When such officer, agent, or employee, and his sureties, or either of them, is a non-resident of the district where such officer, agent, or employee was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process. Second. When such officer, agent, or employee, and his sureties, or either of them, has conveyed away, or is about to convey away his property, or any part thereof, or has removed or is about to remove the same or any part thereof from the district wherein it is situate, with intent to defraud the United States. And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon

²⁹ Griffin v. Am. Gold Min. Co., C. C. A., 136 Fed. 69.

³⁰ U. S. v. Neely, 146 Fed. 764.

³¹ U. S. v. Neely, 146 Fed. 764.

³² Davis v. Cleveland, C., C. & St. L. R. Co., 146 Fed. 403; *supra*, §§ 168, 169.

³³ Hammer v. Scott, C. C. A., 60 Fed. 343. But see *infra*, Chapter on Writs of Error and Appeals; Standley v. Roberts, C. C. A., 59 Fed. 836. Approved as to this but reversed on another point, 217 U. S. 157, 174, 54 L. ed. 708, 718, 27

due application, and the validity of the warrant first issued shall continue until the return day thereof.”³⁴ “Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the Postmaster-General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt.”³⁵ “Upon any such application and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court.”³⁶ “At any time within twenty days before the return day of such warrant, the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached and a specific return thereof, shall be confined to the remedy herein afforded, but his right to an action of trespass, or other action for damages, shall not be impaired hereby.”³⁷ “When the property attached is sold on any interlocutory order of the court or is producing any revenue, the money arising

L.R.A.(N.S.) 823; *Atl. Lumber Co.*
v. L. Bucki & Son L. Co., C. C. A.,
92 Fed. 864.

³⁵ U. S. R. S., § 925.

³⁶ U. S. R. S., § 926.

³⁷ U. S. R. S., § 927.

³⁴ U. S. R. S., § 924.

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from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same.”³⁸ “Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors, for two months, and non-residents for four months. The publication shall be made in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued.”³⁹ “After the first publication of such notice of attachment as required by law, every person indebted to, or having possession of any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment.”⁴⁰ “Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises.”⁴¹ “Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of, or the adoption of State laws by, the United States courts.”⁴² “An attachment of property, upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the

³⁸ U. S. R. S., § 928.³⁹ U. S. R. S., § 929.⁴⁰ U. S. R. S., § 930.⁴¹ U. S. R. S., § 931.⁴² U. S. R. S., § 932.

plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State: Provided, that nothing herein contained shall interfere with any priority of the United States in the payment of debts.”⁴³ “All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.”⁴⁴ “In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such depositions; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States: Provided, that no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action; nor until the sum in which the garnishee stands indebted is actually due.”⁴⁵ “When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suits.”⁴⁶ “If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.”⁴⁷ “Whenever any writ or process is sued out or prosecuted by any person in any

⁴³ U. S. R. S., § 933.⁴⁶ U. S. R. S., § 936.⁴⁴ U. S. R. S., § 934.⁴⁷ U. S. R. S., § 937.⁴⁵ U. S. R. S., § 935.

court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.”⁴⁸ “Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations, and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court.”⁴⁹ “The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office.”⁵⁰ “All persons shall have resort to the list of names so posted in the marshal’s office, and may take copies without fee.”⁵¹

§ 471. Arrests. The Revised Statutes regulate arrests in civil actions as follows: “No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished.” And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted

⁴⁸ U. S. R. S., § 4063.

⁴⁹ U. S. R. S., § 4064.

⁵⁰ U. S. R. S., § 4065.

⁵¹ U. S. R. S., § 4066.

therein as may be adopted in the courts of such State."¹ The statute does not apply to imprisonment for failure to pay a fine,² or a penalty;³ nor, perhaps, to imprisonment in suits to which the United States is a party,⁴ such as a suit to enforce a forfeiture;⁵ nor, it has been said, to suits for torts.⁶ "When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the Circuit Court for the district where the defendant is so held."⁷ A subsequent statute provides for the appointment for the District Courts of each district, of United States Commissioners, with the same powers and duties that were previously given to Commissioners of the Circuit Courts.⁸ United States Commissioners have now jurisdiction of proceedings for the discharge of persons arrested on *mesne* process, issued out of a Federal court, and to obtain the arrest of a judgment debtor upon an execution issued from such a court.⁹ "Persons imprisoned on process issuing from any court in the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective States are entitled to, and under the like regulations and restric-

§ 471. ¹ U. S. R. S., § 900; *Re Bergen*, 2 Hughes, 513; *Low v. Duffee*, 5 Fed. 256; *Catherwood v. Gapete*, 2 Curt. 94; *Moan v. Wilmarth*, 3 W. & M. 399.

² *Re Sanborn*, 52 Fed. 583.

³ U. S. v. Walsh, Deady, 281.

⁴ U. S. v. Hewes, Crabbe, 307. But see U. S. v. Tetlow, 2 Lowell, 159; *Re Sanborn*, 52 Fed. 583, 585.

⁵ U. S. v. Banister, 70 Fed. 44.

⁶ U. S. ex rel. Deinell v. Arnold, 69 Fed. 987, 992. See *Stroheim v. Deinell*, C. C. A., 77 Fed. 802.

⁷ U. S. R. S., § 991.

⁸ Act of May 28, 1896, ch. 252, § 19, 29 St. at L. 184, Comp. St. 1901, p. 499.

⁹ *Hayes v. Canada*, A. & P. S. S. Co., C. C. A., 184 Fed. 821.

tions.”¹⁰ The effect of these provisions and others previously quoted¹¹ is to make the practice and proceedings in arrests in civil actions in the Federal Circuit and District Courts almost exactly similar to those in the State courts held in their respective districts.¹² A judgment debtor may be arrested, under civil process of a Federal court, in any case where the State practice authorizes it.¹³ A person arrested under civil process of a Federal court may be incarcerated in any of the jails of the district.¹⁴ “Whenever any collector of the revenue, receiver of public money, or other officer who has received the public money before it is paid into the Treasury of the United States, fails to render his account, or pay over the same in the manner or within the time required by law, it shall be the duty of the First Comptroller of the Treasury or the Commissioner of Customs, as the case may be, to cause to be stated the account of such officer, exhibiting truly the amount due to the United States, and to certify the same to the Solicitor of the Treasury, who shall issue a warrant of distress against the delinquent officer and his sureties, directed to the marshal of the district in which such officer and his sureties reside. Where the officer and his sureties reside in different districts, or where they, or either of them, reside in a district other than that in which the estate of either may be, which it is intended to take and sell, then such warrant shall be directed to the marshals of such districts, respectively.”¹⁵ “The warrant of distress shall specify the amount with which such delinquent is chargeable, and the sums, if any, which have been paid.”¹⁶ “The marshal authorized to execute any warrant of distress shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such de-

¹⁰ U. S. R. S., § 992.

¹¹ U. S. R. S., § 914; *supra*, § 453; U. S. R. S., § 716; *supra*, § 461.

¹² *Moan v. Wilmarth*, 3 W. & M. 399; *Gray v. Monroe*, 1 McLean, 528; *Low v. Durfee*, 5 Fed. 256; U. S. v. *Tetlow*, 2 Lowell, 159; *Re Bergen*, 2 Hughes, 513. But see *Duncan v. Darst*, 1 How. 301, 11 L. ed. 139; *Re Watson Freeman*, 6 Curt. 491; U. S. v. *Knight*, 14 Pet.

301, 10 L. ed. 465; U. S. v. *Arnold*, C. C. A., 69 Fed. 987. For the practice in Equity, see *supra*, §§ 326-328.

¹³ *Johnson v. Crawford & Yothers*, 154 Fed. 761.

¹⁴ *Johnson v. Crawford & Yothers*, 154 Fed. 761.

¹⁵ U. S. R. S., § 3625.

¹⁶ U. S. R. S., § 3626.

linquent officer; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town and county where the goods or chattels were taken, or in the town or county where the owner of such goods or chattels may reside. If the goods and chattels be not sufficient to satisfy the warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law."¹⁷ "If the delinquent officer absconds, or if goods and chattels belonging to him cannot be found sufficient to satisfy the warrant, the marshal or his deputy shall proceed, notwithstanding the commitment of the delinquent officer, to levy and collect the sum which remains due by such delinquent, by the distress and sale of the goods and chattels of his sureties; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the goods or chattels were taken, or in the town or county where the owner resides."¹⁸ "For want of goods and chattels of a delinquent officer, or his sureties, sufficient to satisfy any warrant of distress issued pursuant to the foregoing provisions, the lands, tenements, and hereditaments of such officer and his sureties, or so much thereof as may be necessary for that purpose, after being advertised for at least three weeks in not less than three public places in the county or district where such real estate is situated, before the time of sale, shall be sold by the marshal of such district or his deputy."¹⁹ "For all lands, tenements, or hereditaments sold in pursuance of the preceding section, the conveyance of the marshal or his deputy, executed in due form of law, shall give a valid title against all persons claiming under such delinquent officer or his sureties."²⁰ "The amount due by any delinquent officer is declared to be a lien upon the lands, tenements, and hereditaments of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them, and a record thereof made in the office of the clerk of the district court of the proper dis-

¹⁷ U. S. R. S., § 3627.

¹⁸ U. S. R. S., § 3628.

¹⁹ U. S. R. S., § 3630.

²⁰ U. S. R. S., § 3631.

trict, until the same is discharged according to law.”²¹ These statutes are constitutional.²²

“No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in executions for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted.”²³ “Marines shall be exempt, while enlisted in said service, from all personal arrest for debt or contract.”²⁴ The prohibitions of the arrest of foreign ministers, and their domestic servants, are quoted in the section on attachments.²⁵

§ 472. Consolidation at law and in equity. The Revised Statutes provide that when causes of a like nature or relative to the same question are pending before a court of the United States or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.¹ This statute has been held to apply to suits in equity as well as at law.² The court will usually order a consolidation of several suits brought for the administration of the same property,³ or of parts of the same system, which are operated as a unit and devoted to a public service.⁴ Where a railway company filed a

²¹ U. S. R. S., § 3629.

St. L. R. Co., 10 Fed. 454; Davis

²² U. S. v. Dillin, C. C. A., 168 Fed. 813. v. St. Louis & S. F. Ry. Co., 25 Fed. 786.

²³ U. S. R. S., § 1237.

²⁴ U. S. R. S., § 1610.

²⁵ U. S. R. S., § 369.

² Andrews v. Spear, 4 Dill. 472; Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 23 Fed. 513.

¹ U. S. R. S., § 921; U. S. v. U. P. R. Co., 98 U. S. 569, 25 L. ed. 143; Andrews v. Spear, 4 Dill. 472; Bank of Alexandria v. Young, 1 Cranch, C. C. 458; Wolvertton v. Lacey, 18 Law R. (N. S.), 672; Weide v. Ins. Co. of N. A., 3 Chic. L. N. 353; Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 23 Fed. 513; Ferrett v. Atwill, 4 N. Y. Leg. Obs. 215; Holmes v. Sheridan, 1 Dill. 351; Young v. Grand Trunk Ry. Co., 9 Fed. 348; Keep v. Ind. &

³ Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 23 Fed. 513; Lant v. Kinne, C. C. A., 75 Fed. 636; Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., C. C. A., 95 Fed. 497; Cole v. Phila. & E. Ry. Co., 140 Fed. 944, 947. See Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98.

⁴ Morton Tr. Co. v. Metropolitan St. Ry. Co., 170 Fed. 336; Gay v. Hudson River El. Power Co., 190 Fed. 773.

bill in a State court asking that its property be placed in the hands of a receiver, and the trustee of a mortgage upon its property after removal filed a cross-bill in the Federal court to foreclose the mortgage, and then began a foreclosure suit in the State court, which was afterwards removed; the Federal court consolidated all three proceedings.⁵ This has been done in actions of ejectment by the same plaintiff claiming under the same title against several defendants;⁶ in actions by different plaintiffs against the same defendant, to recover damages for personal injuries,⁷ or for the deaths of persons killed, at the same time and in the same manner;⁸ in two suits against separate defendants for the same injury, although one was an action in tort and the other on contract;⁹ when several actions were brought between the same parties upon different notes with the same makers, payees, and indorsers;¹⁰ where several actions at common law were based upon insurance policies on the same life¹¹ or the same property,¹² and the defenses were the same; where several actions for different publications of the same libel were brought by the same plaintiff against the different publishers of several newspapers,¹³ and where several

⁵ *Wabash, St. L. & P. Ry. Co. v. Central Tr. Co.*, 23 Fed. 513. A creditor's bill in which a receiver has been appointed will ordinarily be consolidated with an ancillary foreclosure suit. *Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co.*, C. C. A., 95 Fed. 497; *Cole v. Phila. & E. Ry. Co.*, 140 Fed. 944, 947. See *Central Tr. Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98. A bill filed in aid of an attachment may be consolidated with a bill to restrain the enforcement of the attachment; and the latter, if subsequently brought, will then be considered as a cross-bill to the former. *Lant v. Kinne*, C. C. A., 75 Fed. 636. The court may refuse to consolidate two foreclosure suits, when the result would be to delay that which was first brought. The court may order several cases involving substantially

the same evidence to be tried together, and direct the jury to bring in separate verdicts. *Mercantile Tr. Co. v. Mo., K. & T. Ry. Co.*, 41 Fed. 8; *Keep. v. I. & St. L. R. Co.*, 10 Fed. 454.

⁶ *Ibid.*

⁷ *Denver City Tramway Co. v. Norton*, C. C. A., 141 Fed. 599; *Am. Window Glass Co. v. Noe*, C. C. A., 158 Fed. 777.

⁸ *Diggs v. Louisville & N. R. Co.*, C. C. A., 156 Fed. 564.

⁹ *Ibid.*

¹⁰ *Davis v. St. Louis & S. F. Ry. Co.*, 25 Fed. 786.

¹¹ *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 707.

¹² *Falls of Neuse Mfg. Co. v. Ga. Home Insurance Co.*, 26 Fed. 1.

¹³ *Butler v. Courier-Citizen Co.*, 127 Fed. 1015.

actions had been brought for penalties because of the violation of the same statute.¹⁴ A consolidation was allowed when cross-actions had been brought between the same parties for breach of the same contract.¹⁵ A consolidation was refused when several actions were pending between the same parties upon assigned claims for overcharges.¹⁶ Where actions were consolidated, which were brought against several insurance companies upon different policies, containing a clause for contribution, the court ordered: that one of the causes be transferred to the equity docket, and the other defendants be made parties thereto; that the pleadings in that case be reformed according to the equity practice; and that the proceedings in the other causes be stayed.¹⁷ The consolidation of two suits will not prevent the subsequent remand of one of them which has been improperly removed;¹⁸ nor the right to dismiss either of them.¹⁹ It has been said that a consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except in so far as the evidence in one is, by order of the court, treated as evidence in both. It has been held that the consolidation does "not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits. The parties in one suit do not thereby become parties in the other, and a decree in one is not a decree in the other unless so directed. It operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense."²⁰ It has been held: that, where actions have

¹⁴ B. & O. Southwestern R. R. Co. v. U. S., 220 U. S. 94, 106, 55 L. ed. 384, 388.

¹⁵ Am. Tr. & Sav. Bank v. Zeigler Coal Co., C. C. A., 165 Fed. 34.

¹⁶ Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786.

¹⁷ Falls of Neuse Mfg. Co. v. Ga. Home Insurance Co., 26 Fed. 1.

¹⁸ Colburn v. Hill, C. C. A., 101 Fed. 500.

¹⁹ Young v. Grand Trunk Ry. Co., 9 Fed. 348.

²⁰ Toledo, St. L. & K. C. R. Co.

v. Continental Tr. Co., C. C. A., 95 Fed. 497, 506, per Lawton, J., citing Brevard v. Summar, 2 Heisk. (Tenn.) 97, 105; Loffand v. Coward, 12 Heisk. (Tenn.) 546. But see Ross-Meehan B. S. F. Co. v. So. M. Iron Co., 72 Fed. 957. In Morton Tr. Co. v. Metropolitan St. Ry. Co., 170 Fed. 336, 337; per Lacombe, J.: "In a situation so complicated as this one, with so many conflicting interests and different suits, the court is not inclined to be over technical as to pleading and

been consolidated, both the plaintiffs²¹ and the defendants²² are entitled to the same number of challenges to jurors as they would be if the cases had been tried separately. Where the court has, without objection, treated two causes as consolidated, the omission of a formal order of consolidation is no ground for error.²³

§ 473. Trials. The Revised Statutes provide that the trial of issues of fact in actions at common law in the Circuit and District Courts shall be by jury.¹ There is but one exception to this, namely, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury.² Then, it is provided that the issues of fact may be tried and determined by a Circuit Court without the intervention of a jury; and the rulings of the court on the trial, if excepted to at the time and included in the bill of exceptions, may be reviewed in the Supreme Court upon a writ of error or appeal; and when the findings are special, the review may extend to the determination of the sufficiency of the facts found to support the judgment.³ Where the defendant defaults, there is no trial of any issue, and if the State practice permits, the court may itself, in cases not specified in the Revised Statutes of the United States, assess the damages,⁴ or it may refer their assessment to an auditor.⁵ It has been held that, when the plaintiff fails to appear upon the trial, the proper practice is to impanel the jury and direct a verdict for the defendant.⁶

The Revised Statutes provide: "In all suits brought to recover the forfeiture annexed to any articles of agreement, cove-

practice. If some way can be found in which the equities of all may be substantially secured, it will be adopted, although some novel practice may be thereby pursued."

²¹ *Butler v. Evening Post Pub. Co.*, C. C. A., 148 Fed. 821. But see *Connecticut Mutual Life Ins. Co. v. Hillmon*, 188 U. S. 208, 47 L. ed. 446.

²² *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 707.

²³ *Gila Reservoir & Irr. Co. v. Gila Water Co.*, 202 U. S. 270, 50 L. ed. 1023.

§ 473. ¹ U. S. R. S., §§ 566, 648.

² U. S. R. S., §§ 649, 700.

³ U. S. R. S., §§ 649, 700. See *infra*, § 474.

⁴ *Midland Contracting Co. v. Toledo Foundry & Machine Co.*, C. C. A., 154 Fed. 797.

⁵ *Brock v. Fuller Lumber Co.*, C. C. A., 153 Fed. 272.

⁶ *Patting v. Spring & C. Co.*, 93 Fed. 98; *Schultz v. Mut. L. Ins. Co.*, U. S. C. C., S. D. N. Y., 1881, per Shipman, J.

nant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."⁷ Such a request is too late when made after a reference to an auditor by mutual consent.⁸ "When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided."⁹ "In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the Post-Office Department, which has been submitted to and disallowed by the Sixth Auditor, specifying such claim in his affidavit, and that he could not be prepared for

⁷ U. S. R. S., § 961.⁹ U. S. R. S., § 957.⁸ Brock v. Fuller Lumber Co., C. C. A., 153 Fed. 272.

trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term.”¹⁰ “In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted.”¹¹ “When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice.”¹²

No State statute¹³ or constitutional¹⁴ provision regulating the manner of the trial,¹⁵ or applications for postponements or

¹⁰ U. S. R. S., § 958.

¹¹ U. S. R. S., § 959.

¹² U. S. R. S., § 960.

¹³ *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898. Where an attorney admitted, in open court, that the defendants could not sustain the defense which they had pleaded, and that plaintiffs were entitled to the relief prayed for, and consented that judgment be entered in favor of the plaintiffs; it was held that his authority so to do must be presumed in the absence of any evidence to

the contrary; and that there was no necessity of a formal waiver of a trial by jury. *Harniska v. Dolph*, C. C. A., 133 Fed. 158.

¹⁴ *St. Louis, I. M. & S. Ry. Co. v. Vickers*, 122 U. S. 360, 30 L. ed. 1161.

¹⁵ *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257; *St. Louis, I. M. & S. Ry. Co. v. Vickers*, 122 U. S. 360, 30 L. ed. 1161.

continuances,¹⁶ or form of a verdict,¹⁷ or the custody of the jury,¹⁸ or providing for the trial of a class of cases before a judge without a jury,¹⁹ compulsory references in a special class of cases, such as an action on an account,²⁰ or limiting the powers of the judge to comment on the facts in his charge to the jury,²¹ or directing that such charge be in writing,²² or providing that papers read in evidence may be taken into the jury-room,²³ or forbidding the separation of a jury between the charge and the verdict,²⁴ has any influence upon the practice in the Federal courts. This matter is in the discretion of the court.²⁵ But it

¹⁶ *Texas & P. Ry. Co. v. Nelson*, 50 Fed. 814. A continuance or adjournment of a trial because of the absence of a witness should not be granted unless the moving party shows that he exercised due diligence in seeking to procure his attendance or testimony and that his attendance can probably be secured at the subsequent term, *St. Louis Stave & Lumber Co. v. U. S., C. C. A.*, 177 Fed. 178; *Armour & Co. v. Kollmeyer, C. C. A.*, 161 Fed. 78.

¹⁷ *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 30 L. ed. 1161; *Abbott v. Curtis & Co. Mfg. Co.*, 25 Fed. 402; *U. S. Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 33 L. ed. 60. For example, a direction that exemplary damages must be separately assessed. *Times Pub. Co. v. Carlisle, C. C. A.*, 94 Fed. 762; *McElwee v. Metropolitan Lumber Co., C. C. A.*, 69 Fed. 302, 319, 16 C. C. A. 232; *Toledo, St. L. & W. R. Co. v. Reardon, C. C. A.*, 159 Fed. 366, holding that a judge may refuse to submit special interrogatories to the jury because they were not filed until the summing up.

¹⁸ *Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co., C. C. A.*, 133 Fed. 713.

¹⁹ *Klever v. Seawell*, 65 Fed. 393.

²⁰ *Howe Mach. Co. v. Edwards*,

15 *Blatchf.* 402; *U. S. v. Rathbone*, 2 *Paine*, 578; *Sulzer v. Watson*, 39 Fed. 414.

²¹ *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257; *St. Louis, I. M. & S. Ry. Co. v. Vickers*, 122 U. S. 360, 30 L. ed. 1161; *U. S. v. Phila. & R. R. Co.*, 123 U. S. 113, 31 L. ed. 138; *Rucker v. Wheeler*, 127 U. S. 85, 93, 32 L. ed. 102, 105; *Lovejoy v. U. S.*, 128 U. S. 171, 32 L. ed. 389.

²² *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286. Rules of court are valid which require that requests to charge must be presented to the court and the opposing counsel at the close of the evidence and before the argument and that they be plainly written and so framed that the answer thereto, by a simple affirmation or negation, will be full, direct and explicit. *Keystone Bank v. Safety Banking & Tr. Co.*, 179 Fed. 727. The court may refuse a request as made too late, when delayed until after the jury was sworn before their retirement. *Astruc v. Star Co.*, 182 Fed. 705.

²³ *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286.

²⁴ *Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co., C. C. A.*, 133 Fed. 713, 716, 66 C. C. A. 543.

²⁵ *Ibid.*; *Guardian Fire Ins. Co. v.*

has been said that the sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law, are matters in which the Courts of the United States are governed by the practice of the courts of the State in which they are held.²⁶ A State statute authorizing a motion for judgment *non obstante veredicto* has been followed.²⁷ The State practice in the withdrawal of jurors may in a proper case be followed.²⁸ The manner of the selection of jurors and their qualifications are subscribed by statutes of the United States.²⁹ Each party has the right to three peremptory challenges in a civil case.³⁰ The power of the Courts to make rules regulating the taking of testimony in actions at common law, has been denied.³¹ It is the general rule of the Federal courts, that the cross-examination of a witness shall be limited to the subjects of his direct examination; ³² but where a witness for the plaintiff has disclosed, upon his direct examination, part of a conversation or transaction, the fact that the entire conversation or transaction constitutes an affirmative defense is no bar to its dis-

Central Glass Co., C. C. A., 194 Fed. 851.

²⁶ Gray, J., in Glenn v. Sumner, 132 U. S. 152, 156, 33 L. ed. 301. See Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835; and § 360.

²⁷ Goehrig v. Stryker, 174 Fed. 897; Smith v. Jones, 181 Fed. 819. But see Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

²⁸ Silsby v. Foote, 14 How. 218, 220, 14 L. ed. 394, 395.

²⁹ Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 707; *supra*, § 371. See Stone v. U. S., C. C. A., 64 Fed. 667.

³⁰ U. S. R. S., §§ 800-882; Brewer v. Jacobs, 22 Fed. 217; Lovejoy v. U. S., 128 U. S. 171, 32 L. ed. 389; U. S. v. Chaires, 40 Fed. 820; U. S. v. Paxton, 40 Fed. 136; U. S. v. Ewan, 40 Fed. 451; *Ex parte Farley*, 40 Fed. 66; Walker v. Collins, 50 Fed. 737; Pullman's P. C. Co. v. Harkins, 55 Fed. 932; Parker v. U. S., 151 U. S. 396, 38 L. ed. 208;

Turner v. U. S., 66 Fed. 280; *infra*, § 526.

³¹ Randall v. Venable, 17 Fed. 163; Flint v. Board of Com'rs, 5 Dill. 481; McLennon v. Kansas City, St. J. & C. B. R. Co., 22 Fed. 198. *Contra*, Warren v. Younger, 18 Fed. 859.

³² Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668. The trial court may, in its discretion, allow a more extended examination. California Fruit Cannery Ass'n v. Lilly, C. C. A., 184 Fed. 570. The trial judge should not interfere in the cross-examination of a witness by questions or commenting on his testimony. Klauder-Weldon Dyeing Mach. Co. v. Gagnon, C. C. A., 183 Fed. 962, 965; but, except in an extraordinary case, a judgment will not be reversed for that reason, *Ibid*. An exception taken to an offer of testimony is good, although the witness was not actually called to the

closure upon cross-examination.³³ The trial judge may allow a witness to give testimony in a narrative form; and if such a witness states irrelevant or incompetent matter it is the duty of the injured party to arrest the narrative and move to have the irrelevant matter stricken out.³⁴ It has been said that, ordinarily, a party who calls witnesses, although not bound by their testimony, cannot insist that they are unworthy of belief, and that, unless self-contradicted or inherently improbable, it cannot be disregarded.³⁵ It has been held: that where a party has been surprised by the testimony of his own witness, the court has discretionary power to allow him to offer evidence that before the trial the witness made a contradictory statement; and that where the previous statement is in writing, he is permitted to call the attention of the witness to the parts which contradict the testimony. It is an abuse of discretion to exclude the entire statement when offered by the other side as evidence for the purpose of impeachment.³⁶ The determination as to whether a witness is competent to testify as an expert rests largely in the discretion of the trial judge and will rarely be a ground for a reversal upon writ of error.³⁷ Experts may be asked hypothetical questions, based upon the view of the facts in evidence taken by the counsel for the interrogator, although the facts are in dispute; and, upon cross-examination, such witnesses may be asked hypothetical questions, based on different facts which the cross-examiner claims have been proved.³⁸ Ob-

stand. *Scotland County v. Hill*, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. ed. 692; *Missouri Pac. Ry. Co. v. Castle*, C. C. A., 172 Fed. 841, 844. It is improper for the court to withhold rulings upon various objections to questions in depositions until after the answers have been read to the jury. *State of Missouri v. Hencken*, C. C. A., 174 Fed. 624. See *Chicago, M. & St. P. Ry. Co. v. Newsome*, C. C. A., 174 Fed. 394. For a case where it was held not improper to refuse to strike out from a deposition an answer which was not responsive to a question on cross-examination, see *Partridge v.*

Boston & M. R. Co., C. C. A., 184 Fed. 211.

³³ *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 129 Fed. 668.

³⁴ *N. Pac. R. Co. v. Charles*, C. C. A., 51 Fed. 562, 571.

³⁵ *U. S. v. Barber Lumber Co.*, 173 Fed. 948.

³⁶ *Griffin Wheel Co. v. Smith*, C. C. A., 173 Fed. 245.

³⁷ *Montana Ry. Co. v. Warren*, 137 U. S. 348, 353, 34 L. ed. 681, 683; *Stillwell Mfg. Co. v. Phelps*, 130 U. S. 520, 32 L. ed. 1035.

³⁸ *Assets Realization Co. v. Wellington*, C. C. A., 194 Fed. 87.

jections to the admission of evidence, which state no ground for its exclusion, cannot support valid exceptions, unless the defects could not have been cured upon the trial.³⁹ When, before the submission of a case to the jury, irrelevant evidence previously admitted was withdrawn and the jury instructed to disregard the same, it was held that an exception to its admission could not be sustained.⁴⁰ It has been held that when a party inspects a paper produced by his adversary at his request upon the trial and then fails to offer it in evidence, it may be put in evidence by his opponent.⁴¹ The jury may be allowed, under the custody of an officer, to leave the court-room and inspect a machine or place.⁴² A judgment may be reversed for an erroneous ruling as to the order of the examination of witnesses.⁴³ It has been held: that where the plaintiff in an action for a personal injury exhibits to the jury the part of his body that has been injured, the defendant may require him to submit the same to a surgical examination;⁴⁴ and that where articles are produced by a party upon the trial, the court may permit the application of chemical tests to them;⁴⁵ although there is no State statute upon the subject. It has been held that a judgment will not be reversed because a party was denied the right to open and close to the jury.⁴⁶ A judgment will not be reversed because of improper remarks by counsel during the trial, unless a ruling upon the subject was requested from the trial court and an exception duly taken.⁴⁷ Where such remarks are withdrawn and the jury instructed to ignore the same, a judgment will not ordinarily be reversed because the court overruled

³⁹ *Sigafus v. Porter*, C. C. A., 84 Fed. 430, 435, 28 C. C. A. 443; *Rush v. French*, 1 Ariz. 99, 123.

⁴⁰ *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141.

⁴¹ *Edison El. Light Co. v. U. S. El. Lighting Co.*, 45 Fed. 55.

⁴² *Owens v. Mo. Pac. Ry. Co.*, 38 Fed. 571.

⁴³ *O'Connell v. Pennsylvania Co.*, C. C. A., 118 Fed. 989.

⁴⁴ *Chicago & N. W. Ry. Co. v. Kendall*, C. C. A., 187 Fed. 62.

⁴⁵ *Lundberg v. Albany & R. I. & S. Co.*, 32 Fed. 501; *Johnson S. S.*

R. Co. v. N. B. S. Co., 48 Fed. 191, 194, 195.

⁴⁶ *Hall v. Weare*, 92 U. S. 728, 23 L. ed. 500; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Lancaster v. Collins*, 115 U. S. 222, 129 L. ed. 373. As to the power of counsel to read cases in the presence of the jury, see *Hastings v. No. Pac. Ry. Co.*, 53 Fed. 224. See *Mann v. Dempster*, C. C. A., 181 Fed. 76.

⁴⁷ *Toledo, St. L. & W. R. Co. v. Howe*, C. C. A., 191 Fed. 776; *Carlisle v. U. S.*, C. C. A., 194 Fed. 827.

an objection thereto when first made.⁴⁸ In the absence of a State statute or practice giving such authority, the trial judge has no power to order a compulsory non-suit;⁴⁹ but he may do so⁵⁰ or dismiss the complaint⁵¹ if the State practice permits that to be done. The plaintiff may consent to a non-suit;⁵² but not after the commencement of the trial without the leave of the court,⁵³ unless a State statute gives him an absolute right so to do.⁵⁴ A State statute regulating non-suits should be followed.⁵⁵ It has been held: that a voluntary nonsuit cannot be taken after a verdict has been directed for the defendant.⁵⁶ But after a verdict and judgment in his favor a plaintiff was allowed, pending a motion for a new trial, to have the suit discontinued against one of two joint tort feasons who were defendants.⁵⁷ The court may submit to the jury preliminary questions of fact, and after their verdict thereupon, either submit the whole case to them or direct a verdict upon all the issues, as the circumstances require.⁵⁸ Where an issue of fact

⁴⁸ *St. Louis & S. F. R. Co. v. Rose*, C. C. A., 159 Fed. 129.

⁴⁹ *Elmore v. Grymes*, 1 Pet. 469, 7 L. ed. 224; *D'Wolfe v. Rabaud*, 1 Pet. 476, 7 L. ed. 227; *Crane v. Morris*, 6 Pet. 598, 8 L. ed. 514; *Silsby v. Foote*, 14 How. 218, 14 L. ed. 394; *Castle v. Bullard*, 23 How. 172, 16 L. ed. 424; *Board of Com'rs v. Home Sav. Bank*, C. C. A., 200 Fed. 28. See *Moss v. City of Pittsburg*, C. C. A., 184 Fed. 325.

⁵⁰ *Russo-Chinese Bank v. Nat. Bank of Commerce*, C. C. A., 187 Fed. 80; *Board of Com'rs v. Home Sav. Bank*, C. C. A., 200 Fed. 28. But see *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364.

⁵¹ *Central Transp. Co. v. Pullman's P. C. Co.*, 139 U. S. 24, 38-40, 35 L. ed. 55, 60, 61; *Paul v. Delaware L. & W. R. Co.*, 130 Fed. 951.

⁵² *Elmore v. Grymes*, 1 Pet. 469, 7 L. ed. 224. See *Worthington v. McGough*, C. C. A., 192 Fed. 512. An "involuntary nonsuit" ordered

at the plaintiff's request is equivalent to a voluntary nonsuit. *Duffy v. Glucose Sugar Refining Co.*, 141 Fed. 206.

⁵³ *Johnson v. Bailey*, 59 Fed. 670.

⁵⁴ *Etna Life Ins. Co. v. Lakin*, C. C. A., 59 Fed. 989; *Francisco v. Chicago & A. R. Co.*, C. C. A., 149 Fed. 354; *Meyer v. National Biscuit Co.*, C. C. A., 168 Fed. 906.

⁵⁵ *Connecticut Fire Ins. Co. v. Manning*, C. C. A., 177 Fed. 893.

⁵⁶ *Parks v. Southern Ry. Co.*, C. C. A., 143 Fed. 276; *Huntt v. McNamee*, C. C. A., 141 Fed. 293. *Contra*, *Chicago, M. & St. P. Ry. Co. v. Metalstaff*, C. C. A., 101 Fed. 769, where the State practice permitted it, after the judge had announced his intention to direct a verdict for the defendant but no such verdict had been made.

⁵⁷ *Texas & P. Ry. Co. v. Sheftall*, C. C. A., 133 Fed. 722.

⁵⁸ *Elizabeth v. Fitzgerald*, C. C. A., 114 Fed. 547.

concerning jurisdictional allegations, such as difference of citizenship, is raised with other issues, all the issues are tried together, in the absence of any State practice to the contrary; but the jury should be requested to make a separate finding as to the jurisdictional allegations, independent from their general verdict.⁵⁹

The trial judge may direct a verdict for either party in a case where the evidence is such as to make it proper to set aside a verdict in favor of the other.⁶⁰ Upon a motion to direct a verdict, the grounds of the motion should be stated.⁶¹ It has been said to be the better practice for the court to hear the argument and decide the motion in the absence of the jury; but the presence of the jury at comments upon the evidence, when made by the judge, is no ground for a new trial.⁶² Such a motion cannot be granted if made before all the evidence of both parties is closed.⁶³ Where, after such a motion made at the

⁵⁹ *Roberts v. Langenbach*, C. C. A., 119 Fed. 349.

⁶⁰ *Randall v. B. & O. R. Co.*, 109 U. S. 478, 27 L. ed. 1003; *Bunt v. Sierra Butte G. Min. Co.*, 138 U. S. 483, 34 L. ed. 1031; *Hathaway v. East Tenn. V. & G. R. Co.*, 29 Fed. 489; *Hodges v. Kimball*, C. C. A., 104 Fed. 745; *Journal Pub. Co. v. Drake*, C. C. A., 199 Fed. 572. The inconsistency between the plaintiff's testimony and that given by him upon a former trial, was held to be in itself a sufficient reason for a direction of a verdict in favor of the defendant. *Smith v. Boston Elevated Ry. Co.*, C. C. A., 184 Fed. 387. A judgment will not be reversed because the court refused to direct a verdict, when the only justification of such a direction was a failure to prove a fact, such as a failure to take out letters of administration, the existence of which had been assumed on the trial, *Choctaw, O. & G. R. Co. v. Jackson*, C. C. A., 192 Fed. 792, 798; nor when it involves a ruling in direct

conflict with the theory upon which both parties tried the case; *Louisville & N. R. Co. v. Womack*, C. C. A., 173 Fed. 752, 97 C. C. A., 566. In the Seventh Circuit, it was held to be no error to deny a motion for the direction of a verdict for the defendant where no statement of the point, in which there is contended to be a lack of evidence, was specified on the motion. *Adams v. Shirk*, C. C. A., 104 Fed. 54, 43 C. C. A., 407. In the First, *O'Halloran v. McGuirk*, C. C. A., 167 Fed. 493, 93 C. C. A., 129, and in the Sixth Circuit, *Erie R. Co. v. Schultz*, C. C. A., 173 Fed. 759, a different rule prevails. See *Atlantic Terra Cotta Co. v. Masons' Supply Co.*, C. C. A., 180 Fed. 332.

⁶¹ *N. Y. & T. S. S. Co. v. Anderson*, C. C. A., 50 Fed. 462; *U. S. v. Bank of Metropolis*, 15 Pet. 377, 10 L. ed. 774.

⁶² *Illinois Cent. R. Co. v. Griffin*, C. C. A., 80 Fed. 278.

⁶³ *Walker v. Windsor Nat. Bank*, C. C. A., 56 Fed. 76.

close of the plaintiff's case has been denied, the defendant offers evidence on his own behalf, any error in denying the motion is cured.⁶⁴ A verdict can only be directed when no recovery could be had by the party against whom the verdict is given, upon any view which could properly be taken of the facts.⁶⁵ When both parties move for a direction of a verdict, that is a submission of the facts to the court for decision and its finding is conclusive; unless there is no evidence as to a fact essential to support the judgment,⁶⁶ but not where a party moved in the alternative either for a verdict in his favor, or, in case that were denied, that he might have leave to go to the jury.⁶⁷ After such a motion has been decided, it is too late for the unsuccessful party whose motion for a direction has been denied to ask leave to go to the jury.⁶⁸ The sufficiency of the evidence to justify the verdict will not be reviewed on writ of error unless a motion for the direction of a verdict was made

⁶⁴ *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 204, 38 L. ed. 405; *Northern Pac. R. Co. v. Charles*, C. C. A., 51 Fed. 562, 572; *Southern Pac. Co. v. Hamilton*, C. C. A., 54 Fed. 468; *U. S. Fidelity & G. Co. v. Board of Com'rs*, C. C. A., 145 Fed. 144; *Fidelity & Casualty Co. of New York v. Thompson*, C. C. A., 11 L.R.A. (N.S.) 1069, 154 Fed. 484; *Leyer v. U. S.*, C. C. A., 183 Fed. 102; *Bell v. Union Pac. R. Co.*, C. C. A., 194 Fed. 366; *Harmon v. Flintham*, C. C. A., 196 Fed. 635; *Atlantic Coast Line R. Co. v. Connor*, C. C. A., 194 Fed. 409.

⁶⁵ *Washington Tr. R. Co. v. MeDade*, 135 U. S. 554, 571, 34 L. ed. 235, 241; *Dunlap v. N. E. R. Co.*, 130 U. S. 649, 32 L. ed. 1058; *Kane v. N. Central Ry. Co.*, 128 U. S. 91; *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 621, 33 L. ed. 1032, 1034.

⁶⁶ *City of Defiance v. McGonigale*, C. C. A., 150 Fed. 689; *Anderson v. Messenger*, C. C. A., 158 Fed. 250; *Sena v. Am. Turquoise Co.*,

220 U. S. 497, 55 L. ed. 559; *Interstate Life Assur. Co. v. Dakton*, C. C. A., 165 Fed. 176; *Melton v. Pensacola Bank & Tr. Co.*, C. C. A., 190 Fed. 126.

⁶⁷ *Charlotte Nat. Bank v. Southern Ry. Co.*, C. C. A., 179 Fed. 769, where a request at the same time for peremptory instructions and for special charges relating to conflicting evidence to be given in case the former were refused, were held not to be a waiver of the right to go to the jury upon a disputed question of fact; *Pensacola State Bank v. Merchants' & Farmers' Bank*, 180 Fed. 504, holding that, in such a case, the moving party must specifically point out the facts upon which he relies as undisputed. For a decision upon a motion to compel the plaintiff to elect between two causes of action, see *California Fruit Cannery Ass'n v. Lilly*, C. C. A., 184 Fed. 570.

⁶⁸ *Insurance Co. of North America v. Wisconsin Cent. Ry. Co.*, C. C. A., 134 Fed. 794.

by the plaintiff in error at the conclusion of the evidence.⁶⁹ The judge may also comment upon the facts, provided that, when the evidence is conflicting, he makes it clear to the jury that they are not bound by his opinion.⁷⁰ Exceptions to a charge or to a refusal to charge must be noted before the jury retire.⁷¹ The court may recall a jury which has retired, and give new instructions,⁷² even in the absence of counsel;⁷³ although, usually, it should not, in the absence of counsel, give further instructions, as to the correctness of which there can be any question.⁷⁴ Even in a criminal case, where, after a trial is begun, it is discovered that a juror is disqualified, the court may, under proper circumstances, discharge the jury and order a new trial against the defendant's objections.⁷⁵ In an action for damages because of the infringement of a patent for a design, if the plaintiff succeeds the verdict must be for at least the sum of two hundred and fifty dollars.⁷⁶ In actions for the infringement of copyright, the verdict must be, in the case of a newspaper reproduction of a copyrighted photograph, not more than two hundred and not less than fifty dollars. In no other case shall they exceed five thousand dollars, nor be less than two hundred and fifty dollars; but the court may, in its discretion, award: "First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees; Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the posses-

⁶⁹ German Ins. Co. of Freeport, Ill. v. Frederick, C. C. A., 58 Fed.

144; Joplin & P. Ry. Co. v. Payne, C. C. A., 194 Fed. 387.

⁷⁰ Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257; St. Louis, I. M. & S. Ry. Co. v. Wickers, 122 U. S. 360, 30 L. ed. 1161; U. S. v. Phila. & R. R. Co., 123 U. S. 113, 31 L. ed. 139; Rucker v. Wheeler, 127 U. S. 85, 93, 32 L. ed. 102, 105; Lovejoy v. U. S., 128 U. S. 171, 32 L. ed. 389; *infra*, § 479. But see Starr v. U. S., 153 U. S. 614, 325, 38 L. ed. 841; Fuller

v. N. Y. Life Ins. Co., C. C. A., 199 Fed. 897.

⁷¹ Phelps v. Mayer, 15 How. 160, 14 L. ed. 643; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 52 L. ed. 606.

⁷² Allis v. U. S., 155 U. S. 117, 39 L. ed. 91.

⁷³ Fournier v. Pike, 128 Fed. 991.

⁷⁴ Fournier v. Pike, 128 Fed. 991.

⁷⁵ Thompson v. U. S., 155 U. S. 271, 39 L. ed. 146.

⁷⁶ Act of Feb'y. 4, 1887, 24 St. at L. 387, 5 Fed. St. Ann. 303, Comp. St. 3398, Pierce Fed. Code, § 8785.

sion of the infringer or his agents or employees; Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery; Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."⁷⁷ In actions for the infringement of patents⁷⁸ and trade-marks,⁷⁹ after a verdict is rendered for the plaintiff, the court may, in its discretion, enter judgment thereupon for an additional sum, according to the circumstances of the case, not exceeding three times its amount, besides costs. In one case the court amended the verdict by the addition of interest, where it was shown, by the affidavits of all of the jurors, that they intended that interest should be computed from a certain date,⁸⁰ but a verdict for the plaintiff upon a specified cause of action cannot, after the discharge of the jury, be amended so as to show a finding for the defendant on the other causes of action, when the jury were not asked before their discharge what their finding was upon the same.⁸¹ An order made subsequent to the verdict to strike out evidence *nunc pro tunc* as of the date of the trial will not cure an error in admitting the same, even though there was no exception thereto at the time of the trial.⁸² It has been held that a judgment will not be reversed when the court has requested the jury to find upon particular questions of fact, because the jury failed to answer an interrogatory, improvidently submitted, concerning a fact which was not disputed.⁸³

§ 474. Trials by the court. There can be no trial by the court of issues of fact in an action at common law, except by

⁷⁷ Act of Mar. 4, 1909, 35 St. at L. 1075, § 25, Pierce Fed. Code Supp., § 1587. See *Mail & Exp. Co. v. Life Pub. Co.*, C. C. A., 192 Fed. 899.

⁷⁸ U. S. R. S., § 4919, 5 Fed. St. Ann. 552, Pierce Fed. Code, § 8784.

⁷⁹ Act of Mar. 2, 1907, 34 St. at L. 1251, § 19, Pierce Fed. Code, § 8825.

⁸⁰ *Elliott v. Gilmore*, 145 Fed. 964.

⁸¹ *Chandler v. Andrews*, C. C. A., 192 Fed. 543; where one of the defendants sued jointly filed a separate plea of justification, it was held that he was not prejudiced by a verdict assessing damages separately against him and his associates.

⁸² *Goehrig v. Stryker*, 174 Fed. 897.

⁸³ *Drum-Flato Commission Co. v. Edmissen*, 208 U. S. 534.

the consent of the parties;¹ even in a case where the State statute permits such a trial.² The Revised Statutes provide: "Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."³ "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."⁴ There is no express provision of law authorizing the review, by writ of error, of any errors committed on the trial of an action in a District Court, tried by a judge by consent without a jury,⁵ but, under the Judicial Code, it seems that the statute now applies to such a court.⁶ If the stipulation is not in writing the judgment will be valid;⁷ but

¹ § 474. ¹ *Klever v. Seawell*, 65 Fed. 393.

² *Klever v. Seawell*, 65 Fed. 393.

³ U. S. R. S., § 649.

⁴ U. S. R. S., § 700. See *Marion Phosphate Co. v. Cummer*, 60 Fed. 873; *Vera Cruz & P. R. Co. v. Waddell*, C. C. A., 155 Fed. 401.

⁵ *Rogers v. U. S.*, 141 U. S. 548, 35 L. ed. 853; *Campbell v. U. S.*, 224 U. S. 99, 56 L. ed. 684; *U. S. v. St. Louis*, 1 M. & S. Ry. Co., C. C. A., 169 Fed. 73; *Frank v. U. S.*, C. C. A., 192 Fed. 864.

⁶ Jud. Code, § 291, 36 Stat. at L. 1087.

⁷ *Campbell v. Boyreau*, 21 How. 223, 16 L. ed. 96; *Bond v. Dustin*, 112 U. S. 604, 606, 28 L. ed. 835, 836; *Talcott v. Friend*, C. C. A., 179 Fed. 676. The most appropriate

proof of a compliance with the statute is the inclusion of the stipulation in the judgment roll. *Bond v. Dustin*, 112 U. S. 604, 28 L. ed. 835. A statement in the finding of facts, the record of the judgment entry, or the bill of exceptions that such a stipulation was made in writing, will be sufficient proof of a compliance with the statute. *Kearney v. Case*, 12 Wall. 275, 284, 20 L. ed. 395, 397; *Dickinson v. Planters' Bank*, 16 Wall. 250, 21 L. ed. 278; *Bond v. Dustin*, 112 U. S. 604, 607, 28 L. ed. 835, 836. It seems that when the court has authority to refer a case, upon consent in writing only, an order that the case be referred, which expressly states that it is made "by consent of the parties," necessarily implies that such

the appellate court cannot reverse the same for any error in the admission or exclusion of evidence, or because the evidence was insufficient to warrant the finding of the judge, or upon any other question of law growing out of the evidence.⁸ The stipulation waives an objection that the suit should have been brought in equity and not at law, or *vice versa*,⁹ and any other defect in the form of the action.¹⁰

The court's findings may be general or special,¹¹ but they should not be both.¹² They have the same effect as the ver-

consent was in writing. *Bond v. Dustin*, 112 U. S. 604, 607, 28 L. ed. 835, 836; *Boogher v. Insurance Co.*, 103 U. S. 90, 26 L. ed. 310. A recital in the judgment that both parties announcing "ready for trial" formally waived a jury in open court, is insufficient. *Columbus Compress Co. v. U. S. Fidelity & Guaranty Co.*, C. C. A., 186 Fed. 487. A statement in a bill of exceptions "that the cause came on for hearing, and a jury having been impaneled and sworn, and the introduction of evidence having been commenced, by stipulation of parties hereto duly entered, the jury was withdrawn, trial to jury waived," was held to be insufficient to show that a written stipulation was filed. *Cudahy P. Co. v. Sioux Nat. Bank*, C. C. A., 69 Fed. 182. A stipulation that the case be marked "jury waived tentatively" was held not to be in compliance with the statute. *Merrill v. Floyd*, C. C. A., 53 Fed. 172. A stipulation, which reserves the right to go to the jury in case of a certain ruling which was not made, is insufficient. *Smith v. Weeks*, C. C. A., 53 Fed. 758. Where the case was tried before a judge under an order providing, by consent, that it be so tried, and that if it should appear to the judge that there were

questions of fact, the same be subsequently submitted to a jury; it was held that the Supreme Court could not consider on appeal rulings of the judge upon the trial. *Andes v. Slauson*, 130 U. S. 435, 32 L. ed. 989. A stipulation cannot be amended *nunc pro tunc*. *Smith v. Weeks*, C. C. A., 53 Fed. 758.

⁸ *Campbell v. Boyreau*, 21 How. 223, 16 L. ed. 96; *Bond v. Dustin*, 112 U. S. 604, 28 L. ed. 835; *Spalding v. Manasse*, 131 U. S. 65, 33 L. ed. 86; *Andes v. Slauson*, 130 U. S. 435, 32 L. ed. 989; *Hayden v. Ogden Sav. Bank*, C. C. A., 158 Fed. 90; *Erkel v. U. S.*, C. C. A., 169 Fed. 623; *Keeley v. Ophir Hill Consol. Min. Co.*, C. C. A., 169 Fed. 598.

⁹ *Burton v. Platter*, C. C. A., 53 Fed. 901.

¹⁰ *Fisher v. Knight*, C. C. A., 61 Fed. 491.

¹¹ U. S. R. S., § 649; *Meath v. Mississippi Levee Com'rs*, 109 U. S. 268, 27 L. ed. 930; *British Q. Min. Co. v. Baker S. Min. Co.*, 139 U. S. 222, 35 L. ed. 147.

¹² U. S. R. S., § 649; *Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *U. S. v. Dawson*, 101 U. S. 569, 25 L. ed. 791; *O'Reilly v. Campbell*, 110 U. S. 418, 29 L. ed. 669; *Hayden v. Ogden Sav. Bank*, C. C. A., 158 Fed.

diet of a jury.¹³ A special finding is controlled by a general finding in favor of one party upon all the issues and no error then can be assigned to the same.¹⁴ A statement of facts in an opinion is not a finding.¹⁵ Even, it has been held, when it is referred to in the judgment.¹⁶ A statement of facts in an opinion¹⁷ or a bill of exceptions,¹⁸ is not a finding. Where there is no finding of facts, but merely a stipulation that either party may refer to certain testimony in other suits and rely upon the same, the court of review has no jurisdiction to determine the questions of law thereupon arising.¹⁸ It has been held that additional findings cannot be made at a subsequent term.¹⁹ Where special findings are made and they are insufficient to support the judgment, there will be a reversal,²⁰ and it has been held that no exception is needed to raise this objection.²¹

90; *Nat. Surety Co. v. U. S., C. C. A.*, 200 Fed. 142.

¹³ *Meath v. Mississippi Levee Com'rs*, 109 U. S. 268, 27 L. ed. 930; *British Q. Min. Co. v. Baker S. Min. Co.*, 139 U. S. 222, 35 L. ed. 147.

¹⁴ *Consol. Coal Co. v. Polar W. Ice Co., C. C. A.*, 106 Fed. 798; *Lehman v. Dickson*, 148 U. S. 71, 37 L. ed. 373; *Webb v. Nat. Bank of Republic, C. C. A.*, 146 Fed. 717.

¹⁵ *Kentucky L. M. Co. v. Hamilton*, 63 Fed. 93; *York v. Washburn, C. C. A.*, 129 Fed. 564. *Contra*, under the Alaska Code, *Lindeberg v. Doverspike, C. C. A.*, 141 Fed. 59.

¹⁶ *Hayden v. Ogden Sav. Bank, C. C. A.*, 158 Fed. 90; *Pacific Sheet Metal Works v. Californian Canneries Co., C. C. A.*, 164 Fed. 980; *Keeley v. Ophir Hill Consol. Min. Co., C. C. A.*, 169 Fed. 598; *Gibson v. Luther, C. C. A.*, 196 Fed. 203.

¹⁷ *Lehman v. Dickson*, 148 U. S. 71, 37 L. ed. 373; *Kentucky L. M. Co. v. Hamilton*, 63 Fed. 93; *York v. Washburn, C. C. A.*, 129 Fed. 564.

¹⁸ *Glenn v. Fant*, 134 U. S. 398, 33 L. ed. 969; *Davenport v. Paris*, 136 U. S. 580, 34 L. ed. 548.

¹⁹ *Lang v. Baxter*, 69 Fed. 905; *Streeter v. Sanitary District of Chicago, C. C. A.*, 133 Fed. 124; *Jackson v. Mutual Life Ins. Co.*, 186 Fed. 447. It seems that findings may be filed by an order of the judge who tried the case, *nunc pro tunc*, at a term subsequent to the entry of judgment on his decision. *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395. But see *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775.

²⁰ *Saltonstall v. Birtwell*, 150 U. S. 417, 37 L. ed. 1128; *Chicago, R. I. & P. Ry. Co. v. Barrett, C. C. A.*, 190 Fed. 118; *Mason v. Smith, C. C. A.*, 191 Fed. 502; *Guaranty Tr. Co. v. Koehler*, 195 Fed. 669. A special finding, which is not contained in the record but appears only in the bill of exceptions, does not qualify one that is general. *U. S. v. Cleage, C. C. A.*, 161 Fed. 85.

²¹ *Webb v. Nat. Bank, C. C. A.*, 146 Fed. 717; *Guaranty Tr. Co. v. Koehler*, 195 Fed. 669. *Contra*, *Press v. Davis, C. C. A.*, 54 Fed. 267; *Mason v. Smith, C. C. A.*, 191

Where the pleadings²² or the agreed facts²³ do not support the judgment, there will be a reversal in any case. Where the court overruled demurrers to several pleas and there were no findings, it was held that there must be a reversal if any one of the pleas was bad.²⁴ It has been said that the court cannot examine the evidence to see whether a finding of fact is justified;²⁵ but if the uncontradicted evidence entitles a party to a judgment in his favor, and he duly requests a ruling and finding to that effect, and excepts to a refusal thereof, the judgment will be reversed even if no special findings were made.²⁶ Not, however, it has been held, when there was no exception below.²⁷

Fed. 502; *Fellman v. Royal Ins. Co.*, C. C. A., 185 Fed. 689.

²² *Michigan Home Colony Co. v. Tabor*, C. C. A., 141 Fed. 332; *Miller v. Houston City Ry. Co.*, C. C. A., 55 Fed. 366.

²³ *U. S. v. Cleage*, C. C. A., 161 Fed. 85; *Talcott v. Friend*, C. C. A., 179 Fed. 676.

²⁴ *Miller v. Houston City Ry. Co.*, C. C. A., 55 Fed. 366.

²⁵ *Tyng v. Grinnell*, 92 U. S. 467, 23 L. ed. 733; *Dooley v. Pease*, 180 U. S. 126, 45 L. ed. 457; *Reed v. Stapp*, C. C. A., 52 Fed. 641, 644; *Syracuse Tp. v. Rollins*, C. C. A., 104 Fed. 958; *West v. East Coast Cedar Co.*, C. C. A., 113 Fed. 737; *York v. Washburn*, C. C. A., 129 Fed. 564; *Delaware, L. & W. R. Co. v. Kutter*, C. C. A., 147 Fed. 51; *Swensen v. Cunningham*, C. C. A., 157 Fed. 753; *Hall v. Western Union Tel. Co.*, C. C. A., 162 Fed. 657; *Pacific Sheet Metal Works v. Californian Canneries Co.*, C. C. A., 164 Fed. 980; *Marinette Sawmill Co. v. Scofield*, C. C. A., 174 Fed. 562; *Union County Nat. Bank, Liberty, Ind. v. Ozan Lumber Co.*, C. C. A., 179 Fed. 710; *Meyer v. Everett Pulp & Paper Co.*, C. C. A., 193 Fed. 857; *Bell v. Union Pac. R. Co.*,

C. C. A., 194 Fed. 366; *Felker v. First Nat. Bank of Cincinnati, Ohio*, C. C. A., 196 Fed. 200. It has been held, that it cannot review a question of mixed fact and law, when the question of law has not been reserved by some proper exception. *U. S. Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144.

²⁶ *St. Louis v. Western U. Tel. Co.*, 148 U. S. 92, 37 L. ed. 380; *West v. East Coast Cedar Co.*, C. C. A., 113 Fed. 737, 739; *Paul v. Delaware, L. & W. R. Co.*, 130 Fed. 951; *U. S. Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144; *Delaware, L. & W. R. Co. v. Kutter*, C. C. A., 147 Fed. 51; *U. S. v. Robertson*, C. C. A., 183 Fed. 711; *Union County Nat. Bank, Liberty, Ind. v. Ozan Lumber Co.*, C. C. A., 179 Fed. 710; *Felker v. First Nat. Bank*, C. C. A., 196 Fed. 200. But see *Adam v. N. Y. Life Ins. Co.*, C. C. A., 113 Fed. 303; *Berwind-White Coal Min. Co. v. Martin*, C. C. A., 124 Fed. 313; *National Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, C. C. A., 145 Fed. 34.

²⁷ *National Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, C. C. A., 145 Fed. 34. An exception "to each, all, and every, of said finding, conclusion and judgment" made

It seems that such a request may be too late if not made until after the judge has announced his decision.²⁸ Whether the findings are general or special, there will be a reversal for an error in the admission or exclusion of evidence, which might have affected the decision;²⁹ provided there is a bill of exceptions;³⁰ but not for the admission of harmless evidence.³¹ Where there is a special finding of fact sufficient to support the judgment, an error in the admission of evidence not affecting such finding is harmless.³² It has been held that there can be no reversal for a refusal to make a special finding;³³ or because the court declined to make rulings upon questions of law at the request of the unsuccessful party.³⁴ The findings

after judgment, has been held to be ineffective. *Webb v. National Bank of Republic of Chicago*, C. C. A., 146 Fed. 717; *Keeley v. Ophir Hill Consol. Min. Co.*, C. C. A., 169 Fed. 598; *Lake Shore & M. S. Ry. Co. v. Eder*, C. C. A., 174 Fed. 944; *Gibson v. Luther*, C. C. A., 196 Fed. 203. *Contra*, *Webb v. National Bank of Republic of Chicago*, C. C. A., 146 Fed. 717; *Keeley v. Ophir Hill Consol. Min. Co.*, C. C. A., 169 Fed. 598; *Jackson v. Mutual Life Ins. Co.*, C. C. A., 186 Fed. 447; *Hennig v. Richey*, C. C. A., 196 Fed. 779.

²⁸ *Merrill v. Floyd*, C. C. A., 50 Fed. 849, 850, per Mr. Justice Gray.

²⁹ *Michigan Home Colony Co. v. Tabor*, C. C. A., 141 Fed. 332; *Continental & Commercial Nat. Bank v. Cobb*, C. C. A., 200 Fed. 511.

³⁰ *Gardner v. Lake*, C. C. A., 114 Fed. 306; *Paul v. Delaware, L. & W. R. Co.*, 130 Fed. 951. Where it was agreed between counsel that the court should reserve its rulings upon objections to the evidence, and no exceptions were taken when the rulings were ultimately made, it was held that they could not be reviewed. *Gibson v. Luther*, C. C. A., 196 Fed. 203.

³¹ *Reed v. Stapp*, C. C. A., 52 Fed. 641; *City of Key West v. Baer*, C. C. A., 65 Fed. 440; *Searcy County v. Thompson*, C. C. A., 66 Fed. 92; *Rhodes v. U. S. Nat. Bank*, C. C. A., 34 L.R.A. 742, 66 Fed. 512; *D. & C. F. Co. v. Gottschalk*, 66 Fed. 609. But see *Citizens' Bank v. Farwell*, C. C. A., 63 Fed. 117; *Southern Ry. Co. v. St. Louis Hay & Grain Co.*, C. C. A., 153 Fed. 730; *Atlantic Tr. Co. v. Osgood*, 155 Fed. 700.

³² *Ibid*.

³³ *Insurance Co. v. Folsom*, 18 Wall. 237, 21 L. ed. 827; *Streeter v. Sanitary District of Chicago*, C. C. A., 133 Fed. 124; *School District No. 11, Dakota County, Neb. v. Chapman*, C. C. A., 152 Fed. 887; *Southern Ry. Co. v. St. Louis Hay & Grain Co.*, C. C. A., 153 Fed. 730. In the Second Circuit, a party is entitled to make requests to find in order to raise questions of law; and if they relate to material facts, a judgment may be reversed for refusal to pass upon the same. *Treat v. Farmers' Loan & Tr. Co.*, C. C. A., 185 Fed. 760; *Joline v. Metropolitan Securities Co.*, 164 Fed. 650.

³⁴ *Insurance Co. v. Folsom*, 18 Wall. 237, 253, 21 L. ed. 827, 834;

must be confined to the ultimate facts, upon which the law determines the rights of the parties.³⁵ The trial ends when the finding is filed; or, if no finding is previously filed, when the judgment is rendered.³⁶ An order made by the court after hearing a case without a jury taking the same under advisement, does not work a discontinuance of the suit, although a provision is added that the case is to be decided in vacation.³⁷ When the findings are sufficient, or, it seems, whenever the evidence in support of the contention of the plaintiff in error is uncontradicted, the court of review may, instead of awarding a new trial, direct the judgment to be entered, below in his favor immediately,³⁸ or after the assessment of damages by the trial court.³⁹ When the special findings are imperfect and do not cover all the issues, a reversal must order a new trial.⁴⁰

§ 475. *References.* A State statute providing for compulsory references in a special class of cases, such as an action on an account, is not binding upon the Federal court.¹ Where

Searcy County v. Thompson, C. C. A., 66 Fed. 92, 98; *Consolidated Coal Co. v. Polar Wave Ice Co.*, C. C. A., 106 Fed. 798; *Paul v. Delaware, L. & W. R. Co.*, 130 Fed. 951, 955; *Southern Ry. Co. v. St. Louis Hay & Grain Co.*, C. C. A., 153 Fed. 728. But see *Paul v. Delaware, L. & W. R. Co.*, 130 Fed. 951; *U. S. Fidelity & G. Co. v. Board of Com'rs*, C. C. A., 145 Fed. 144; *Webb v. National Bank of Republic of Chicago*, C. C. A., 146 Fed. 717.

³⁵ *Am. Nat. Bank of Denver v. Watkins*, C. C. A., 119 Fed. 545; *W. L. Perkins & Co. v. Van Baumbach*, C. C. A., 185 Fed. 265, holding that a judgment cannot be supported upon a finding which merely sets forth the testimony of a witness and that it is true; *Continental & Commercial Nat. Bank v. Cobb*, C. C. A., 200 Fed. 511. Where the finding by the court of the ultimate facts sustains the judgment and clearly shows that it is based on all the evidence and not alone on evi-

dentiary or other facts it contains, and the latter facts are not necessarily inconsistent with the ultimate facts found, they present no ground for a reversal of the judgment. *American Nat. Bank v. Watkins*, C. C. A., 119 Fed. 545.

³⁶ *U. S. Fidelity & G'y Co. v. Board of Com'rs*, C. C. A., 145 Fed. 144.

³⁷ *Abraham v. Levy*, C. C. A., 72 Fed. 124. See the argument of the author who was plaintiff's counsel in 62 Fed. 569.

³⁸ *Anglo-American Land, M. & A. Co. v. Lombard*, C. C. A., 132 Fed. 721, 735.

³⁹ *Fisher v. Newark City Ice Co.*, C. C. A., 62 Fed. 569; *s. o.*, C. C. A., 76 Fed. 427.

⁴⁰ *Anglo-American Land, M. & A. Co. v. Lombard*, C. C. A., 132 Fed. 721; *Webb v. National Bank of Republic of Chicago*, C. C. A., 146 Fed. 717; *Towle v. First Nat. Bank of Boston*, C. C. A., 153 Fed. 566.

§ 475. ¹ *Howe Mach. Co. v. Ed-*

there was no rule of the Federal court upon the subject, it was held that an action therein could not, even with the acquiescence of both parties, be referred to a special master authorized to hear and pass upon the issues of fact and report his findings to the court.² It has been held that a Federal court at common law has inherent power to appoint an auditor, where the issues or items involved are so numerous or complex as to render a proper understanding of the controversy by a jury impossible until they have been simplified.³ It has been held that when the parties consent that the case be referred to the judge or some one else as referee, the only question presented by the writ of error is whether there is any error of law in the judgment upon the facts as found by the referee.⁴

The court of review has reviewed the decision of the lower court upon a motion to strike out a notice of a termination of the reference, which was decided after the report was filed, and also the decision of a motion to set aside the report because of such a notice.⁵ It was held that a stipulation to refer a case to a special master, and that the rights of the parties shall be the same as though the case were one within the terms of the State statute, neither enlarges nor contracts the rights of the parties with respect to a review by the Circuit Court of Appeals of a judgment on a trial without a jury,⁶ and that an oral consent in open court to an order of reference, made pursuant to a State statute of Nebraska, will not enable the Circuit Court of Appeals in the Eighth Circuit to review the action of the Circuit Court on exceptions to the referee's report, where there is no bill of exceptions making that report, or the evidence upon which it was founded, a part of the record.⁷ In

wards, 15 Blatchf. 402; U. S. v. Rathbone, 2 Paine, 578; Sulzer v. Watson, 39 Fed. 414.

² Swift & Co. v. Jones, C. C. A., 145 Fed. 489.

³ Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786; Fenno v. Primrose, C. C. A., 119 Fed. 801; Vermeule v. Reilly, 196 Fed. 226.

⁴ Paine v. Central Vt. R. Co., 118 U. S. 152, 158, 30 L. ed. 193, 195; Boogher v. Insurance Co., 103 U. S.

90, 26 L. ed. 310. See Dundee M. & Tr. Co. v. Hughes, 124 U. S. 157, 31 L. ed. 357.

⁵ Parker v. Ogdensburg, L. & L. C. R. Co., C. C. A., 79 Fed. 817.

⁶ Shipman v. Ohio Coal Exchange, C. C. A., 70 Fed. 652.

⁷ Dietz v. Lymer, C. C. A., 63 Fed. 758. See also Board of Com'rs. of Hamilton County v. Sherwood, C. C. A., 64 Fed. 103.

the absence of such a rule upon the subject, where the issues of fact at common law have been referred to a referee to make findings of fact, the judge will not set aside the findings of the referee, unless it appears that he has been guilty of some misconduct or has denied both parties a full and fair hearing;⁸ and the judge has no power himself to determine the issues of fact;⁹ except, perhaps, to correct a manifest clerical error; but he can only confirm or reject the referee's findings or order,¹⁰ or order new findings,¹¹ or send the case back to him for further findings;¹² and in case they are set aside, the cause will be sent back to the same referee,¹³ or stand for trial as if it had never been referred.¹⁴ Ordinarily, judgment upon a referee's report may be entered by the clerk without an application to the court.¹⁵ After judgment has been entered on a referee's report, a new trial cannot be granted by the referee or the court;¹⁶ but after the report has been filed and before judgment, possibly the referee may correct a manifest clerical error in the report.¹⁷

§ 476. Agreed statement of facts. A judgment upon an agreed statement of facts presents nothing but a question of law, which may be reviewed on a writ of error.¹ The statement of agreed facts must consist of facts only, and not contain a recapitulation of the evidence,² nor should it contain evidential

• ⁸ *United States v. Ramsey*, 158 Fed. 488.

⁹ *David Lupton's Sons Co. v. Auto. Club of America*, 225 U. S. 489, 56 L. ed. 1177; *Boatmen's Bank v. Trower Bros. Co.*, C. C. A., 181 Fed. 804. *Contra*, *Boatmen's Bank v. Trower Bros. Co.*, 171 Fed. 964; *Kilduff v. John A. Roebling's Sons Co.*, 150 Fed. 240.

¹⁰ *Boatmen's Bank v. Trower Bros. Co.*, C. C. A., 181 Fed. 804.

¹¹ *Boatmen's Bank v. Trower Bros. Co.*, C. C. A., 181 Fed. 804. See *Paine v. Standard Plunger Elevator Co.*, 186 Fed. 605.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *United States v. Ramsey*, 158 Fed. 488; *Elkin v. Denver Engineer-*

ing Works Co., C. C. A., 181 Fed. 684.

¹⁵ *Alder v. Edenborn*, 198 Fed. 928.

¹⁶ *Ibid.*

¹⁷ *Kilduff v. John A. Roebling's Sons Co.*, 150 Fed. 240.

§ 476. ¹ *Bond v. Dustin*, 112 U. S. 604, 607, 28 L. ed. 835, 836; *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. ed. 486; *U. S. v. Eliason*, 16 Pet. 291, 10 L. ed. 968; *Burr v. Des Moines R. & Nav. Co.*, 1 Wall 99, 17 L. ed. 561; *Campbell v. Boyreau*, 21 How. 223, 226, 16 L. ed. 96, 97; *Mutual Life Ins. Co. v. Kelly*, C. C. A., 114 Fed. 268. But see *Glenn v. Flant*, 134 U. S. 398, 33 L. ed. 969.

² *Raimond v. Terrebonne Parish*, 132 U. S. 192, 33 L. ed. 309.

facts, from which a ultimate fact might be but is not, found.³ If, however, it states the ultimate facts, it will not be vitiated because it contains the evidential facts as well.⁴ When a judgment upon agreed facts is reversed because the facts stipulated were evidential only, a new trial may be ordered with liberty to each party to offer additional evidence not inconsistent with the stipulation.⁵ Where the agreed facts do not support the judgment there must be a reversal.⁶

A statement of facts agreed by the parties, that is, a case stated, in an action at law, waives all questions of pleading, or of form of action, which might have been cured by amendment; but it cannot enable a court of law to assume the jurisdiction of a court of equity.⁷ For example, in a State where the remedy of a mortgagee against one who has covenanted with a mortgagor to pay the mortgage is in equity, a case stated cannot authorize him to sue at law.⁸ But it has been held that a stipulation in an action of assumpsit to submit the case to the court upon an agreed statement of facts, with like effect as though the same had been found by a jury, judgment to be entered for the party whom the court finds to be entitled thereto, authorizes judgment in favor of the plaintiff for a sum of money, although his rights are purely equitable in their nature.⁹

§ 477. Rules of decision at common law. The Revised Statutes provide that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."¹ This rule applies to condemnation proceedings and to all civil proceedings in the Fed-

³ *Wilson v. Merchants' L. & Tr. Co.*, 183 U. S. 121, 46 L. ed. 113; *U. S. Trust Co. v. New Mexico*, 183 U. S. 535, 46 L. ed. 315; *Burnham v. No. Chicago St. Ry. Co.*, C. C. A., 88 Fed. 627. See *Olcott v. Ennis-Calvert Compress Co.*, C. C. A., 114 Fed. 907.

⁴ *Am. Nat. Bank v. Watkins*, C. C. A., 119 Fed. 545.

⁵ *Burnham v. No. Chicago St. Ry. Co.*, C. C. A., 88 Fed. 627.

⁶ *U. S. v. Cleage*, C. C. A., 161 Fed. 85; *Talcott v. Friend*, C. C. A., 179 Fed. 676.

⁷ *Willard v. Wood*, 135 U. S. 309, 314, 34 L. ed. 210, 213.

⁸ *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, *supra*, § 453.

⁹ *Knight v. Fisher*, 58 Fed. 991.

§ 477. ¹ U. S. R. S., § 721.

eral courts, except equity and admiralty cases, although they are not strictly according to the common law.² It has been held that this statute does not apply to questions of commercial law, or those which involve the application of principles of the common law which are general throughout the United States, and although settled by the decision of State courts are not regulated by a State statute. In such cases, the Federal courts are not bound by the decisions of the State courts.³ Such are:

² N. Y., N. H. & H. R. Co. v. Cockroft, 49 Fed. 3, 4, per Wheeler, J.

³ Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, per Bradley, J. Daly v. James, 8 Wheat. 495, 5 L. ed. 670; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Shelby v. Guy, 11 Wheat. 361, 6 L. ed. 495; Jackson v. Chew, 12 Wheat. 153-168, 6 L. ed. 583-589; Fullerton v. Bank of U. S., 1 Pet. 604, 7 L. ed. 280; Gardiner v. Collins, 2 Pet. 58, 7 L. ed. 347; U. S. v. Morrison, 4 Pet. 124, 7 L. ed. 804; Green v. Neal's Lessee, 6 Pet. 291, 8 L. ed. 402; Groves v. Slaughter, 15 Pet. 449, 10 L. ed. 800; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. ed. 1044; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Lane v. Vick, 3 How. 464, 11 L. ed. 681; Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Smith v. Kernochen, 7 How. 198, 12 L. ed. 666; Nesmith v. Sheldon, 7 How. 312, 12 L. ed. 925; Williamson v. Berry, 8 How. 495, 12 L. ed. 1170; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703; Webster v. Cooper, 14 How. 488, 14 L. ed. 510; Ohio Life Ins. & Tr. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Beauregard v. New Orleans, 18 How. 497, 15 L. ed. 469; Watson v. Tarpley, 18 How. 517, 15 L. ed. 509; Pease v. Peck,

18 How. 595, 15 L. ed. 518; Morgan v. Curtenius, 20 How. 1, 15 L. ed. 823; League v. Egery, 24 How. 264, 16 L. ed. 655; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; s. c., 6 Wall. 736, 18 L. ed. 972; Leflingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Mercer County v. Hackett, 1 Wall. 83, 17 L. ed. 548; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. ed. 520; Seybert v. Pittsburgh, 1 Wall. 272, 17 L. ed. 553; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; Thompson v. Lee County, 3 Wall. 327, 18 L. ed. 177; Christy v. Pridgeon, 4 Wall. 196, 18 L. ed. 322; Mitchell v. Burlington, 4 Wall. 270, 18 L. ed. 350; Lee County v. Rogers, 7 Wall. 181, 19 L. ed. 160; Butz v. City of Muscatine, 8 Wall. 575, 19 L. ed. 490; City v. Lamson, 9 Wall. 477, 19 L. ed. 725; Olcott v. Supervisors, 16 Wall. 678, 21 L. ed. 382; Supervisors v. U. S., 18 Wall. 71, 21 L. ed. 771; Boyce v. Tabb, 18 Wall. 546, 21 L. ed. 757; Pine Grove v. Talcott, 19 Wall. 666, 22 L. ed. 227; Elmwood v. Marcy, 92 U. S. 289, 23 L. ed. 710; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. ed. 544; Oates v. Na-

the law of insurance,⁴ the liability for negligence by masters⁵ and common carriers,⁶ and telegraph companies,⁷ contributory negligence,⁸ it has been held the imputation of the contributory negligence of the parent to the child,⁹ negotiable paper,¹⁰ municipal bonds,¹¹ bills of lading,¹² master and servant,¹³ contracts

tional Bank, 100 U. S. 239, 25 L. ed. 580; *Douglas v. County of Pike*, 101 U. S. 677, 25 L. ed. 968; *Barrett v. Holmes*, 102 U. S. 651, 26 L. ed. 291; *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612; s. c., 106 U. S. 589, 27 L. ed. 298.

For a discussion of the subject, see *Holt on Concurrent Jurisdiction of the Federal and State Courts*, chs. vi and vii. See also § 298.

⁴ *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. ed. 1044; *Hening v. U. S. Ins. Co.*, 2 Dill. 26.

⁵ *Hough v. Railway Co.*, 100 U. S. 213, 226, 25 L. ed. 612, 618; *North-eastern Pac. R. Co. v. Peterson*, C. C. A., 51 Fed. 182; *Gardiner v. Mich. C. R. Co.*, 150 U. S. 349, 37 L. ed. 1107; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772; *Kinnear Mfg. Co. v. Carlisle*, C. C. A., 152 Fed. 933.

⁶ *Myrick v. Michigan Central R. Co.*, 107 U. S. 102, 109, 27 L. ed. 325, 327; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627.

⁷ *Western U. Tel. Co. v. Cook*, C. C. A., 61 Fed. 624; *Western U. Tel. Co. v. Wood*, C. C. A., 21 L. R. A. 706, 57 Fed. 471.

⁸ *Railroad Co. v. Gladmon*, 15 Wall. 401; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898, No. Pac. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296.

⁹ *Berry v. Lake E. & W. R. Co.*, 70 Fed. 679. But as to this see the *dicta* in *Kowalski v. Chicago*

& G. W. Ry. Co., 84 Fed. 586; s. c. C. C. A., 92 Fed. 310.

¹⁰ *Swift v. Tyson*, 16 Pet. 1; 10 L. ed. 865; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Watson v. Tarpley*, 18 How. 517, 15 L. ed. 509; *Tilden v. Blair*, 21 Wall. 241; 22 L. ed. 632.

¹¹ *Olcott v. Supervisors*, 16 Wall. 678, 21 L. ed. 382; *Pine Grove v. Talcott*, 19 Wall. 666, 22 L. ed. 227; *Venice v. Mirdock*, 92 U. S. 494, 23 L. ed. 583; *Com'rs of Johnson County v. Thayer*, 94 U. S. 631, 24 L. ed. 133; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. ed. 681; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Douglass v. Pike County*, 101 U. S. 677, 686, 25 L. ed. 968, 971.

¹² *Myrick v. Michigan Central R. Co.*, 107 U. S. 102, 109, 27 L. ed. 325, 327; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998. See the dissent of Field, J., in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 397, 405, 37 L. ed. 772, 784, 787, 27 Am. Law Reg. 398-402.

¹³ *Hough v. Railway Co.*, 100 U. S. 213, 226, 25 L. ed. 612, 618; *Coyne v. Union Pac. R. Co.*, 133 U. S. 370, 33 L. ed. 651; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656; *Newport News & M. V. Co. v. Howe*, 52 Fed. 362, 366; s. c., 3 C. C. A., 121. But see *Kerlin v. Chicago & St. L. R. Co.*, 50 Fed. 185; *Atlantic Coast Line R. Co. v. Farmer*, C. C. A., 176 Fed. 692. When there is no proof of the law of the State

by private corporations,¹⁴ the distribution of assets of insolvents before the bankruptcy law,¹⁵ the liability of stockholders to creditors in the absence of any particular local statute,¹⁶ but not as to the liability of stockholders in a building and loan association for their loans from the same;¹⁷ private international law, or the conflict of laws, so far, at least, as the same applies to the effect to be given to the statutes of another State,¹⁸ or of a foreign country.¹⁹ In the absence of a State statute, the Federal courts are not bound by the State decisions concerning the measure of damages.²⁰ It has been so held as to the law excusing a plaintiff for failure to return replevied property upon his failure in the action,²¹ and even as regards the construction and validity of a bond to secure the payment for labor and materials given by a contractor in accordance with a State statute.²² Thus, irrespective of the decisions of the courts of the States where they are held, the Federal courts hold: that in suits for damages by negligence the contributory negligence of the plaintiff is a defense, the burden of proving which rests upon the defendant, and that the plaintiff is not bound as a part of his case to disprove the same;²³ that a common carrier

where the accident occurred, the court will apply the law of the forum. *Cuba R. Co. v. Crosby*, C. C. A., 170 Fed. 369.

¹⁴ *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Hening v. U. S. Ins. Co.*, 2 Dill. 26; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 109, 27 L. ed. 325, 327.

¹⁵ *London & S. F. Ry. Co. v. Willamette S. M. L. & M. Co.*, 80 Fed. 226.

¹⁶ *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Clark v. Bever*, 139 U. S. 96, 116, 35 L. ed. 88, 96; *Brunswick Terminal Co. v. National Bank of Baltimore*, 192 U. S. 386, 48 L. ed. 491; *Converse v. Mears*, 162 Fed. 767. But see *Allen v. Fairbanks*, 45 Fed. 445, 447; *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966. But see *Sioux City T. R. R.*

& W. Co. v. Trust Co. of N. A. 173 U. S. 99, 43 L. ed. 628.

¹⁷ *U. S. Sav. & Loan Co. v. Harris*, 113 Fed. 27.

¹⁸ *Greaves v. Neal*, 57 Fed. 816, 817; *Dygert v. Vt. L. & Tr. Co.*, C. C. A., 94 Fed. 913.

¹⁹ *Evey v. Mex. Cent. R. Co.*, C. C. A., 38 L.R.A. 387, 81 Fed. 294.

²⁰ *Lake S. & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97. *Woldson v. Larson*, C. C. A., 164 Fed. 548; *Power v. City of Augusta*, 191 Fed. 647.

²¹ *Three States Lumber Co. v. Blanks*, C. C. A., 69 L.R.A. 283, 133 Fed. 479.

²² *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 149 Fed. 507.

²³ The text is cited with approval by *Shelby, J.* in *Hemingway v. Illi-*

cannot by contract relieve himself from liability for negligence;²⁴ that a person who has received negotiable paper in payment of a pre-existing indebtedness is a holder for value;²⁵ that a purchaser of negotiable paper before maturity in good faith and for value may recover the face of the same, and not merely his purchase price;²⁶ and that parol evidence of an oral agreement made at the time of the drawing, making, or indorsement of a bill or note cannot be permitted to vary, qualify, or contradict the terms of the written contract.²⁷ A State statute forbidding a foreign corporation to sue upon a contract made within a State, until it shall have procured a certificate authorizing it to do business there, does not prevent the maintenance of such an action at common law in a Federal court, unless the statute makes such contracts void.²⁸

There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of

nois, Cent. R. Co., 114 Fed. 843; it was so held in *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. ed. 296.

²⁴ *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174, 23 L. ed. 872. But see *Balt. & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 44 L. ed. 560.

²⁵ *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61.

²⁶ *Cromwell v. County of Sac*, 96 U. S. 51, 60, 24 L. ed. 681, 687; *Wade v. Chicago, S. & St. L. R. Co.*,

149 U. S. 327, 343, 37 L. ed. 755, 762.

²⁷ *Van Vleet v. Sledge*, 45 Fed. 743, 749; *Specht v. Howard*, 16 Wall. 564, 21 L. ed. 348; *Forsythe v. Kimball*, 91 U. S. 291, 23 L. ed. 352; *White v. National Bank*, 102 U. S. 658, 661, 26 L. ed. 250, 252; *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647.

²⁸ *David Lupton's Sons Co. v. Auto. Club of America*, 225 U. S. 489; *Sullivan v. Beck*, 79 Fed. 200; *Eastern B. & L. Ass'n v. Bedford*, 88 Fed. 7; *Groton Bridge & Mfg. Co. v. Am. Bridge Co.*, 151 Fed. 871. See § 87, *supra*. *Contra, Re Monongahela Distillery Co.*, 186 Fed. 220.

Congress."²⁹ It was accordingly held that a telegraph company was liable in damages, independent of any statute, for unjust discriminations in its charges for interstate commerce.³⁰

"Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed within one of the States of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court."³¹ Thus it has been held: that the validity of an agreement that the lessor, a railway company, should not be responsible to the lessee for damage by fire due to the lessor's negligence, should be determined in accordance with the decisions of the courts of the State. The State decisions as to the validity of a stipulation in a mortgage for an attorney's fee are followed by the Federal courts.³²

Where the decisions of the courts of a State have established a local rule of property, they will usually be followed by the Federal courts held within such State.³³ The same rule applies to decisions concerning the power of State corporations.³⁴

²⁹ *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 45 L. ed. 765, per Mr. Justice Brewer. See also *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. 24; *Du Ponceau* upon Jurisdiction. *Contra*, *Swift v. Phila. & R. R. Co.*, 58 Fed. 858.

³⁰ *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. ed. 765.

³¹ *Hartford F. Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U. S. 91, 100, 44 L. ed. 84, 89, per Mr. Justice Gray.

³² *Ibid.*

³³ *Bendey v. Townsend*, 109 U. S. 665, 27 L. ed. 1065; *Dodge v. Tulleys*, 144 U. S. 451, 36 L. ed. 501; *Gray v. Havemeyer*, C. C. A., 53 Fed. 174; *Childs v. Ferguson*, C. C. A., 181 Fed. 795; *Ehmen v. City of Gothenburg, Neb.*, C. C. A., 200 Fed.

564. It was so held as to decisions construing contracts for the sale of a vein of coal, by *Fretts v. Shriver*, 181 Fed. 279. But see *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 54 L. ed. 228, where the decision was made after the execution of the instrument construed. As to the rights of children adopted according to the laws of other States, *Hood v. McGehee*, 189 Fed. 205.

³⁴ *Alabama Consol. Coal & Iron Co. v. Baltimore Tr. Co.*, 197 Fed. 347.

"Upon the question whether the expression of a testator, in his will, of a wish or recommendation, will create a trust, the decisions of the State courts merely afford a guide in applying the general rule that the intention of the testator is to

The statute law of a State will always be followed by a Federal court there held, so far as the statutes establish a local rule of property;³⁵ and nearly always, so far as they create or abolish rights as distinct from remedies.³⁶ The construction of a statute, by the courts of the State of its enactment, will usually be followed by the Federal courts, and always will be so followed if it was made before the facts occurred, out of which the question for adjudication arises, and it is not clearly erroneous.³⁷ It has been held that this rule applies to the decisions of a special judiciary commission of the State;³⁸ and to those of an intermediate court of appeal, which are not in conflict with the law as laid down by the decisions of the Supreme Court of the

be effectuated." *Russell v. U. S. Trust Co.*, 127 Fed. 445.

³⁵ *Neves v. Scott*, 13 How. 268, 271, 14 L. ed. 140; *Gaines v. Fuentes*, 92 U. S. 10, 20, 23 L. ed. 524, 528; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006; *Lorman v. Clarke*, 2 McLean, 568; *McClaskey v. Barr*, 42 Fed. 609, 617. See *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. ed. 795; *Nichols v. Eaton*, 91 U. S. 716, 729, 23 L. ed. 254.

³⁶ *D'Wolf v. Rabaud*, 1 Pet. 476, 7 L. ed. 227; *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Fitch v. Creighton*, 24 How. 159, 16 L. ed. 596; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. ed. 858; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294; *Vander Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. ed. 795; *Percy Summer Club v. Astle*, C. C. A., 163 Fed. 1. But see *Watson v. Tarpley*, 18 How. 517, 15 L. ed. 509; *supra*, §§ 82, 83.

³⁷ *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *D'Wolf v. Rabaud*, 1 Pet. 476, 7 L. ed. 227; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. ed. 703; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137, 22 L. ed. 331; *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413; *U. S. v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Scipio v. Wright*, 101 U. S. 665, 25 L. ed. 1037; *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. ed. 359, 365; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. ed. 795; *Bacon v. N. W. Mut. L. Ins. Co.*, 131 U. S. 258, 33 L. ed. 128; *Hawkins v. Glenn*, 131 U. S. 319, 331, 33 L. ed. 184, 191; *Barnum v. Okolona*, 148 U. S. 393, 397, 37 L. ed. 495, 497; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683; *Zeiger v. Pennsylvania R. Co.*, C. C. A., 158 Fed. 809. See *Henderson v. Phillips*, 178 Fed. 374.

³⁸ *Sioux Falls v. Farmers' Loan & Trust Co.*, C. C. A., 136 Fed. 721 (where the decision was made pending a suit in the Federal court); *Ankeny v. Hannon*, 147 U. S. 118, 37 L. ed. 105.

State;³⁹ and to a decision of a divided court.⁴⁰ The decisions of the State courts as to the interpretation of a Territorial statute, in force in such a State, are also usually binding on the Federal courts. If, pending a writ of error or appeal, the highest court of the State gives to the statute a different interpretation from that which seemed to prevail, when the court below made its decision, the judgment or decree will ordinarily be reversed.⁴² Where the decision was in a suit that was apparently collusive, it will not be followed.⁴³ If a contract when made is valid by the laws of the State as then construed by its courts, subsequent decisions altering the construction of those laws will not be followed by the Federal courts.⁴⁵ Where the former decisions of the State courts were against the validity of the contract and the latter sustain it, the latter are followed.⁴⁶ This

³⁹ *Re Gilligan*, C. C. A., 152 Fed. 605.

⁴⁰ *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047. But see *Central R. Co. v. Wright*, 164 U. S. 327, 41 L. ed. 454.

⁴¹ *Ankeny v. Clark*, 148 U. S. 345.

⁴² *Tefft v. Stern*, C. C. A., 74 Fed. 755; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 475. See § 377, *supra*. A Federal court need not await the decision of the Supreme Court of the State before passing upon the construction of a State statute when the plaintiff is not a party to the State litigation. *Foster-Eddy v. Baker*, 192 Fed. 624. A Federal court is bound to follow the decision of the Supreme Court of the United States concerning the construction of a statute, although the highest court of the State has subsequently given a different construction of the same. *Adelbert College of Western Reserve University v. Wabash R. Co.*, C. C. A., 171 Fed. 805. But see *Morgan v. Curtenius*, 20 How. 1, 15 L. ed. 823; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359.

⁴³ *Davis v. Commonwealth Land & Lumber Co.*, 141 Fed. 711. But see *Sioux Falls v. Farmers' Loan & Trust Co.*, C. C. A., 136 Fed. 721.

⁴⁵ *Ohio L. Ins. & Tr. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Havenmeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38; *Thomson v. Lee County*, 3 Wall. 327, 18 L. ed. 177; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517; *Anderson v. Santa Anna*, 116 U. S. 356, 29 L. ed. 633; *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642. See *N. O. W. Co. v. Southern B. Co.*, 36 Fed. 833; *Forest Products Co. v. Russell*, 161 Fed. 1004; *Fleischmann Co. v. Murray*, 161 Fed. 162; *Meador Furniture Co. v. Commercial Nat. S. D. Co.*, 192 Fed. 616.

⁴⁶ *Wade v. Travis County*, 174 U. S. 499, 509, 43 L. ed. 1060, 1064.

rule does not extend so as to authorize the reversal of a judgment of a State court because it gave a construction to a State statute different from one previously given by it to the same language in another statute.⁴⁷ Whether a State statute has been passed,⁴⁸ or repealed,⁴⁹ by the legislature; what is conclusive evidence of the contents of a State statute;⁵⁰ what are the territorial boundaries of a municipal corporation;⁵¹ and except, at least, when the jurisdiction of the Federal court is in question,⁵² whether a particular corporation is a corporation of that State;⁵³ are questions as to which the Federal courts will, in general, follow the decisions of the courts of such State. It has been said that they will follow the construction by State courts of a reservation of a right to amend corporate charters.⁵⁴ Federal courts will in actions at common law, on causes of action not created by Federal statutes, follow the statutes of limitations,⁵⁵ including statutes of limitations to suits against executors and administrators⁵⁶ even though ap-

⁴⁷ *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981. But see *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642; *Muhlker v. New York & Harlem R. Co.*, 197 U. S. 544, 49 L. ed. 872.

⁴⁸ *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. ed. 63; *South Ottawa v. Perkins*, 94 U. S. 260; 24 L. ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. ed. 1204; *Re Duncan*, 139 U. S. 449, 35 L. ed. 219; *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 Fed. 812.

⁴⁹ *Kibbe v. Ditto*, 93 U. S. 674, 23 L. ed. 1005; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 24 L. ed. 97; *Southern Ry. Co. v. N. C. Corp. Commission*, 99 Fed. 162, 101 U. S. v. Andem, 158 Fed. 996.

⁵⁰ *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095.

⁵¹ *Thomas v. Board of Trustees of Ohio State University*, 195 U. S. 207, 49 L. ed. 160; *supra*, § 47.

⁵² *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 36 L. ed. 755;

Fitzgerald v. Mo. Pac. R. Co., 45 Fed. 812.

⁵⁴ *People ex rel. Schurz v. Cook*, 148 U. S. 397, 411; 37 L. ed. 498, 503.

⁵⁵ *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137, 22 L. ed. 331; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316; *Newbery v. Wilkinson*, 190 Fed. 62; *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, C. C. A., 184 Fed. 199; *supra*, §§ 180, 181. The right to issue a writ of *scire facias* under § 955 of the Revised Statutes, where the cause of action is not created by an act of Congress, is barred by the lapse of time prescribed by the State Statute of Limitations. *Browne v. Chavez*, 181 U. S. 68, 45 L. ed. 752; *Butler v. Poole*, 44 Fed. 586; *Barkler v. Ladd*, 3 Saw. 44; *Price v. Fates*, 19 A. L. J. 295, § 218, *supra*.

⁵⁶ *Security Tr. Co. v. Black River Nat. Bank*, 187 U. S. 211, 47 L. ed. 147.

plied to judgments of the courts of the United States⁵⁷ Statute of Frauds,⁵⁸ recording acts,⁵⁹ statutes regulating chattel mortgages,⁶⁰ conditional sales,⁶¹ insolvents' assignments,⁶² so far as they are not affected by the bankruptcy law;⁶³ conveyances by married women;⁶⁴ the descent, alienation, and transfer of real property;⁶⁵ giving preferences to claims against the estates of decedents which are presented within a certain time,⁶⁶ providing that upon the foreclosure of a mortgage given to secure the payment of several notes, the notes shall be paid in the order in which they fall due,⁶⁷ statutes regulating employers' liability,⁶⁸ the measure of damages,⁶⁹ the granting compensation for improvements upon land in good faith,⁷⁰ regulating the sale of land within their jurisdiction by domestic and foreign corporations,⁷¹ making shares of stock in a domestic corporation personal property within the State,⁷² regulating the liability of stockholders, who borrow money from building loan associa-

⁵⁷ *Metcalf v. Watertown*, 153 U. S. 671, 38 L. ed. 861.

⁵⁸ *D'Wolf v. Rabaud*, 1 Pet. 476, 7 L. ed. 227; *Moses v. Lawrence County Bank*, 149 U. S. 298, 303, 37 L. ed. 743, 745.

⁵⁹ *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413; *Jones v. Smith*, 40 Fed. 314; *Union Pac. Ry. Co. v. Reed*, 80 Fed. 234.

⁶⁰ *Etheridge v. Sperry*, 139 U. S. 266, 277, 35 L. ed. 171, 176; *Wilson v. Perrin*, C. C. A., 62 Fed. 629; *Dugan v. Beckett*, C. C. A., 129 Fed. 56; *Stratton v. Natural Carbonic Gas Co.*, 189 Fed. 928; *E. I. Du Pont De Nemours Powder Co. v. Jones Bros.*, 200 Fed. 638.

⁶¹ *Re Gilligan*, C. C. A., 152 Fed. 605.

⁶² *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 34 L. ed. 341; *Smith M. P. Co. v. McGroarty*, 136 U. S. 237, 34 L. ed. 346; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 34 L. ed. 200.

⁶³ *Infra*, Chapter on Bankruptcy.

⁶⁴ *Gillespie v. Pocahontas Coal & Coke Co.*, C. C. A., 163 Fed. 992.

⁶⁵ *Childs v. Ferguson*, C. C. A., 181 Fed. 795.

⁶⁶ *Dodd v. Ghiselin*, 27 Fed. 405.

⁶⁷ *N. Y. Security & Tr. Co. v. Lombard*, 65 Fed. 271; reversed upon another point, C. C. A., 74 Fed. 769.

⁶⁸ *Peirce v. Van Dusen*, C. C. A., 69 L.R.A. 705, 78 Fed. 693. In Louisiana, the State doctrine was not followed. *Hale v. Kansas City So. Ry. Co.*, C. C. A., 120 Fed. 735.

⁶⁹ *Golden Reward Min. Co. v. Buxton Min. Co.*, C. C. A., 97 Fed. 413.

⁷⁰ *McClaskey v. Barr*, 62 Fed. 209. *Of. Santee R. C. L. Co. v. James*, 50 Fed. 360.

⁷¹ *Williams v. Gaylord*, C. C. A., 102 Fed. 372.

⁷² *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 13, 44 L. ed. 647, 651.

tions,⁷³ statutes giving a cause of action for an injury that has caused a death,⁷⁴ and, in so far as they affect rights, the Sunday laws;⁷⁵ of the State where such courts are held; and the construction given to those statutes by the courts of the State which enacted them, so far as they apply, subject to the exceptions already noted. Federal courts will follow the decisions of the State courts concerning the validity of transactions between husband and wife;⁷⁶ concerning the rights of a third person to sue at common law, upon a contract made with another for his benefit;⁷⁷ as to the allowance or disallowance of interest upon overdue coupons for interest,⁷⁸ or upon damages for a tort;⁷⁹ as to the amount of damages recoverable upon a court bond;⁸⁰ and as to the rate of interest upon an obligation after it falls due.⁸¹ Ordinarily, they will also follow the State decisions as to the liability of municipal corporations for tort;⁸² and as to their power to contract;⁸³ but a municipal fireboat was held liable, in admiralty, for its negligence, in

⁷³ U. S. Sav. & Loan Co. v. Harris, 113 Fed. 27.

⁷⁴ Railroad Co. v. Barron, 5 Wall. 90, 18 L. ed. 591; Serensen v. N. P. R. Co., 45 Fed. 407; Holland v. Brown, 35 Fed. 43; Holmes v. Railway Co., 5 Fed. 75; s. c., 5 Fed. 523; Maysville St. R. & T. Co. v. Marvin, C. C. A., 59 Fed. 91; Den- nick v. Central R. Co., 103 U. S. 11, 26 L. ed. 439. See § 92, *supra*, § 560, *infra*. Where the decedent was a non-resident, and the only assets in the State were the cause of action for his wrongful death, the Federal court had jurisdiction of an action by his administratrix. Cornell Steamboat Co. v. Fallon, C. C. A., 179 Fed. 293. Such an action may be maintained in a Federal court upon a cause of action which accrued under the statutes of another State, although the latter State, where the suit is brought, forbids such actions where the death was caused outside of the State.

Missouri Pac. Ry. Co. v. Larussi, C. A., 161 Fed. 66.

⁷⁵ Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795.

⁷⁶ *Re* Tucker, 148 Fed. 928.

⁷⁷ Bethlehem Iron Co. v. Hoadley, 152 Fed. 735.

⁷⁸ Bolles v. Town of Amboy, 40 Fed. 168; Holden v. Freedman's S. & Tr. Co., 100 U. S. 72, 25 L. ed. 587.

⁷⁹ N. Y., L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292.

⁸⁰ Fidelity & D. Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135, 47 L. ed. 744.

⁸¹ Ohio v. Frank, 103 U. S. 697, 26 L. ed. 531.

⁸² Detroit v. Osborne, 135 U. S. 492, 34 L. ed. 260; Edgerton v. Mayor, etc. of N. Y., 27 Fed. 30; Clark v. Atlantic City, 180 Fed. 598.

⁸³ Claiborne County v. Burks, 111 U. S. 400, 28 L. ed. 470; Norton v. Shelby County, 118 U. S. 425, 440,

a case where the State law gave no remedy against the city.⁸⁴ It has been said that "the United States courts will follow the rules laid down by the highest courts of a State, in the matter of determining whether the *lex loci contractus*, or the *lex fori*, shall govern."⁸⁵ Water rights,⁸⁶ the right to a wharf extending into navigable waters, when the acts of Congress are silent upon the subject,⁸⁷ the title to land formed by accretion,⁸⁸ the rights of riparian owners in the bed of a stream, whether navigable or otherwise,⁸⁹ the validity of tax sales,⁹⁰ the rights of abutters in streets,⁹¹ the law as to what constitutes possession of land,⁹² and generally all questions affecting real estate,⁹³ in the absence of constitutional difficulties, depend upon the local rule of property. The authorities as to how far the State law of *lis pendens* will be followed are not harmonious. It is the safer practice to comply with the State statutes.⁹⁴ It has been held that the filing of a creditors' bill against an insolvent corporation, in the Federal court, is constructive notice of *lis pendens* with respect to all property of the corporation in the Federal district;⁹⁵ and where the State practice was the same, that the

30 L. ed. 178, 185; *Meriwether v. Muhlenburg Court*, 120 U. S. 354, 357, 30 L. ed. 653, 654; *Francis v. Howard County*, 50 Fed. 44; *Thompson v. Searey County*, 57 Fed. 1030; *City Water Supply Co. v. Ottumwa*, 120 Fed. 309. But see *supra*, notes 46, 47.

⁸⁴ *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314.

⁸⁵ *Parker v. Moore, C. C. A.*, 115 Fed. 799, 802. The State decisions as to the effect of a judgment of its courts, as *res adjudicata*, will ordinarily be followed. *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712.

⁸⁶ *Chicago, B. & Q. R. Co. v. Board of Sup'rs. of Appanoose County, Iowa, C. C. A.*, 182 Fed. 291.

⁸⁷ *The Golden Rod*, 197 Fed. 830.

⁸⁸ *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *St. Louis v.*

Rutz, 138 U. S. 226, 250, 34 L. ed. 941, 951.

⁸⁹ *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228; *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1131; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 242, 34 L. ed. 941, 947.

⁹⁰ *Lewis v. Monson*, 151 U. S. 545, 38 L. ed. 265; *Bardon v. Land & R. Imp. Co.*, 157 U. S. 327, 39 L. ed. 719.

⁹¹ *Lobensteine v. Union El. R. Co.*, 80 Fed. 199. But see *Barber v. Pittsburgh, etc., Ry. Co.*, 69 Fed. 501.

⁹² *Santee R. C. L. Co. v. James*, 50 Fed. 360.

⁹³ *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513.

⁹⁴ See *Jones v. Smith*, 40 Fed. 314.

⁹⁵ *Atlas Ry. Supply Co. v. Lake & River Ry. Co.*, 134 Fed. 503.

filing of a bill to set aside deeds, as fraudulent, was notice of *lis pendens* to all subsequent purchasers or acquirers of encumbrances upon the property,⁹⁶ at least after the subpoenas have been served upon material defendants. The Federal courts will refuse to follow any State statutes or decisions which provide that non-resident citizens of other States who hold negotiable paper or chattels beyond the jurisdiction of the court shall have constructive notice of litigation affecting the title or validity of the same.⁹⁷ A *bona fide* holder of negotiable paper is not subject to the general doctrine of *lis pendens*.⁹⁸ It has been held in the Second Circuit, that a State statute providing that purchasers without actual notice of a pending suit are not bound by the proceedings therein unless a notice of *lis pendens* has been filed in a designated public office, will be followed by the Federal court there held, which will require notice of the pendency of a suit in such a Federal court to be filed in such office so as to bind consequent purchasers.⁹⁹ A State statute giving the right to two trials in an action of ejectment will be followed by the Federal courts.¹⁰⁰ It has been said at Circuit that the adjudications of the State courts "prescribing the laws of its citizens in respect to the custody of infant children resident in the State, and the relative rights of of parents in respect to such children, are rules of decision in this court in all common-law cases touching these questions."¹⁰¹ "Statutory modifications of the common law in regard to the rights of husband and wife, as plaintiffs, in actions at law in the courts of a State, are applicable also in the United States courts held in such State, if not inconsistent with the laws of the United States or with the duties which belong to its judges and courts and the powers with which they are clothed."¹⁰²

⁹⁶ *Barstow v. Becket*, (E. D. Ga. S. D.), 110 Fed. 826.

⁹⁷ *Enfield v. Jordan*, 119 U. S. 680, 693, 30 L. ed. 523, 529.

⁹⁸ *Farmers' L. & Tr. Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759, 772, per Jackson, J.

⁹⁹ *Jones v. Smith*, 40 Fed. 314, per Lacombe, J. *Contra* in the Sixth Circuit. *McCloskey v. Barr*, 48 Fed. 130, 132, per Jackson and Sage, JJ.

¹⁰⁰ *Equator M. & S. Co. v. Hall*, 106 U. S. 86, 27 L. ed. 114. But see § 376.

¹⁰¹ *Betts, J., in Re Barry*, 42 Fed. 113, 132; s. c., 136 U. S. 597, 624, 34 L. ed. 512, 514.

¹⁰² *The Morning Journal Ass'n v. Smith, C. C. A.*, 56 Fed. 141, per *curiam*; *Texas & Pac. Ry. Co. v. Humble*, 181 U. S. 57, 45 L. ed. 747.

A State statute providing that an assignee of a cause of action by a written instrument may sue in his own name, although the assignor retains an interest therein, will be followed by a Federal court in an action at common law.¹⁰³

Where the Federal court had adopted the State practice in serving process, it was held that the State decisions, holding that the sheriff's return was conclusive, must be followed.¹⁰⁴ A Federal court refused to follow a State statute giving an attorney a lien upon his client's cause of action, so far as it was construed to require the court to go on and try a cause for the attorney's benefit after it had been settled by the parties, without the satisfaction of his claim.¹⁰⁵ It has been said that a District Court should not hold an act of Congress to be unconstitutional,¹⁰⁶ unless, in a clear case, to prevent irreparable injury to property.¹⁰⁷

§ 478. New Trials. The power of a Federal court to grant a new trial cannot be enlarged or restricted by a State statute.¹ It has been held that a State statute forbidding a new trial for the insufficiency of damages would be unconstitutional as a violation of the Seventh Amendment if applied to a Federal

¹⁰³ *Dexter, Horton & Co. v. Sayward*, 51 Fed. 729, 732. See *supra*, §§ 453, 454. The right of an assignee of a chose in action to sue in his own name depends upon the law of the forum. *Joseph Dixon Crucible Co. v. Paul, C. C. A.*, 167 Fed. 784. The right of a mortgagee to recover the mortgage debt from a purchaser who had agreed with the mortgagor to pay it, although the deed and mortgage were executed in and covered property solely in New York, where the mortgagee might have sued in a common-law action of assumpsit, was held, when the suit was brought in the District of Columbia, to defend upon the *lex fori*, and consequently to be maintainable only in a court of equity. *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210. See also *North Alabama Development*

Co. v. Orman, 55 Fed. 18; *supra*, § 82.

¹⁰⁴ *Joseph v. New Albany St. & R. M. Co.*, 53 Fed. 180.

¹⁰⁵ *Sherry v. Oceanic S. Nav. Co.*, 72 Fed. 565.

¹⁰⁶ *Michie v. N. H. & H. R. Co.*, 151 Fed. 694. *Contra, Am. L. & Tr. Co. v. Grand Rivers Co.*, 159 Fed. 775.

¹⁰⁷ *U. S. v. Scott*, 148 Fed. 431; *Ex parte Wood*, 155 Fed. 190; *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. 220; *Consolidated Gas Co. v. New York*, 157 Fed. 849.

§ 478. ¹ *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Newcomb v. Wood*, 97 U. S. 581, 24 L. ed. 1085; *Fishbrom v. Chicago, M. & St. P. Ry. Co.*, 137 U. S. 60, 34 L. ed. 585. But see *Travelers' Protective Ass'n v.*

court,² but that the right to two or more trials of an action for ejectment may be given³ or taken away⁴ by a State statute, which is constitutional even when applied to actions pending when it was passed,⁵ and will be followed by the courts of the United States.⁶ After one trial and an order for a new trial in a State court, it was held that the plaintiff could not discontinue and sue in the Federal court.⁷ The District courts have power to grant new trials after a trial by jury "for reasons for which new trials have usually been granted in the courts of law."⁸ A motion for a new trial must be made or noticed for argument during the term at which the trial took place, or by special leave of the court granted, upon a petition filed within forty-two days after the entry of judgment.⁹ It has been held that the filing of a motion for a new trial, in the Federal Court during the term, without any order or recognition by the court concerning the same, will not carry the matter over to the succeeding term, so as to give the court jurisdiction then to hear and determine it.¹⁰ It has been held that an order granting a new trial may be set aside and the verdict reinstated, at any time before the new trial is begun.¹¹ It has been held that, where the State statute authorizes a motion for a new trial in civil causes after the trial term, the Federal court should follow the same.¹² Where, after the affirmance of a criminal conviction, the defendant applied to the Circuit Court of Appeals for leave to file a motion for a new trial in the District Court, although the term had expired, and relied upon a local statute authorizing such a motion before or after the expiration of the term,

Gilbert, C. C. A., 55 L.R.A. 538, 111 Fed. 269.

² Hughey v. Sullivan, 80 Fed. 72.

³ Equator Co. v. Hall, 106 U. S. 86, 27 L. ed. 114. As to costs, see Shreve v. Cheesman, C. C. A., 69 Fed. 785.

⁴ Campbell v. Iron-Silver Min. Co., C. C. A., 83 Fed. 643.

⁵ Ibid.

⁶ Ibid.; Equator Co. v. Hall, 106 U. S. 86, 27 L. ed. 114.

⁷ Hyatt v. Challiss, 55 Fed. 267. See *infra*, Chapter on Removal of Causes.

⁸ U. S. R. S., § 726; Clark v. Sollier, 1 W. & M. 368; Milliken v. Ross, 9 Fed. 855.

⁹ U. S. R. S., § 987. See § 482; Mann v. Dempster, C. C. A., 181 Fed. 76.

¹⁰ Klein v. Southern Pac. Co., 140 Fed. 213.

¹¹ Evans v. Freeman, 149 Fed. 1020.

¹² Travelers' Protective Ass'n v. Gilbert, C. C. A., 55 L.R.A. 538, 111 Fed. 269. But see *infra*, § 481.

at any time within one year after sentence, the court said: "We doubt whether any State statute regulating criminal proceedings passed since the original judiciary act is cognizable by the Federal courts." "However, on the record before us, we do not feel ourselves required to investigate with the view of reaching a final conclusion any questions raised by the petition we are considering, and it is more convenient, and we deem it suitable, to leave all the topics involved, whether of jurisdiction or the merits, to be first investigated by the District Court, without any implication *pro* or *con*, either from our order or this opinion, which should be held as limiting that investigation."¹³ If leave to make the motion be granted at the trial term, the motion may be made at a subsequent term; provided, at least, that judgment was not entered by the trial term.¹⁴ It was held that the United States court, in the Indian Territory, had power to grant a new trial for newly-discovered evidence after the trial and the entry of judgment, while the case was pending in the Supreme Court upon writ of error.¹⁵

A motion for a new trial upon exceptions, or because the verdict was against the evidence or against the weight of evidence, or because of excessive or insufficient damages, is regularly argued before the judge who tried the case.¹⁶ He may, if he chooses, ask another judge to assist him in rendering his decision;¹⁷ and the latter may then hear the argument;¹⁸ but neither party has the right to demand the participation of another judge in the decision.¹⁹ It has been held that the power to try a case carries with it as an incident the power to hear and decide a motion for a new trial,²⁰ but that an order denying a motion for a new trial is void if signed by a judge after his successor has been appointed and qualified, and notice of this

¹³ *Trafton v. U. S.*, C. C. A., 147 Fed. 513, 514.

¹⁴ *Walker v. Moser*, C. C. A., 117 Fed. 230.

¹⁵ *Fuller v. U. S.*, 182 U. S. 562, 45 L. ed. 1230.

¹⁶ *Ives v. Grand Trunk Ry. Co.*, 35 Fed. 176.

¹⁷ *Ives v. Grand Trunk Ry. Co.*,

35 Fed. 176; *Adams v. Spangler*, 17 Fed. 133.

¹⁸ *Adams v. Spangler*, 17 Fed. 133; *Ives v. Grand Trunk Ry. Co.*, 35 Fed. 176.

¹⁹ *Ives v. Grand Trunk Ry. Co.*, 35 Fed. 176.

²⁰ *Cheesman v. Hart*, 42 Fed. 98, 105.

has been given to the judge who signs the order.²¹ The power of Congress to authorize such a re-examination of the proceedings upon the trial has been questioned.²²

The Revised Statutes, as recently amended, provide: "That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon said motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions, and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."²³ Upon a motion for a new trial, in-

²¹ U. S. v. Alexander, 46 Fed. 728.

²² Ives v. Grand Trunk Ry. Co., 35 Fed. 176. Cf. Metropolitan R. Co. v. Moore, 121 U. S. 558, 573, 30 L. ed. 1022, 1026.

²³ U. S. R. S., § 953, as amended by Act of June 5, 1900, c. 717; 31 St. at L. 270. See U. S. v. Mel-drum, 146 Fed. 390; § 479, *infra*. Where the trial judge had died pending a motion for a new trial, and there were no stenographer's minutes, nor other record or memoranda, from which his successor

could fairly pass upon the motion and settle a bill of exceptions; it was held that his only authority under the statute was to grant a new trial. Penn Mut. Life Ins. Co. v. Ashe, C. C. A., 145 Fed. 593. Where a stenographer had taken notes of the trial, but the moving party failed to pay for writing them out in order that they might be submitted to the trial judge, the motion was denied. Thorndyke v. Gunnison, C. C. A., 174 Fed. 137.

structions to the jury will rarely be reviewed;²⁴ but they may be.²⁵ The objection that the plaintiff sues in the wrong capacity cannot be raised for the first time upon a motion for a new trial.²⁶ A new trial may be granted because the verdict was against the weight of evidence.²⁷ "Where the evidence submitted to the jury is such as to render the issue doubtful, a new trial will not be granted, even though the verdict is against the apparent weight of the evidence."²⁸ When the evidence is conflicting and the witnesses are of good character, the verdict, if not manifestly wrong or improperly obtained, ought not to be set aside. And this rule prevails, even though the court might have rendered a decision different from that jury.²⁹

As a general rule, on a motion for a new trial affidavits of jurors may be received to support but not to impeach the verdict.³⁰ "A jurymen may testify as to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."³¹ It has been held: that affidavits of jurors stating that a certain paper was not shown to nor read by them,³² and that reading a newspaper report did not influence their verdict,³³ may be admitted to support a verdict; that affidavits of

²⁴ *Thorne v. Am. Distributing Co.*, 117 Fed. 973.

²⁵ See *Demarest v. Dutton*, 151 Fed. 508.

²⁶ *St. Louis & S. F. R. Co. v. Herr*, C. C. A., 193 Fed. 950.

²⁷ *Felton v. Spiro*, C. C. A., 78 Fed. 576. See *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, C. C. A., 74 Fed. 463.

²⁸ *Lurton, J. in Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, C. C. A., 74 Fed. 463, 473.

²⁹ *Pringle v. Guild*, 119 Fed. 962, 964, per *Simonton, J.* To a similar effect are: *Pim v. Wait*, 32 Fed. 741; *Nonce v. Richmond & D. R. Co.*, 33 Fed. 429; *Sargent v. Home Benefit Ass'n*, 35 Fed. 711; *Plummer v. Granite Mountain Min. Co.*, 55 Fed. 755, 756.

³⁰ *Hyman v. Eames*, 41 Fed. 676, 677; *Chandler v. Thompson*, 30 Fed. 38, 45; *Glaspell v. N. Pac. R. Co.*, 43 Fed. 903, 909; *Fuller v. Fletcher*, 44 Fed. 34, 39; *Biggs v. Barry*, 2 Curtis, 259; *Ewer's Adm'r v. National Imp. Co.*, 63 Fed. 562. Such affidavits were considered in *Mattox v. U. S.*, 146 U. S. 141, 151, 13 Sup. Ct. 50, 36 L. ed. 917; *Stevenson v. Tennessee Copper Co.*, 193 Fed. 268.

³¹ *Mr. Justice Gray in Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; approved in *Clyde Mattox v. U. S.*, 146 U. S. 140, 149, 36 L. ed. 917.

³² *Fuller v. Fletcher*, 44 Fed. 34, 39.

³³ *U. S. v. Reid*, 12 How. 361, 366, 13 L. ed. 1023, 1025.

jurors stating that they were not influenced by erroneous instructions as to the measure of damages will not be considered;³⁴ that affidavits of jurors explaining the grounds of their verdict will not be considered;³⁵ that affidavits of jurors showing statements by a juror in the jury room as to his incompetency,³⁶ and showing the presence of an officer and his statements and the reading of a newspaper report and comments on the case during the deliberations of the jury³⁷ may be admitted to impeach the verdict. Such objections may be waived by a party who proceeds in a case after he has knowledge of them.³⁸ Proceeding in the trial without a request for the withdrawal of a juror, after clear information that prejudicial newspaper articles had been read by jurors, was held to be a waiver of that objection.³⁹ But, where, after information to a party of prejudice on behalf of one of the jurors, his counsel stated that fact to the court, and the counsel for the other side, in the absence of the jury, and action thereupon was postponed by the direction of the court; it was held that he had not waived his right to a new trial.⁴⁰ The refusal of the court to grant a continuance because of the publication, that morning, of an article in a newspaper prejudicial to the defense, is no ground for a new trial, when the jurors selected have testified that they did not read the same.⁴¹ Affidavits of jurors to show that a verdict was a quotient verdict were not considered; and it was held that in the absence of an antecedent agreement to be bound by a division of the sum of each juror's estimate of the damages, a

³⁴ *Glaspell v. N. Pac. R. Co.*, 43 Fed. 903, 909.

³⁵ *Chandler v. Thompson*, 30 Fed. 38, 45.

³⁶ *Hyman v. Eames*, 41 Fed. 676, 677.

³⁷ *Clyde Mattox v. U. S.*, 146 U. S. 140, 36 L. ed. 917. So has been proof of statements in the deliberations by the jury, that the defendant had taken out insurance against liability for accidents and would not be required to pay any damages awarded. *Ruckle v. Am. Car & Foundry Co.*, 194 Fed. 459. A verdict was set aside because the

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jurors stated to each other their own knowledge concerning the value of certain property which was one of the issues in the case. *Stevenson v. Tennessee Copper Co.*, 193 Fed. 268. But not that because, during the deliberations of the jury, one of them procured from the bailiff a copy of the statutes. *Colt v. U. S.*, C. C. A., 190 Fed. 305.

³⁸ *U. S. v. Marrin*, 159 Fed. 767.

³⁹ *Ibid.*

⁴⁰ *Wilson v. Clement*, 126 Fed. 808.

⁴¹ *U. S. v. Francis*, 144 Fed. 520. Nor is a report in the newspapers

verdict thus obtained should not be set aside.⁴² A motion for a new trial may be denied upon condition that the plaintiff remit a portion of the verdict.⁴³ In one case, when the jury were sent out, the court said that no provision was made by law for furnishing them meals, and asked whether both parties would contribute to the expense of any food that might be needed by the jury during their deliberations; whereupon the defendant's counsel declined to pay any part of such expense, and the meals of the jury were provided at the plaintiff's expense; it was held that this was a ground for a new trial after a verdict for the plaintiff.⁴⁴ New trials were granted because pending the trial three jurymen visited the plaintiff's place of business and were there given twenty-five cigars;⁴⁵ because a juror privately measured a place described in the testimony;⁴⁶ because of articles upon the issues published in newspapers which were read by the jurors⁴⁷ and because the jury had in the jury room, among other exhibits, the indictment, which contained an endorsement showing a verdict of guilty upon a previous trial;⁴⁸ but not for reading a newspaper report of the case, which was not prejudicial to the defendant.⁴⁹ "Non-residence of a juror is not of itself a sufficient reason to compel the grant of a new trial. It is a question of sound discretion whether,

of the commitment of one of the defendants for misconduct in attempting to corrupt the jury, when there was no proof that any juror had read the same and they had been warned not to read reports of the case. *U. S. v. Rice*, 195 Fed. 171. Nor the public entertainment of the jury by a party after a verdict in his favor. *Beach Front Hotel Co. v. Sooy*, C. C. A., 197 Fed. 881.

⁴² *Consol. Ice Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. 898. Where the court is of the opinion that the weight of evidence was in favor of the defendant, it will not set a verdict aside for insufficient damages. *Reading v. Texas Pac. Ry. Co.*, 4 Fed. 134; *Olek v. Fern*

Rock Woolen Mills, 180 Fed. 117. Consent that the judge may permit a compromise verdict to be returned is a waiver of the right to a new trial for that reason. *Stitzer v. Horsham Tp.*, 180 Fed. 591.

⁴³ *Chils v. Gronlund*, 41 Fed. 145; s. c., 41 Fed. 505.

⁴⁴ *Johnson v. Hobart*, 45 Fed. 542.

⁴⁵ *Platt v. Threadgill*, 80 Fed. 192.

⁴⁶ *Ewer's Adm'r v. National Imp. Co.*, 63 Fed. 562.

⁴⁷ *Meyer v. Cadwalader*, 49 Fed. 32; *Morse v. Montana Ore P. Co.*, 105 Fed. 337.

⁴⁸ *Ogden v. U. S., C. C. A.*, 112 Fed. 523.

⁴⁹ *U. S. v. Francis*, 144 Fed. 520; *U. S. v. Marrin*, 159 Fed. 767.

under all the facts connected with the case, it should be done.”⁵⁰ A verdict for the defendant was set aside and a new trial ordered, in an action for slander, because of charges made by him in an “open political crusade against the liquor law of Vermont;” when it appeared that one of the jurors actively sympathized with the defendant in that crusade and took part in the canvass for his nomination for governor in the following elections, and that another juror was in the employ of a railroad company while the defendant was its president and managed, and of which the president was still a director;⁵¹ but where a party had, through a mistake of fact, failed to challenge and examine a disqualified juror, who had concealed his disqualification; it was held that the verdict should not be disturbed.⁵² It has been held that an order granting a new trial may be set aside and the verdict reinstated at a subsequent term.⁵³ This was done where, in an action for conspiracy against two defendants upon a verdict in favor of one and against the other, a new trial against both had been granted because the trial court was of the opinion that one alone could not be liable, and the Circuit Court of Appeals subsequently reversed that judgment, holding that a recovery against one of them could be sustained.⁵⁴ Where a verdict was directed for plaintiff upon one of several special interrogatories submitted without setting aside the answers to others which were against him, and thereafter the verdict so directed was set aside as unsupported by the evidence, since he had lost his right to move to set aside the other findings and to an exception in case a verdict had been directed for the defendant upon one of them; a new trial, instead of a dismissal, was ordered.⁵⁵ After a verdict has been directed in an action at common law and the jury discharged, the trial judge has no jurisdiction upon a motion for a new trial, or otherwise, to admit new evidence, to make new findings on the evidence already given, or to alter the

⁵⁰ Fisher v. Yoder, 53 Fed. 565, per Buffington, J.

⁵¹ Wilson v. Clement, 126 Fed. 808.

⁵² Morse v. Montana, Ore-Purchasing Co., 105 Fed. 337.

⁵³ Evans v. Freeman, 149 Fed. 1020.

⁵⁴ Evans v. Freeman, 149 Fed. 1020.

⁵⁵ Johnson v. Cadillac Motor Car Co., 197 Fed. 485.

record.⁵⁶ An order granting or denying a motion for a new trial cannot be reviewed upon a writ of error;⁵⁷ but a refusal to consider affidavits offered in support of a motion for a new trial may be a ground for a reversal when an exception was duly taken to their exclusion,⁵⁸ and so, it was held, may be a refusal to consider a motion for a new trial, because the verdict was against the weight of evidence;⁵⁹ and where uncontradicted affidavits, which the inferior court refused to consider, proved that a new trial must be granted, the Circuit Court of Appeals granted the same.⁶⁰

§ 479. **Bills of exceptions.** The time and manner of taking exceptions and filing bills of exceptions are also matters as to which the Federal courts act independently of the State practice.¹ No bill of exceptions is granted in a case in equity, except as to proceedings upon a feigned issue.² The Revised Statutes as amended provide that "a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and

⁵⁶ *Langdon v. Taylor*, C. C. A., 180 Fed. 385.

⁵⁷ *Missouri Pac. Ry. Co. v. Chicago & A. R. Co.*, 132 U. S. 191, 33 L. ed. 309; *Beaupré v. Noyes*, 138 U. S. 397, 34 L. ed. 991; *infra*, § 494, notes 87, 88, 89.

⁵⁸ *Clyde Mattox v. U. S.*, 146 U. S. 140, 147, 38 L. ed. 917, 920.

⁵⁹ *Felton v. Spiro*, C. C. A., 78 Fed. 576.

⁶⁰ *Ogden v. U. S.*, 112 Fed. 523.

§ 479. ¹*Chateaugay Ore. & Iron Co.*, 128 U. S. 544, 32 L. ed. 508; *Fishburn v. Chicago, M. & St. P. Ry. Co.*, 137 U. S. 60, 34 L. ed. 585; *Richmond & D. R. Co. v. McGee*, C. C. A., 50 Fed. 906.

²*Southern Building & Loan Ass'n v. Carey*, 117 Fed. 325, 329, 333.

allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case such judge is satisfied that, owing to the fact that he did not preside at the trial, or for any other cause, he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor.”³ Before this enactment the only remedy was a new trial where the death or illness of the trial judge prevented his signing the bill of exceptions.⁴ The signature of the judge without his seal is sufficient.⁵ If the bill of exception is neither signed nor

³ U. S. R. S., § 953, as amended by 31 St. at L. 270. This applies to the judge of the District Court of the United States for Porto Rico. *Guardian Assur. Co. of London v. Quintana*, 227 U. S. 100, 57 L. ed. —. The acceptance of an appointment to another court is such a disability. *Sanborn v. Bay*, C. C. A., 194 Fed. 37.

⁴ *Hume v. Bowie*, 148 U. S. 245, 253, 37 L. ed. 438, 440.

⁵ *Hanna v. Maas*, 122 U. S. 24, 30 L. ed. 1117. A paper in the record, entitled “case and exceptions,” is a sufficient bill of exceptions, if it has all the requisites of a bill, except the name. *Herbert v. Butler*, 97 Fed. 319. Exceptions contained in the minutes of the trial included in the transcript but not signed by the judge will not be considered by the appellate court; *Pomeroy’s Lessee v. State Bank of Indiana*, 1 Wall. 592, 598, 17 L. ed. 638; 640; *Thompson v. Riggs*, 5 Wall. 663, 18 L. ed. 704; *Young v. Martin*, 8 Wall. 354, 19 L. ed. 418; *Insurance Co. v. Lanier*, 95 U. S. 171, 24 L. ed. 383; *Hanna v. Maas*, 122 U. S. 24, 26, 30 L. ed. 1117, 1118; *Lee Won Jeong v. U. S., C.*

C. A., 145 Fed. 512; *Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co.*, C. C. A., 151 Fed. 466; even, it has been said, when stipulated to have been taken. *Metropolitan R. R. Co. v. District of Columbia*, 195 U. S. 322, 49 L. ed. 219. The entries on the judge’s minutes upon the trial, which usually state the exceptions then taken and allowed, are not bills of exceptions, but evidence of the party’s right to the same. *Pomeroy’s Lessee v. State Bank of Indiana*, 1 Wall. 592, 17 L. ed. 638. A bill of exceptions which states that the parties respectively introduced evidence as shown in an exhibit annexed and marked A., which exhibit consists of the stenographer’s report of the trial, containing oral exceptions then taken, is not a good bill of exceptions, and may be disregarded by the appellate court. *Hanna v. Maas*, 122 U. S. 24, 30 L. ed. 1117. See *Marion Phosphate Co. v. Cummer*, C. C. A., 60 Fed. 873. But where the evidence was embodied in a bill of exceptions, duly allowed and certified by the trial judge, the fact that the testimony was taken down by a stenographer employed

sealed, it will be disregarded upon a writ of error.⁶ An exception must be noted when taken,⁷ but, in the absence of a rule or order restricting or enlarging the time, may be signed at any

by one of the parties, and not by order of the court or by consent, was held to be immaterial. *St. Louis Southwestern Ry. Co. v. Purcell*, C. C. A., 135 Fed. 499. The record of a former trial of a case, which is made a part of an agreed statement of facts upon a second trial, it has been said, cannot be considered upon a writ of error by the court of review, unless it is incorporated in a bill of exceptions or made a part thereof; *Oxford & Coast Line R. Co. v. Union Bank*, C. C. A., 153 Fed. 723, 725; except perhaps when it is incorporated in the last record. *Oxford & Coast Line R. Co. v. Union Bank*, C. C. A., 153 Fed. 723.

⁶ *Mussina v. Cavazos*, 6 Wall. 355, 18 L. ed. 810; *Knight v. Illinois Cent. R. Co.*, C. C. A., 180 Fed. 368. It has been held that the initials of the judge are a sufficient signature. *Origet v. U. S.*, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. ed. 743; *Kinney v. U. S. Fidelity & Guaranty Co.*, 222 U. S. 283. The signature by the judge to an order settling and allowing a bill of exceptions thereto attached, is insufficient when the bill itself is not signed nor sealed, *Oxford Coast Line R. Co. v. Union Bank*, C. C. A., 153 Fed. 723, 726; *Dalton v. Hazelet*, C. C. A., 182 Fed. 561, 568; although the order states that the bill was signed. *Oxford Coast Line R. Co. v. Union Bank*, C. C. A., 153 Fed. 723, 726. It was held that a paper signed by the plaintiff was not a bill of exceptions, although it was styled "Exceptions to charge of jury" and purported to be ini-

tialed by the trial judge. *Kinney v. U. S. Fidelity & Guaranty Co.*, 222 U. S. 283. But a stipulation in aid of a writ of error, that the papers mentioned therein should "constitute the record" on the writ of error, to which was attached the certificate of the clerk that such papers were a true and faithful copy of the original papers and proceedings in the case as per the stipulations of counsel, was held to be a sufficient substitute for a bill of exceptions. *Re Grove*, C. C. A., 180 Fed. 62. In former times, it was customary for the judge to sign and seal each separate exceptions; but a single seal and signature at the end of the bill is sufficient. *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 17 L. ed. 638.

⁷ *Hunnicut v. Peyton*, 102 U. S. 333, 354, 26 L. ed. 113, 116. Exceptions to instructions, taken after a jury has retired, cannot be reviewed, *Gandia v. Pettingill*, 222 U. S. 452; *Star Co. v. Maddon*, C. C. A., 188 Fed. 910; although the court and adversary consented to this. *Mann v. Dempster*, C. C. A., 181 Fed. 76. But an exception will lie to a direction by the court that the jury retire before the plaintiff has had an opportunity to take his exceptions to the charge. *Mann v. Dempster*, 179 Fed. 837. The record should show that the exceptions were reserved while the jury were at the bar. *Star Co. v. Madden*, C. C. A., 188 Fed. 910. An exception, to the direction of a verdict is too late after the verdict has been returned. *Bidwell v. George B.*

time during the term.⁸ A bill of exceptions must be signed at the term at which the judgment was rendered, not necessarily at the term at which the trial was had.⁹ A bill of exceptions filed subsequently to the term at which judgment is entered will be disregarded by the court of review,¹⁰ even although an order of the trial court has permitted it to be filed *nunc pro*

Douglas Trading Co., C. C. A., 183 Fed. 93. It has been held: that an exception is necessary to obtain the review of an order for judgment *non obstante veredicto*; Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23; and that the same is too late when not signed and sealed until a term subsequent to the entry of judgment thereupon, McCord v. Baltimore & O. R. Co., C. C. A., 187 Fed. 743; and that an order sustaining a demurrer to a defense in an answer cannot be reviewed unless there was a due exception thereto, Board of Com'rs of City and County of Denver v. Home Sav. Bank, C. C. A., 200 Fed. 28. No exception is necessary to obtain a review of an error in granting a motion for a voluntary non-suit, when the action of the court upon the subject is recited in the record, Worthington v. McGough, C. C. A., 192 Fed. 512; or of the sufficiency of a verdict, Patterson v. Robinson Bros. Co., C. C. A., 180 Fed. 668; or of a special finding by the court, Webb v. Nat. Bank, C. C. A., 146 Fed. 717; St. Joseph Stockyards Co. v. U. S., C. C. A., 187 Fed. 1104. *Contra*, Press v. Davis, C. C. A., 54 Fed. 267. See §§ 473, 478, *supra*.

⁸ Hunnicutt v. Peyton, 102 U. S. 333, 354, 26 L. ed. 113, 116; Jennings v. Phil., Balt. & Wash. Ry. Co., 218 U. S. 255, 54 L. ed. 1031; Reader v. Haggin, C. C. A., 160 Fed. 909; Dalton v. Hazelet, C. C. A.,

182 Fed. 561; Wyss-Thalman v. Maryland Casualty Co. of Baltimore, C. C. A., 193 Fed. 53; U. S. D. C., S. D. N. Y., Rule 5, allows three calendar months from the first Tuesday of the month in which verdict is rendered or judgment or decree entered, within which to make and file bills of exceptions. A court rule providing that the bill must be signed within a less time will not prevent an extension subsequent to a default when there is a reasonable excuse. U. S. v. Waite, 193 Fed. 258, where the court stenographer was too busy to furnish the necessary minutes. See Russo-Chinese Bank v. Nat. Bank of Commerce, C. C. A., 187 Fed. 80.

⁹ Walton v. U. S., 9 Wheat. 651, 6 L. ed. 182; Muller v. Ehlers, 91 U. S. 249, 23 L. ed. 319; Preble v. Bates, 40 Fed. 745; Minahan v. Grand Trunk Western Ry. Co., C. C. A., 138 Fed. 37. The making of the court, subsequent to judgment, of supplemental findings, at the request of the defendant, was held not to extend the time after the entry of the judgment in which a bill of exceptions must be filed and approved, where the findings contained in the original judgment roll were sufficient to support the judgment. Dalton v. Hazelet, C. C. A., 182 Fed. 561.

¹⁰ Morse v. Anderson, 150 U. S. 156, 37 L. ed. 1037; Miller v. Morgan, C. C. A., 67 Fed. 82.

tunc,¹¹ unless before the time expired it was enlarged by order or consent;¹² except in districts where a special local rule or practice prevails,¹³ or under extraordinary circumstances.¹⁴ The inability of the trial judge to settle a bill of exceptions

¹¹ *Muller v. Ehlers*, 91 U. S. 249, 23 L. ed. 319; *Whalen v. Sheridan*, 10 Fed. 661; *Herbert v. Butler*, 14 Blatchf. 357. But see *Harrison v. German American F. Ins. Co., C. C. A.*, 90 Fed. 758; *So. Pac. Co. v. Hamilton, C. C. A.*, 54 Fed. 468, 474.

¹² *Davis v. Patrick*, 122 U. S. 138, 30 L. ed. 1090; *Chateaugay Ore & Iron Co.*, 128 U. S. 544, 32 L. ed. 508; *Richmond & D. R. Co. v. McGee, C. C. A.*, 50 Fed. 906; *Kellow P. L. Co. v. Chapman, C. C. A.*, 74 Fed. 444; *U. S. v. Jones*, 149 U. S. 262, 37 L. ed. 726; *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195; *Minahan v. Grand Trunk Western Ry. Co., C. C. A.*, 138 Fed. 37, 41. An order of the court allowing "such time as counsel should want to prepare a bill of exceptions" is sufficient to justify its signature after the term. *Koewing v. Wilder, C. C. A.*, 126 Fed. 472. It is not void for indefiniteness, but should be construed as limited to the time allowed by law for suing out a writ of error. *Koewing v. Wilder, C. C. A.*, 126 Fed. 472. When an order was made allowing four months within which to prepare and file, for allowance, a bill of exceptions, and the paper was filed within the time, it was held that it might be subsequently signed. *Sutherland v. Pearce, C. C. A.*, 186 Fed. 783. An order extending the time for the preparation and filing of the transcript does not extend the time for

signing and filing the bill of exceptions. *Reliable L. & B. Co. v. Stahl, C. C. A.*, 102 Fed. 590. An endorsement upon the bill, "we agree upon the above and foregoing bill of exceptions," signed by counsel after an extension by an insufficient order, was held to be a waiver of any objections to the order. *Gulf, C. & S. F. Ry. Co. v. Jackson*, 64 Fed. 79. For what does not constitute consent, see *Jennings v. Phil., Balt. & Wash. Ry. Co.*, 218 U. S. 255, 54 L. ed. 1031.

¹³ *Chateaugay Ore & Iron Co.*, 128 U. S. 544, 32 L. ed. 508; *Woods v. Lindvall*, 48 Fed. 73; *Morse v. Anderson*, 150 U. S. 156, 37 L. ed. 1037. For the practice in the First Circuit, see *N. Y. & N. E. R. Co. v. Hyde, C. C. A.*, 56 Fed. 188. In the Southern District of New York, by Rule 5, "For the purpose of making and filing bills of exceptions and making any and all motions necessary to be made within the term at which any judgment or decree is entered; each term of this Court shall be, and hereby is, extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered, or judgment or decree entered."

¹⁴ *Western Dredging & Imp. Co. v. Heldmaier, C. C. A.*, 116 Fed. 179; *Roberts v. Bennett, C. C. A.*, 135 Fed. 748; *Pittsburgh Gas. & Coke Co. v. Goff-Kirby Coal Co., C. C. A.*, 151 Fed. 466.

during the term, when caused by illness,¹⁵ or by death,¹⁶ or by his absence from the district,¹⁷ or by his appointment and qualification as judge of a higher court,¹⁸ and the loss of exhibits without the fault or negligence of the plaintiff in error, when they were not found until after the expiration of the term;¹⁹ have been held to justify the signing of the bill after the term. An extension granted during the vacation before the term succeeding the judgment was held to be insufficient.²⁰ It has been held in the Sixth²¹ and in the Seventh²² Circuit that the pendency of a motion for a new trial or to set aside the judgment extends the time to have the bill of exceptions signed and filed, and that the court when denying the motion may extend the time even at a subsequent term, and in the Ninth Circuit, that this rule does not apply to a motion to vacate the judgment.²³ When the bill is signed subsequent to the trial term, it should state any excuse for the delay;²⁴ but where a bill of exceptions, not filed nor served within the proper time, was duly settled and certified by the court, it was presumed, upon appeal, that the court had relaxed the rule for some good reason, and a motion to strike out the bill was denied.²⁵ It has been held that a statement in the bill of exceptions that the time to file the same had been extended by previous orders is insufficient, unless the orders are contained there or elsewhere in the record.²⁶ If the time prescribed by the rules is enlarged by order, it is the safer

¹⁵ *Roberts v. Bennett*, C. C. A., 135 Fed. 748.

¹⁶ *Guardian Assur. Co. of London v. Quintana*, 227 U. S. 100, 57 L. ed. —, where the delay was caused by doubt as to whether the Revised Statutes applied in Porto Rico.

¹⁷ *Western Dredging & Imp. Co. v. Heldmaier*, C. C. A., 116 Fed. 179.

¹⁸ See *Sanborn v. Bay*, C. C. A., 194 Fed. 37.

¹⁹ *Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co.*, C. C. A., 151 Fed. 466.

²⁰ *Missouri, K. & T. Ry. Co. v. Russell*, 60 Fed. 501.

²¹ *Kentucky Distillers & Ware-*

house Co. v. Lillard, C. C. A., 160 Fed. 34; *Maloning Valley Ry. Co. v. O'Hara*, C. C. A., 196 Fed. 945.

²² *Tullis v. L. E. & W. R. Co.*, C. C. A., 105 Fed. 554.

²³ *Dalton v. Hazelet*, C. C. A., 182 Fed. 561.

²⁴ *Reliable Incubator & Brooder Co. v. Stahl*, C. C. A., 102 Fed. 590.

²⁵ *City of Seattle v. Board of Home Missions of Methodist Protestant Church*, C. C. A., 138 Fed. 307. *Contra*, *Sena v. U. S.*, C. C. A., 195 Fed. 244.

²⁶ *Oxford & Coast Line R. Co. v. Union Bank*, C. C. A., 153 Fed. 723.

practice to date the bill of exceptions at a day within the time as originally limited, and to insert in the order a provision that the bill of exceptions be signed, sealed, and filed, *nunc pro tunc*.²⁷ Where there is nothing in the record to the contrary, it will be presumed that notice of the settlement of a bill of exceptions was given to the attorney for the defendant in error.²⁸ A bill of exceptions if otherwise in time may be signed after a writ of error has been sued out,²⁹ or an appeal allowed and citation issued,³⁰ or a supersedeas bond filed and approved.³¹ It has been held that, even after a writ of error, a bill of exceptions duly allowed may be amended by the trial court at the same term;³² but not by the court of review;³³ that a new exception cannot be added by amendment after the time to file a bill has expired;³⁴ and that the bill cannot be otherwise amended at a subsequent term to supply an omission due to the neglect or oversight of the plaintiff in error.³⁵

Theoretically, exhibits marked upon the trial are left with the clerk, although in practice they are usually returned to and kept by the party who offers them.³⁶ It has been held that they are a part of the record and must be included in the transcript by the clerk.³⁷ But when a paper, which is to constitute a part of the bill of exceptions, is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one

²⁷ *Hunnicutt v. Peyton*, 102 U. S. 333, 357, 26 L. ed. 113, 117; *Walton v. U. S.*, 9 Wheat. 651, 6 L. ed. 182.

²⁸ *Kentucky Distillers & Warehouse Co. v. Lillard*, C. C. A., 160 Fed. 34.

²⁹ *Hunnicutt v. Peyton*, 102 U. S. 333, 357, 26 L. ed. 113, 117; *Davis v. Patrick*, 122 U. S. 138, 30 L. ed. 1090.

³⁰ *Cook v. Klonos*, C. C. A., 164 Fed. 529.

³¹ *Ibid.*

³² *Whiting v. Equitable L. A. Soc.*, 60 Fed. 197.

³³ *Stimpson v. Westchester R. Co.*, 3 How. 553, 11 L. ed. 722; *Case v. Hall*, C. C. A., 94 Fed. 300.

³⁴ *Sutherland v. Round*, C. C. A., 57 Fed. 467.

³⁵ *Adams v. Shirk*, C. C. A., 121 Fed. 823; *Franklin County v. Furry*, C. C. A., 144 Fed. 663. See *Bidwell v. Amsinck*, C. C. A., 166 Fed. 752.

³⁶ *Hobbs v. Nat. Bank of Commerce*, C. C. A., 93 Fed. 615.

³⁷ *Hobbs v. Nat. Bank of Commerce*, C. C. A., 93 Fed. 615; *Dalton v. Moore*, C. C. A., 141 Fed. 311.

referred to in the bill of exceptions. Otherwise it may be disregarded.³⁸

The court refused to consider an affidavit in support of a motion for a continuance,³⁹ and affidavits in support of a motion for a new trial,⁴⁰ which were included in the transcript but not referred to in the bill of exceptions.⁴¹ The evidence will not be considered unless contained in the bill of exceptions.⁴² The bill of exceptions should not contain the evidence in the language used by the witnesses, by question and answer nor everything said upon the trial,⁴³ but it must contain enough of the evidence to show the materiality of the exceptions,⁴⁴ and it must show the relation, to the issues involved, of the matters that are the subject of the exceptions.⁴⁵ An exception to the admission or exclusion of evidence will not usually be reversed for a different reason than that assigned in the trial court to sustain the objection.⁴⁶ It has been said that, when a question is excluded, the bill of exceptions must show the answer that was expected.⁴⁷ And where separate bills were signed, it was held

³⁸ *Ibid.* Where the bill of exceptions certified to contain all the evidence and proceedings showed that a certain paper was produced by a witness and marked for identification, but no further reference to it was made in connection with the evidence offered, it was held by the appellate court to show affirmatively that the paper was not offered nor introduced in evidence, although an affidavit showed that the trial judge, who had since been removed, said on the trial that it was his recollection that it had been put in evidence. *Leftwich v. Lecanu*, 4 Wall. 187, 18 L. ed. 388; *Alaska Commercial Co. v. Dinkelspiel*, C. C. A., 126 Fed. 164; *Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co.*, C. C. A., 151 Fed. 466, 468.

³⁹ *Evans v. Stettinisch*, 149 U. S. 605, 37 L. ed. 866.

⁴⁰ *Stewart v. Wyoming C. R. Co.*, 128 U. S. 383, 32 L. ed. 439.

⁴¹ *Hickman v. Jones*, 9 Wall. 197,

19 L. ed. 551. See *Marion Phosphate Co. v. Cummer*, C. C. A., 60 Fed. 873.

⁴² *Re Grove*, C. C. A., 180 Fed. 62. This rule applies in criminal cases. *Ibid.*

⁴³ *Re Southern Pac. Co.*, 155 Fed. 1001, 1011.

⁴⁴ *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 606, 36 L. ed. 829, 833; *Atchison, T. & S. F. R. Co. v. Myers*, C. C. A., 63 Fed. 793; *U. S. v. Wingate*, 44 Fed. 129, 141; *Worthington v. Mason*, 101 U. S. 149, 25 L. ed. 848; *Newport News & Old Point Ry. & El. Co. v. Yount*, C. C. A., 136 Fed. 589.

⁴⁵ *Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co.*, C. C. A., 151 Fed. 466.

⁴⁶ *Lilly v. Hamilton Bank*, C. C. A., 178 Fed. 53.

⁴⁷ *Sun Pub. Co. v. Lake Erie Asphalt Block Co.*, C. C. A., 157 Fed. 80. But see § 711 *infra*.

that the court could not consider evidence stated in one of them when deciding an exception taken in another bill upon the same writ of error.⁴⁸ It is the safer practice to include in the bill of exceptions a statement that it contains all the evidence affecting the matter to which the exceptions relate.⁴⁹ Otherwise, the court of review will not presume that it contains all the evidence and may, on that account, decline to review a refusal to direct a verdict,⁵⁰ or a refusal to give a requested charge,⁵¹ unless it otherwise shows that all the evidence is included.⁵² A statement that the bill of exceptions contains the substance of all of the testimony given on the trial is sufficient.⁵³ Where it

⁴⁸ *S. W. Va. Imp. Co. v. Frari*, C. C. A., 58 Fed. 171.

⁴⁹ *Ibid.*; *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 606, 36 L. ed. 829, 833; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. ed. 811; *U. S. v. Wingate*, 44 Fed. 129; *Kingory v. U. S.*, 44 Fed. 669; *U. S. v. Norris*, 44 Fed. 740; *S. W. Va. Imp. Co. v. Frari*, C. C. A., 58 Fed. 171; *City of Chicago v. Troy Laundry Machinery Co.*, C. C. A., 162 Fed. 678; *Johnson v. Willapa Lumber Co.*, C. C. A., 173 Fed. 488; *Bohen-Darnall Coal Co. v. Hicks*, C. C. A., 190 Fed. 717; *Meyer v. Everett Pulp & Paper Co.*, C. C. A., 193 Fed. 857; *Guardian Fire Ins. Co. v. Central Glass Co.*, C. C. A., 194 Fed. 851; *Journal Pub. Co. v. Drake*, C. C. A., 199 Fed. 572. Where the statement of claim contained a large number of counts and a compulsory non-suit was directed because the evidence was thought to be insufficient to sustain a verdict on any count, the court of review refused to reverse where the record was in such a condition that it was unable to determine what evidence applied to any particular count. *U. S. v. Baltimore & O. R. Co.*, C. C. A., 185 Fed. 486.

Where the bill of exceptions states that a party "gave evidence tending to show" certain facts, it was held that the court could not review the question whether the evidence was sufficient to warrant the verdict. *Union Pac. Ry. Co. v. Harris*, C. C. A., 63 Fed. 300. But that it might pass upon the right of the plaintiff in error to a charge requested and denied. *Cincinnati Traction Co. v. Reebusch*, C. C. A., 192 Fed. 520.

⁵⁰ *Atchison, T. & S. F. R. Co. v. Myers*, C. C. A., 63 Fed. 793; *U. S. v. Copper Queen Min. Co.*, 185 U. S. 495, 46 L. ed. 1008.

⁵¹ *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 305, 51 L. ed. 811, 814.

⁵² *Gunnison County v. Rollins*, 173 U. S. 255, 43 L. ed. 689; *Clyatt v. U. S.*, 197 U. S. 207, 49 L. ed. 726; *Cincinnati, H. & D. R. Co. v. Thiebaud*, C. C. A., 114 Fed. 918. When the only exception is the refusal of a single charge, it is improper to set forth in the bill of exceptions a complete transcript of the testimony. *Cincinnati Traction Co. v. Reebusch*, C. C. A., 192 Fed. 520.

⁵³ *First Nat. Bank of Council*

is claimed that the jury refused to follow an instruction of the court, the bill of exceptions must show affirmatively that they did so.⁵⁴ The court of review cannot consider the contention that the appellant or plaintiff in error was not afforded a proper hearing in the court below, when the record does not show that fact, nor any formal exception to a ruling upon the subject.⁵⁵ It has been held, that if the bill of exceptions shows that an offer of evidence was made and refused admission, and there is nothing in the record to indicate bad faith, the appellate court must assume that the proof could have been made, and govern itself accordingly.⁵⁶

The rules of the Supreme Court provide that "the judges of the Circuit and District courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and these matters of law, and these only, shall be inserted in the bill of exceptions, and allowed by the court."⁵⁷ A general exception to the whole charge,⁵⁸ or to the whole charge "and to each and every part

Bluffs, Iowa v. Moore, C. C. A., 148 Fed. 953.

⁵⁴ Harper & Reynolds Co. v. Wilgus, C. C. A., 56 Fed. 587.

⁵⁵ Gonzales v. Buist, 224 U. S. 126, 56 L. ed. 693.

⁵⁶ Scotland County v. Hill, 112 U. S. 183, 186, 28 L. ed. 692, 693. Where it was claimed that certain acts that occurred during the trial, with reference to the extent of plaintiff's injuries, unduly influenced the sympathies of the jury, and a motion for a new trial had been denied without a specific finding that there had been undue influence; it was held that the bill of exceptions should be construed to mean that, while the facts were as therein stated, the jury were not unduly influenced by the same. Mili-

nois Cent. R. Co. v. Warren, C. C. A., 149 Fed. 658.

⁵⁷ S. C. Rule 4; C. C. of A. Rule 10.

⁵⁸ Anthony v. Louisville & N. R. Co., 132 U. S. 172, 33 L. ed. 301; Lincoln v. Clafin, 7 Wall. 132, 139, 19 L. ed. 106, 109; Cooper v. Schlesinger, 111 U. S. 148, 151, 28 L. ed. 382, 383; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 596, 28 L. ed. 527, 531; Burton v. West Jersey F. Co., 114 U. S. 474, 476, 29 L. ed. 215, 216; Lautz v. Glenn, 183 Fed. 666; nor to a charge because it did not give more full instructions upon a subject as to which no specific requests to charge were made, Cincinnati Traction Co. v. Leach, C. C. A., 169 Fed. 549; nor to a charge "as far as the in-

thereof,"⁵⁹ is of no effect where the charge contains distinct propositions, and any of them is free from objection. So is an exception to "a theory announced throughout" a charge, or throughout an instruction in the same.⁶⁰ An exception to the refusal of the court to instruct the jury in language prayed for by counsel is of no avail, if the refusal be followed by instructions in the general charge in different language, but substantially to the same effect.⁶¹ An exception to a charge or to a refusal to charge is of no avail unless the bill of exceptions shows that it was taken before the jury retired.⁶² It is too

instructions given were inconsistent with the requests for rulings," *Partridge v. Boston & M. R. Co.*, C. C. A., 184 Fed. 211; nor to a general exception to the court's refusal to give a number of charges, which were requested, any one of which was good, *Ibid.* But where the instruction of the court on a particular subject was specific and stated a single legal proposition, a general exception to the charge upon that subject was held to be sufficient. *Humes v. U. S.*, C. C. A., 182 Fed. 485; *Pritchett v. Sullivan*, C. C. A., 182 Fed. 480. A general exception to all of the charge upon a certain subject is usually insufficient. *Winfrey v. Missouri, K. & T. Ry. Co.*, C. C. A., 194 Fed. 808. So was a general exception to a charge on the ground that it erroneously submitted the case under a Federal statute, which was not applicable to the case made by the pleadings. *Erie R. Co. v. Kennedy*, C. C. A., 191 Fed. 332. An exception to the direction of a verdict and to the final judgment was insufficient to review the court's failure to require the actual return and entry of a verdict in accordance with the direction. *Bowman v. Atchison, T. & S. F. Ry. Co.*, C. C. A., 184 Fed. 697. As to the waiver of an exception, see *Win-*

frey v. Missouri, K. & T. Ry. Co., C. C. A., 194 Fed. 808. It has been held that where the exception to an instruction was based upon a specific ground, the court of review could not consider whether the instruction was erroneous for a different reason. *Beiseker v. Moore*, C. C. A., 174 Fed. 368. See *Horn v. U. S.*, C. C. A., 182 Fed. 721.

⁵⁹ *Price v. Parkhurst*, C. C. A., 53 Fed. 312.

⁶⁰ *Bogk v. Gasser*, 149 U. S. 17, 26, 37 L. ed. 631, 635. So was an exception to so much of a paragraph of the charge as assumed a certain state of facts without calling attention to any fact that was omitted from the statement or to any want of proof of a fact therein assumed. *U. S. Coal Co. v. Pinkerton*, C. C. A., 169 Fed. 536.

⁶¹ *Anthony v. Louisville & N. R. Co.*, 132 U. S. 172, 33 L. ed. 301.

⁶² *Phelps v. Mayer*, 15 How. 160, 14 L. ed. 643; *Pacific Express Co. v. Malin*, 132 U. S. 531, 33 L. ed. 450. Although the bill of exceptions states that exceptions to a charge were taken when it was given, they are bad when the bill discloses that they were not taken till afterwards. *MacDonald v. U. S.*, 63 Fed. 426.

late to take it subsequently even at the court's request,⁶³ although it is given in the counsel's absence at the jury's request for further instructions.⁶⁴ A statement that the party who requested the instruction "then and there excepted," is sufficient.⁶⁵ It has been held that the statement "to which defendant excepted," when following a ruling in what purports to be a narrative report of the trial, is sufficient.⁶⁶ The material facts or proofs on which the charges to which exceptions were taken rest,⁶⁷ and enough of the evidence to show that they were erroneous,⁶⁸ should be inserted before the charge, in order that the court may see if the points arose on which they were given and as to which exception was taken. The part of the charge to which the exception was taken must be inserted in full,⁶⁹ with enough of the rest to show that it was not qualified.⁷⁰ In a civil case, the omission of the court to charge on a material question of law is not the subject of an exception when no request for such charge was made on the trial.⁷¹

A judge is not required to charge the law on hypothetical questions which do not affect the case on trial.⁷² If the party asking the charge is dissatisfied with the court's refusal, he may except thereto, which exception will avail him if he shows that the request was warranted by the testimony, and that the charge he asked ought to have been given.⁷³ If the judge proceeds to state the law, and states it erroneously, an exception will lie to his ruling, and if it could have had any influence on the jury, the verdict will be set aside.⁷⁴ An

⁶³ *Minahan v. Grand Trunk Western Ry. Co.*, C. C. A., 138 Fed. 37; *Dalton v. Moore*, C. C. A., 141 Fed. 311; *Mann v. Dempster*, C. C. A., 181 Fed. 76; *Star Co. v. Madden*, C. C. A., 188 Fed. 910.

⁶⁴ *Stewart v. Wyoming C. R. Co.*, 128 U. S. 383, 32 L. ed. 430.

⁶⁵ *Kellogg v. Forsyth*, 2 Black, 571, 17 L. ed. 256.

⁶⁶ *New Orleans & N. E. Ry. Co. v. Jones*, 142 U. S. 18, 35 L. ed. 919.

⁶⁷ *Baltimore & P. R. Co. v. Trustees of Sixth Pres. Church*, 91 U. S. 127, 23 L. ed. 260.

⁶⁸ *Young v. Martin*, 8 Wall. 354, 19 L. ed. 418.

⁶⁹ *Stimpson v. West Chester R. Co.*, 3 How. 553, 11 L. ed. 722.

⁷⁰ *Hicks v. U. S.*, 150 U. S. 443, 458, 37 L. ed. 1137, 1142.

⁷¹ *Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 38 L. ed. 78.

⁷² *Etting v. Bank of U. S.*, 11 Wheat. 59, 6 L. ed. 419.

⁷³ *Etting v. Bank of U. S.*, 11 Wheat. 59, 75, 6 L. ed. 419, 422. *Cf. Hudson v. Charleston C. & C. R. Co.*, 55 Fed. 252.

⁷⁴ *Etting v. Bank of U. S.*, 11 Wheat. 59, 75, 6 L. ed. 419, 422.

exception to the remarks of counsel should be taken when they are made.⁷⁵ Where a party, after an exception, instead of standing upon it, by an amendment or otherwise withdraws from the position that the court held to be erroneous, it may be held that he has waived his right to review the question upon a writ of error.⁷⁶ Where a defendant, after an exception to a refusal to direct a verdict in his favor at the end of the plaintiff's case, offers evidence in support of his defense, he waives such prior exception.⁷⁷

The rules of the District courts usually regulate the manner of settling bills of exceptions. When they are silent, the old English practice is followed.⁷⁸ It is the practice in the First and Second Circuits to have but one bill of exceptions containing all the exceptions taken upon the trial.⁷⁹ That is sufficient.⁸⁰ In the Western Circuits several bills of exceptions are often prepared and presented.⁸¹

In the Eighth Circuit it is the practice to enter judgment immediately after the verdict; and the motion for a new trial may subsequently be made. In that Circuit a bill of exceptions may be allowed and filed at the term at which the motion for a new trial is determined, although that is subsequent to the term at which judgment is entered.⁸² Where the record shows that judgment was entered for relief inconsistent with the verdict,⁸³ or the evidence is all documentary and is annexed to the pleadings or otherwise incorporated in the record;⁸⁴ or there is a demurrer to evidence, and the record shows the evi-

⁷⁵ *Chandler v. Thompson*, 30 Fed. 38, 45.

⁷⁶ *Campbell v. Haberhill*, 155 U. S. 610, 612, 39 L. ed. 280, 281.

⁷⁷ *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740; *Robertson v. Perkins*, 129 U. S. 233, 32 L. ed. 686; *Columbia & P. R. Co. v. Hawthorn*, 144 U. S. 202, 36 L. ed. 405.

⁷⁸ *Chateaugay Ore & Iron Co.*, 128 U. S. 544, 555, 32 L. ed. 508, 512; *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 598, 17 L. ed. 638, 640.

⁷⁹ *Pomeroy's Lessee v. State Bank*

of Indiana, 1 Wall. 592, 601, 17 L. ed. 638, 641.

⁸⁰ *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 17 L. ed. 638.

⁸¹ *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 598, 17 L. ed. 638, 640.

⁸² *Woods v. Lindvall*, 48 Fed. 73.

⁸³ *Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859; *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169.

⁸⁴ *Clinton v. Mo. Pac. Ry. Co.*, 122 U. S. 469, 474, 30 L. ed. 1214, 1215; *Moline Plow Co. v. Webb*, 141 U. S. 616, 623, 35 L. ed. 879, 881.

dence demurred to;⁸⁵ an error thereby appearing may be reviewed without a bill of exceptions. Entries by the clerk of exceptions in the record are disregarded.⁸⁶ The bill of exceptions is no part of the record,⁸⁷ and it cannot be considered when the judgment is attacked collaterally.⁸⁸

§ 480. **Judgments.** It has been held in actions for joint torts, that judgments may be entered in favor of some and against others, if the jury so find in their verdict,¹ but separate judgments for different amounts cannot be entered against different defendants² except by consent.³ In the absence, at least, of a State statute or rule of court upon the subject, it seems that judgment cannot be entered subsequent to the trial term.⁴ A court rule providing that, where there is a failure to enter judgment on a verdict, it shall be considered as entered upon the last day of the term, applies only to a verdict which is sufficient to support a judgment.⁵ Where a plaintiff has recovered a verdict for more than the amount sufficient to warrant a review by writ of error, he may by leave of the court file before judgment a *remittitur* of part of such verdict and enter judgment for an amount less than that required for a review by writ of error.⁶ In such a case, no writ of error will issue to the judgment where the jurisdiction of the court of

⁸⁵ *Baltimore & P. R. Co. v. Trustees of Sixth Pres. Church*, 91 U. S. 127, 23 L. ed. 260.

⁸⁶ *Young v. Martin*, 8 Wall. 354, 19 L. ed. 418.

⁸⁷ *U. S. v. Taylor*, 147 U. S. 695, 700, 37 L. ed. 335, 337; *Re Haskell*, 52 Fed. 795, 798. As to what constitutes the record, see *U. S. v. Taylor*, 147 U. S. 695, 37 L. ed. 335.

⁸⁸ *Re Haskell*, 52 Fed. 795, 798.
§ 480. ¹ *Chaffee & Co. v. U. S.*, 18 Wall. 516, 21 L. ed. 908; *Sawin v. Kenney*, 93 U. S. 289, 23 L. ed. 926; *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596; *Insurance Co. v. Boykin*, 12 Wall. 433, 20 L. ed. 442; *Chils v. Gronlund*, 41 Fed. 505.

² *Chils v. Gronlund*, 41 Fed. 505.

³ *Insurance Co. v. Boykin*, 12 Wall. 433, 20 L. ed. 442. But see Fed. Prac. Vol. II.—101.

Lovejoy v. Murray, 3 Wall. 1, 11, 18 L. ed. 129, 132.

⁴ *Pressed Steel Car Co. v. Steel Car Forge Co.*, C. C. A., 149 Fed. 182.

⁵ *Pressed Steel Car Co. v. Steel Car Forge Co.*, C. C. A., 149 Fed. 182. It was held that a verdict: "We the jury in the above case sustain the validity of the contract sued upon, and fix the damages at ten dollars;" was fatally defective and insufficient to sustain a judgment. *Pressed Steel Car Co. v. Steel Car Forge Co.*, C. C. A., 149 Fed. 182.

⁶ *Thompson v. Butler*, 95 U. S. 694, 24 L. ed. 540; *Alabama Gold L. Ins. Co. v. Nichols*, 109 U. S. 232, 27 L. ed. 915; *First Nat. Bank v. Redick*, 110 U. S. 224, 28 L. ed.

review depends upon the matter in dispute.⁷ After judgment a plaintiff cannot, by a release of part of the judgment, deprive his adversary of the right to a writ of error,⁸ except by special leave of the court, which may allow him to file a *remittitur nunc pro tunc*, and amend the judgment accordingly, before a writ of error has been allowed.⁹ Originally, by the old common law, the record of an action at common law consisted only of the process, pleadings, verdict and judgment.¹⁰ The statutes of a number of States require interlocutory orders to be incorporated in the record. To what extent they should be followed

124; *Pacific Exp. Co. v. Malin*, 132 U. S. 531, 33 L. ed. 450.

⁷ *Thompson v. Butler*, 95 U. S. 694, 24 L. ed. 540; *Alabama Gold L. Ins. Co. v. Nichols*, 109 U. S. 232, 27 L. ed. 915; *First Nat. Bank v. Redick*, 110 U. S. 224, 28 L. ed. 124; *Pac. Express Co. v. Malin*, 132 U. S. 531, 33 L. ed. 450. An entry in the clerk's minutes that the plaintiff consented to the reduction of a verdict is sufficient evidence thereof; and in such a case, after the reduced amount has been paid and satisfaction of the judgment given, the court will not set aside the transaction on the ground that it had improperly compelled the plaintiff to consent as a condition of a denial of the motion to set the verdict aside as excessive. *Lewis v. Wilson*, 151 U. S. 551, 38 L. ed. 267. Where the plaintiff had sued for the benefit of others besides herself, it was held that so much of a *remittitur* filed by her as affected the others' share in the verdict was absolutely void. *Southern Pac. Co. v. Tomlinson*, 163 U. S. 369, 41 L. ed. 193. An omission of allegations of citizenship essential to the jurisdiction cannot be cured by their insertion in a *remittitur*.

Denny v. Pironi, 141 U. S. 121, 35 L. ed. 657.

⁸ *N. Y. El. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608, 30 L. ed. 259.

⁹ *Pacific Exp. Co. v. Malin*, 132 U. S. 531, 33 L. ed. 450.

¹⁰ *Cassatt v. Mitchell Coal & Coke Co., C. C. A.*, 10 L.R.A.(N.S.) 99, 150 Fed. 32, 43; *Brown v. Warden*, 44 N. J. Law, 177. It has been held that, where the plaintiff's pleading in ejectment describes the land as all of a certain tract, except portions thereof embraced in prior grants and patents from the State, the judgment must accurately describe the parts excluded; *Green v. Davis, C. C. A.*, 156 Fed. 352; and that a judgment for the deportation of a Chinese, which recited that he was a laborer, a subject of the Emperor of China, not registered as required by the acts of Congress upon this subject, that he did not belong to one of the classes excepted by said acts from such registration, and was lawfully within the United States, was not objectionable for failure to state sufficient facts to sustain it. *Lee Won Jeong v. U. S., C. C. A.*, 145 Fed. 512.

by the Federal courts has not yet been decided.¹¹ The Federal courts should follow the State practice in recording judgments.¹² The Revised Statutes provide that: "Judgments and decrees rendered in a Circuit or District Court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease by law to be liens thereon."¹³ A recent statute provides as follows: "That judgments and decrees rendered in a Circuit or District Court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State; *Provided*, that whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State." "The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public." "Nothing herein shall

¹¹ *Cassatt v. Mitchell Coal & Coke Co.*, C. C. A., 10 L.R.A. (N.S.) 99, 150 Fed. 32, 43; reversed for want of jurisdiction. The Federal courts have conformed to the procedure prescribed by Act of Pa. April 22, 1905, P. L. 286, giving a party who has requested binding instructions which have been refused, the right to move to have all the evidence taken on the trial certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* on the whole record, and

thereunder the Federal court may order that the evidence taken by an official stenographer be certified and filed as part of the record. *Cornette v. Baltimore & O. R. Co.*, C. C. A., 195 Fed. 59. But see *Slocum v. N. Y. Life Ins. Co.* 228 U. S. 364.

¹² *Morrison v. Bernards*, Tp. 35 Fed. 400; 25 St. at L. 357.

¹³ U. S. R. S., § 967. See *Sellers v. Corwin*, 5 Ohio, 398, 24 Am. Dec. 301.

be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or the same parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish."¹⁴ The clerk cannot charge a fee for allowing an individual or a corporation to inspect these indices or records.¹⁵ It has been held that, in a joint action against two or more railroad companies to recover a penalty for the violation of the safety appliance act,¹⁶ there may be a verdict and judgment in accordance with the proofs, against all or any of the defendants.¹⁷ A judgment in favor of one or more joint contractors has been held no bar to a suit against another, who was neither served with process nor appeared in the action in which the judgment was rendered.¹⁸

§ 481. Correction of judgments by courts that rendered them. In the correction, amendment, and vacation of their

¹⁴ 25 St. at L. 357, as amended by 28 St. at L. 813. "Congress could not make it obligatory on the State clerks to docket and enter a judgment of a Federal court on their records. But it was entirely competent for the State to require her clerks to perform this service, and the proviso in § 1 of the act declares, in legal effect, that when the laws of a State provide for docketing in her clerks offices, or other offices, the judgments of Federal courts, in the same manner that judgments in her own courts may be docketed, then, and not before, the territorial extent (in other respects they were already the same) of the lien of a judgment in a Federal court in that State shall be the same as that of a judgment in the State court. Where the laws of a State provide for docketing the

judgments of its own courts in any county in the State, but do not make a like provision as to the judgments of the Federal court, the act of Congress is not operative; and in such States the lien of a judgment of a Federal court continues to be co-extensive with its territorial jurisdiction. The law of this State conforms exactly to the requirements of the act of Congress, and makes it operative in this State." *Dartmouth Sav. Bank v. Bates et al.*, 44 Fed. 546, per Caldwell, J. See also *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209.

¹⁵ *Re Chambers*, 44 Fed. 786.

¹⁶ Act of March 2, 1893, ch. 196, 27 St. at L. 531.

¹⁷ *U. S. v. Chicago, P. & St. L. Ry. Co.*, 143 Fed. 353.

¹⁸ *Larison v. Hager*, 44 Fed. 49.

own judgments; the Federal courts act independently of the law regulating the State courts,¹ except, possibly, in criminal cases.² "The question relates to the power of the courts and not to the mode of procedure."³ It has been said that, in a removed case, they have the powers vested in the State court.⁴ At the term at which it is entered, a judgment may, for cause shown, be set aside, modified or amended, by the court where it was entered.⁵ A party may be relieved from the consequences of a default in pleading caused by excusable neglect.⁶ A criminal sentence may be modified at the same term.⁷ After the term has expired, unless a motion for the relief was made or noticed during that term,⁸ a judgment of which the court had jurisdiction cannot be vacated, and no alteration or correction can be made therein except by writ of error, and in that class of cases in which the writ of error *coram nobis* was issued in the old English practice.⁹ It has been held that this cannot be

¹ *Bronson v. Schulten*, 104 U. S. 410, 417, 26 L. ed. 797, 799. *Contra*, *Travelers' Protective Ass'n v. Gilbert*, C. C. A., 55 L.R.A. 538; 111 Fed. 269, 176; *Virginia T. & C. Steel & Iron Co. v. Harris*, C. C. A., 151 Fed. 428.

² *Trafton v. U. S.*, C. C. A., 147 Fed. 513; *supra*, § 478.

³ *Bronson v. Schulten*, 104 U. S. 410, 417, 26 L. ed. 797, 799, per Miller, J.; *Ex parte Casey*, 18 Fed. 86.

⁴ *Cady v. Associated Colonies*, 119 Fed. 420. *Contra*, *Bronson v. Schulten*, 104 U. S. 410, 417, 26 L. ed. 797, 799.

⁵ *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. ed. 797, 799.

⁶ *Kinney v. Beaver*, 140 Fed. 792. See *supra*, § 172.

⁷ *Re Graves*, 117 Fed. 798; *Cf. Re Morse*, 117 Fed. 763; *infra*, § 532.

⁸ *Amy v. Watertown*, 130 U. S. 301, 313, 32 L. ed. 946, 950; *Bronson v. Schulten*, 104 U. S. 410, 415, 416, 26 L. ed. 797, 799; *Klever v.*

Seawall, 65 Fed. 373. See U. S. R. S., § 987.

⁹ *Bronson v. Schulten*, 104 U. S. 410, 415, 416, 26 L. ed. 797, 799; *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013; *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775; *Rio Grande Irrigation Co. v. Gildersleeve*, 174 U. S. 603, 609, 43 L. ed. 1103, 1105; *Tubman v. Balt. & O. R. Co.*, 190 U. S. 38, 47 L. ed. 946; *Wetmore v. Karriek*, 205 U. S. 141, 51 L. ed. 745; *Hook v. Mercantile Tr. Co.*, 89 Fed. 410; *Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co.*, C. C. A., 76 Fed. 479, 481; U. S. v. *Four Lorgnette Holders*, 132 Fed. 564; *O'Connor v. O'Connor*, C. C. A., 142 Fed. 449; *United States v. One Trunk*, 155 Fed. 651; U. S. v. *Taylor*, 157 Fed. 718. But in the District of Delaware a judgment by default was set aside upon motion at a subsequent term, where the defendant's attorney had believed that the suit was brought in the State court. *Brown v. Phila. W. & B. R.*

done, although authorized by a State statute,¹⁰ nor when the attorneys have stipulated that the judgment should abide the event of a writ of error in another suit.¹¹ The only remedy by the party aggrieved is in equity.¹² It has been held that an order staying plaintiff's proceedings till he pays costs of a former suit is *res adjudicata* upon a subsequent motion, and is so far final that it cannot be set aside or modified at a subsequent term.¹³ The writ of error *coram nobis* was allowed, to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. It was limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert*, or the like; or error in the process through default of the clerk.¹⁴ "In practice the same end is now generally attained by motion, sustained, if the case require it, by affidavits; and it is observable that so far has the latter mode superseded the former in the British practice, that Blackstone does not even notice this suit among his remedies."¹⁵ A judgment may be amended subsequent to the term of its entry, for the purpose of correcting an error in computation, which appears on the record.¹⁶

Co., 9 Fed. 183. Where neither the record, nor a bill of exceptions, showed either that a defendant excepted to an order, setting aside a judgment at the same term and amending a declaration, which provided that his plea stand to the declaration as amended, or any request by him to file a further plea; it was held that he could not object to the same upon writ of error. *H. G. Holloway & Bro. v. White-Dunham Shoe Co.*, C. C. A., 10 L.R.A. (N.S.) 704, 151 Fed. 216.

¹⁰ *Bronson v. Schulten*, 104 U. S. 410, 417, 26 L. ed. 797, 799; *O'Connor v. O'Connor*, C. C. A., 142 Fed. 449; *Contra. Cady v. Associated Colonies*, 119 Fed. 420; *Virginia, T.*

& C. Steel & Iron Co. v. Harris, C. C. A., 151 Fed. 428.

¹¹ *Brown v. Arnold*, 127 Fed. 387.

¹² *Hamburg-Bremen Fire Ins. Co. v. Pelzer Manuf'g Co.*, C. C. A., 76 Fed. 479; *U. S. v. Taylor*, 157 Fed. 718.

¹³ *Buckles v. Chicago, M. & St. Paul Ry. Co.*, 53 Fed. 566.

¹⁴ *Bronson v. Schulten*, 104 U. S. 410, 416, 26 L. ed. 797, 799, per Miller, J.; *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013. See *Lincoln Nat. Bank v. Perry*, 66 Fed. 887.

¹⁵ *Pickett's Heirs v. Legerwood*, 7 Pet. 144, 148, 8 L. ed. 638, 639, per Johnson, J.

¹⁶ *A. J. Woodruff & Co. v. U. S.*, 154 Fed. 861.

It has been held that a court has power at any time to set aside a judgment which is absolutely void, not merely voidable.¹⁷ Where a sentence has been made in excess of the power granted by statute, it may be amended *nunc pro tunc* at a subsequent term by striking out so much of the same as exceeds the court's authority.¹⁸ It has been held that an application for the remission of a penalty is not a motion to vacate a judgment and may be granted after the term at which the judgment was entered.¹⁹

An order may be entered *nunc pro tunc* to embody a decision made at a previous term of the court even in a criminal case;²⁰ to correct a statement that a dismissal was "without right to further prosecute" so that it shall read "without right to further prosecute for adjudication of bankruptcy under the national bankruptcy law for any of the causes alleged in the petition herein;"²¹ in a civil case to make special findings previously omitted, conformably to the opinion filed at the judgment term,²² and to correct the record, so as to show upon what pleadings²³ or other papers²⁴ the case was in fact sub-

¹⁷ U. S. v. Wallace, 46 Fed. 569, 570. For example, a judgment entered in vacation without statutory authority. Abraham v. Levy, C. C. A., 72 Fed. 124. Cf. *supra*, § 443. A judgment entered by a clerk without authority. Rehfield v. Baltimore & O. R. Co., C. C. A., 187 Fed. 810. A judgment in a case where the court has no jurisdiction because of a lack of difference of citizenship. Politz v. Wabash R. Co., 180 Fed. 950, where the Circuit Court of Appeals had subsequently held that a motion to remand should have been granted. A judgment based upon a statute which is unconstitutional. U. S. v. Rothstein, C. C. A., 187 Fed. 268.

¹⁸ *Ex parte* Harlan, 180 Fed. 119. See *infra*, § 532.

¹⁹ U. S. v. Jenkins, C. C. A., 176 Fed. 672.

²⁰ *Re* Wight, 134 U. S. 136, 33 L.

ed. 865; *Supervisors v. Durant*, 9 Wall. 736, 19 L. ed. 813; *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395. See *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775.

²¹ *Bernard v. Abel*, C. C. A., 156 Fed. 649.

²² *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395. U. S. D. C., S. D. N. Y., Rule 5, extends the term for the purposes of such motions until three calendar months, beginning on the first Tuesday of the month in which the verdict is rendered or judgment or decree entered. *Brown v. U. S.*, C. C. A., 196 Fed. 351.

²³ *Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co.*, 126 Fed. 552.

²⁴ *Hays v. Wagner*, C. C. A., 150 Fed. 533. Such as the filing and certification as part of the record in the stenographer's minutes, when a State statute provides that they

mitted, but not after a writ of error has been decided to insert in a record certain findings, some of which were unavoidably and other accidentally omitted.²⁵ Where, during the term, a new trial had been granted; it was held that its incidental effect was to vacate a previous judgment, and that the court at a subsequent term, by an order *nunc pro tunc*, might state such vacation.²⁶ When the facts are recent, it seems that an order, which is founded upon matters within the knowledge of the court, may be entered *nunc pro tunc*, without notice to the party thereby affected.²⁷ It has been held that, when there is no record of any sort, an order *nunc pro tunc* cannot be made.²⁸ The object of an entry *nunc pro tunc* is, not to make an order now for then, but to enter now for then an order previously made.²⁹ The fact that a judge had, in chambers, expressed a willingness to make a desired order extending time, when no such order was actually made or directed in open court, does not warrant the entry of such an order *nunc pro tunc* as a succeeding term.³⁰ An order *nunc pro tunc* has no effect upon the statute of limitations;³¹ nor can it relate back so as to make a person guilty of contempt for an act done before it was entered.³² Where a case has been tried and is under advisement at the time of the death of a party, a decree may be entered by the court *nunc pro tunc* as of a date before his death;³³ but not when the court had no jurisdiction when he died.³⁴

may be made part of the record. *Cornette v. Baltimore & O. R. Co.*, C. C. A., 195 Fed. 59. The failure by an alien to file a declaration of his intent to become a citizen cannot be cured by an amendment *nunc pro tunc*. *Re Stack*, 200 Fed. 330.

²⁵ *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775.

²⁶ *Evans v. Freeman*, 140 Fed. 419.

²⁷ *Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co.*, 126 Fed. 552. But see *Wetmore v. Karrick*, 205 U. S. 141, 51 L. ed. 745.

²⁸ *Gagnon v. U. S.*, 193 U. S. 451, 48 L. ed. 745. For a case holding that the clerk cannot enter judg-

ment *nunc pro tunc* see *Pressed Steel Car Co. v. Steel Car Forge Co.*, C. C. A., 149 Fed. 182.

²⁹ *Klein v. Southern Pac. Co.*, 140 Fed. 213; *Cuebas v. Cuebas*, 223 U. S. 376, 56 L. ed. 476.

³⁰ *Klein v. Southern Pac. Co.*, 140 Fed. 213.

³¹ *Fewlass v. Keesham*, C. C. A., 88 Fed. 573, 576.

³² *Ex parte Buskirk*, C. C. A., 72 Fed. 14.

³³ *Mitchell v. Overman*, 103 U. S. 62, 26 L. ed. 369; §§ 216, 217, *supra*.

³⁴ *Cuebas v. Cuebas*, 223 U. S. 376, 389, 56 L. ed. 476, 480.

§ 482. **Condemnation proceedings.** * The Act of February 9, 1887, provides that "in every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States Circuit or District Court of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation; and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice." "The practice, pleadings, forms, and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."¹ This act is authorized by the Constitution.² This statute confers no general authority for public officers to acquire land. It only gives them power to institute proceedings for condemnation, where the acquirement of the land is otherwise authorized.³ The Secretary of War has the right to institute proceedings for the "condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors, for which provision has

§ 482, 125 St. at L., ch. 728, p. 377. The statutory authority "for the purchase of land . . . for the assembling, grazing and training of horses purchased for the mounted service," Act of Aug. 1, 1888, ch. 728, 25 St. at L. 357, Comp. St. 1901, p. 2516, empowers the Attorney General upon the application of the proper officer to institute proceedings to condemn the

same, *U. S. v. Beaty*, 198 Fed. 284.

² *Re Rugheimer*, 36 Fed. 369; *Kohl v. U. S.*, 91 U. S. 367, 23 L. ed. 449; *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. ed. 206, 207; *U. S. v. Jones*, 109 U. S. 513, 27 L. ed. 1015.

³ *U. S. v. Certain Lands in the Town of Narragansett, R. I.*, 145 Fed. 654.

been made by law.”⁴ The United States in proceedings to condemn land for Governmental purposes, exercises its own right of eminent domain, subject to the limitation of the Federal constitutional law, and the right to compensation and the measure of compensation may be different from that in a State condemnation proceeding concerning property which had previously been appropriated to public or municipal uses under the State laws.⁵ The act of a State legislature authorizing the condemnation, by the United States, of property within the State, operates merely as a formal assent to the exercise by the United States of its own right of eminent domain, and does not entitle the United States to stand upon the local law concerning the rule of damages, where property taken by the State for a second public use is connected with a prior public use of the same authorized by such State.⁶ It is doubtful whether, in the absence of express statutory authority, land used for a public purpose by a State or a subdivision thereof can be condemned by the United States.⁷ A proceeding by the United States for the condemnation of land is not a proceeding to collect an account or claim against the United States, and it has consequently been held that the statute forbidding the recovery of interest against the United States does not apply thereto.⁸

⁴ 25 St. at L., 94; *U. S. v. Certain Lands in the Town of Narragansett, R. I.*, 145 Fed. 654.

⁵ *Nahant v. U. S.*, C. C. A., 69 L.R.A. 723, 136 Fed. 273.

⁶ *Nahant v. U. S.*, C. C. A., 69 L.R.A. 723, 136 Fed. 273.

⁷ *U. S. v. Certain Land in Town of New Castle*, C. C. A., 165 Fed. 783, 788. In Massachusetts, a city may contest the condemnation of land used as a public park. *Re Certain Land in Lawrence*, 119 Fed. 453. In proceedings by the United States to condemn land within the boundaries shown by a plat for fortification purposes, together with all roads, ways, and avenues, and all buildings and structures thereon, and all interests therein, the constitutional

rule of just compensation entitles a municipal corporation to be compensated for physical structures and improvements which, under the laws of state, it has, by means of taxation, placed or acquired on the lands or streets taken, for the use of its inhabitants or the local public, such as water or sewer pipes, curbing, or the like, of which it is deprived by the taking of the property. *Town of Nahant v. U. S.*, C. C. A., 136 Fed. 273.

⁸ *U. S. v. Sargent*, C. C. A., 162 Fed. 81. In Massachusetts, the owner is not entitled to interest pending the proceedings, unless he prove that he has suffered loss of the use of the land by reason thereof. *Town of Hingham v. U. S.*, C. C. A., 161

The pendency of condemnation proceedings in a Federal court does not deprive the State court of jurisdiction over a subsequent suit, to which the United States are not parties, to try the title to the land and to the award for its condemnation, in which the right of the national government to condemn is not questioned, nor the value of the same considered.⁹ Where a condemnation proceeding in a State court arises under the Constitution or laws of the United States,¹⁰ or is instituted in the name or for the benefit of a corporation between whom and the respondent the requisite difference of citizenship exists,¹¹ it may be removed to the Federal court if the matter in dispute exceeds the jurisdictional amount and the application is made at the proper stage of the proceedings.¹² The petition should be brought in the name of the United States;¹³ but if originally filed in the name of the Secretary of the Treasury it may be amended accordingly.¹⁴ The proceeding is in substance and effect an action at common law.¹⁵ The State practice should be followed in substance, but not necessarily in all the details of the same.¹⁶ It has been held that the constitutional provision concerning the trial by jury of actions at common law does not apply to condemnation proceedings, and that the issues of fact may be tried before commissioners if that be the State practice.¹⁷ It may be that the

Fed. 295. In Minnesota, the court may allow interest on the damages assessed from the date of the commissioner's report. *U. S. v. Sargent*, C. C. A., 162 Fed. 81.

⁹ *U. S. v. Eisenbeis*, C. C. A., 112 Fed. 190.

¹⁰ *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. ed. 319; *Helena Power Transmission Co. v. Spratt*, 146 Fed. 310.

¹¹ *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, and other cases cited *infra*, § 538.

¹² See *infra*, §§ 538, 543.

¹³ *Chappell v. U. S.*, 160 U. S. 499, 513, 40 L. ed. 510, 515. But see *Re Rugheimer*, 36 Fed. 369; s. c., 36 Fed. 376; *Re Secretary of Treasury*, 45 Fed. 396.

¹⁴ *Chappell v. U. S.*, 160 U. S. 499, 513, 40 L. ed. 510, 515.

¹⁵ *Ibid.*; *Re Rugheimer*, 36 Fed. 376.

¹⁶ *U. S. v. Certain Land in Town of New Castle*, 165 Fed. 783, holding that the New Hampshire statute providing that condemnation proceedings should be instituted in a special tribunal did not apply to the Federal courts.

¹⁷ *Postal Telegraph Cable Co. v. Southern Ry. Co.*, 122 Fed. 156; *U. S. v. Beaty*, 198 Fed. 284. *Cf. Luxton v. North River Bridge Co.*, 147 U. S. 337, 37 L. ed. 194. But see *Chappell v. U. S.*, 160 U. S. 499, 513, 40 L. ed. 510, 515. In the districts of New York, condemnation proceedings should follow the practice pre-

issues must be tried by a jury and not before commissioners in accordance with the State practice.¹⁸ If tried before a jury, the jury must be impaneled in accordance with the Federal statutes, and the trial be had before a Federal judge; not before a sheriff's jury in accordance with the State practice.¹⁹ Where a trial was had before commissioners, it was held: that a provision in the State laws, that the commissioners' report should be filed in the office of the clerk of the county, would not be followed,²⁰ but that the report must be filed in the office of the clerk of the Federal court in which the proceedings were instituted,²¹ that the commissioners may testify upon the hearing of exceptions to their report;²² and that where the fairness of the commissioners is not impeached, their report should not be changed by the court except on clear evidence of error

scribed by Chapter xxiii, Title 1, of the Code of Civil Procedure; *Re Secretary of Treasury*, 11 L.R.A. 275, 45 Fed. 396. But it seems that the petition need not state the facts showing the necessity of the acquisition of the property, nor show that there has been an effort to acquire it by purchase, since those are not matter of form or practice. *Ibid.* The provision in the Maryland statute that the petition shall be verified by an agent of the United States is inoperative upon a proceeding presented to the court by an officer designated by an act of Congress. *Chappell v. U. S.*, 160 U. S. 499, 513, 40 L. ed. 510, 515. In Massachusetts, the owner is not entitled to interest pending the proceedings, unless he prove that he has suffered loss of the use of the land by reason thereof. *Town of Hingham v. U. S.*, C. C. A., 161 Fed. 295. In Minnesota, the court may allow interest on the damages assessed from the date of the commissioner's report. *U. S. v. Sargent*, C. C. A., 162 Fed. 81.

¹⁸ *Ibid.*

¹⁹ *Chappell v. U. S.*, 160 U. S.

499, 513, 40 L. ed. 510, 515. It has been held, that in a proceeding for the condemnation of part of a tract of land, the court should not submit to the jury the question whether the value of the part not taken was diminished by the taking, and, if so, to what extent, without testimony from witnesses shown to have special knowledge or qualifications to enable them to form an intelligent and correct judgment, and the fact that the jury viewed the premises is not in itself sufficient. *Town of Hingham v. U. S.*, C. C. A., 161 Fed. 295. Testimony as to the price paid by the Government for land purchased from other owners, forming part of the tract sought to be acquired, is not competent on the question of the compensation to be awarded a respondent in such proceedings. *U. S. v. Beaty*, 198 Fed. 284.

²⁰ *Luxton v. North River Br. Co.*, 147 U. S. 337, 340, 37 L. ed. 194, 195.

²¹ *Ibid.*, 147 U. S. 337, 341, 37 L. ed. 194, 195.

²² *U. S. v. Beaty*, 198 Fed. 284.

or mistake.²³ If a trial by jury is had by way of appeal from the award of the commissioners, that trial must take place in the Federal court.²⁴ The District Attorney may consent to an arbitration of the damages, when the State statute gives attorneys in condemnation proceedings such authority.²⁵

Neither the Supreme Court nor the Circuit Court of Appeals nor a State court can review the proceedings by *certiorari*, although the State statute gives that right of review to a State court.²⁶ The proceedings can only be reviewed by writ of error²⁷ not by appeal.²⁸ No writ of error lies "until after final judgment disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error."²⁹ No writ of error lies to review the order appointing the commissioners of appraisal, although that order may be reviewed on a writ of error to the final order in the proceeding.³⁰ It has been held where a proceeding to condemn real estate, or an easement therein, is removed from a State, to a Federal Court of the United States, and after compensation has been ascertained a writ of error is prosecuted from the judgment, any *supersedeas* obtained should be modified so that the petitioner shall have the same rights as though the proceedings had remained in the State court; and, where the State

²³ *Ibid.* Where, after the condemnation by the United States in a Federal court, of easements appurtenant to a decedent's lands, and before the award of damages the widow obtained in the State court of probate an assignment of her dower; the former court refused to award her a dower interest in the fund paid into court as damages, where the face of the decree did not show that the value of the easements was not considered by the State court in determining her dower interest; but she was required to apply to the State court for any modification of its decree, which could afford her relief in that respect if she were thereto entitled.

U. S. v. Certain Lands in Town of Portsmouth, R. I., 173 Fed. 676.

²⁴ *Ibid.*

²⁵ *Judson v. U. S., C. C. A.*, 120 Fed. 637.

²⁶ *Luxton v. North River Bridge Co.*, 147 U. S. 337, 37 L. ed. 194.

²⁷ *Luxton v. North River Bridge Co.*, 147 U. S. 337, 340, 37 L. ed. 194, 195; *Macrum v. U. S., C. C. A.*, 154 Fed. 653; *infra*, § 637.

²⁸ *Ibid.*

²⁹ *Luxton v. North River Bridge Co.*, 147 U. S. 337, 37 L. ed. 194. But see *Wheeling & Belmont Br. Co. v. Wheeling Br. Co.*, 138 U. S. 287, 290, 34 L. ed. 967, 968.

³⁰ *Luxton v. North River Bridge Co.*, 147 U. S. 337, 37 L. ed. 194.

statute provides that the proposed work shall not be delayed by appellate proceedings in case the amount of compensation awarded is paid into court, the *supersedeas* in the Federal court will be modified to conform to such provision.³¹ Provisions in the State statutes granting costs and counsel fees to the party whose land is taken have not been followed by the Federal courts;³² and upon the dismissal of a condemnation proceeding no costs are awarded against the United States, although the State practice allows costs against the petitioner in such a case.³³ It has been held that an attorney appointed by the court to protect the interests of absent property owners may recover compensation in an independent suit against the United States.³⁴ Proceedings to condemn lands for fortifications and other works of defense, under the act of August 18, 1890, are properly instituted in a District Court of the United States,³⁵ although they may also be instituted in a State court.³⁶ A telegraph company engaged in interstate commerce has no authority to institute condemnation proceedings in a Federal court.³⁷ A condemnation proceeding, although the necessary difference of citizenship exists between the parties interested, cannot be removed to a Federal court when it is a mere administrative proceeding before commissioners of appraisal; but when an appeal is taken to a court, and litigation is then instituted between the parties, the proceeding thereupon becomes a suit which may be removed.³⁸

³¹ *Broadmoors Land Co. v. Curr*, C. C. A., 133 Fed. 37.

³² *U. S. v. Engeman*, 46 Fed. 898.

³³ *Carlisle v. Cooper*, 64 Fed. 472.

³⁴ *Ibid.*, 64 Fed. 472, 476. A dictum. So held in *Masten v. U. S. & C.*, 50 N. Y. —.

³⁵ 26 St. at L. 316; *U. S. v. Engeman*, 45 Fed. 546; *Chappell v. U.*

S., C. C. A., 81 Fed. 764; *Chappell v. U. S.*, 160 U. S. 499, 40 L. ed. 510.

³⁶ *Ibid.*

³⁷ *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. 362.

³⁸ *Upshur County v. Rich*, 135 U. S. 467, 475, 34 L. ed. 196, 199; and authorities cited *infra*, § 537.

CHAPTER XXXI.

PRACTICE IN CRIMINAL CASES.

§ 483. **Criminal practice in general.** In criminal actions, the District Courts of the United States follow the old practice at common law, except in so far as the same has been changed by Federal statute.¹ Criminal proceedings are originally begun by a complaint,² an information,³ a presentment⁴ or an indictment.⁵ In a few cases, they are begun by arrests without a warrant.⁶ The prosecutor in a criminal action in a Federal court, for a crime against the United States, is the District Attorney of the United States for the District where the case is tried. The defendant may be an individual, a corporation or a *quasi* corporation.⁷ Where a criminal proceeding has been instituted in the State court against an officer of the United States and has been subsequently removed to a District Court of the United States, it is the duty of the State prosecutor to continue the prosecution and of the United States District Attorney to defend the same.⁸ It is the duty of the

§ 483. ¹ U. S. v. Maxwell, 3 Dill. 275; U. S. v. Reid, 12 How. 361, 13 L. ed. 1023; U. S. v. Nye, 4 Fed. 888; Erwin v. U. S., 2 L.R.A. 229, 37 Fed. 470, 488.

² *Infra*, § 485.

³ *Infra*, § 494.

⁴ A presentment is an accusation made by the grand jurors upon their personal knowledge or observation of the facts, instead of upon the testimony of witnesses. McKinney v. U. S., C. C. A., 199 Fed. 25.

⁵ *Infra*, § 495. A preliminary complaint or arrest is not an essential prerequisite to an indictment. U. S. v. Baumert, 179 Fed. 735. A de-

fendant is not entitled to a preliminary hearing before an indictment when there is no previous arrest. U. S. v. Kerr, 159 Fed. 185.

⁶ *Infra*, § 484.

⁷ U. S. R. S., § 771. The certification required under the Pure Food & Drugs Law (Act of June 30, 1906, ch. 3915, § 4, 34 St. at L. 769, Comp. St. Supp. 1911, p. 1355) must be to the District Attorney in the district where the prosecution should be instituted. U. S. v. J. L. Hopkins & Co., 199 Fed. 649.

⁸ U. S. v. Am. Express Co., 199 Fed. 321.

⁹ Delaware v. Emerson, 8 Fed. 411.

District Attorney of the United States to appear in contempt proceedings, instituted to vindicate the authority of the national government.¹⁰ The Federal courts will not recognize a prosecution instituted before them as legal, unless the same is instituted and prosecuted by the District Attorney.¹¹ It has been held, however, that a Federal court cannot dismiss a proceeding pending before a United States Commissioner.¹² A District Attorney has no power to bind the United States by a contract, giving immunity to an accomplice for turning State's evidence.¹³ The committing magistrate, in the case of offenses against the United States, is usually a United States Commissioner, whose functions are analogous to those of a justice of the peace.^{13a} The same powers are, however, vested in any justice or judge of the United States, and in any chancery, judge, justice of the peace, mayor or other magistrate of the State where the accused is found.¹⁴ The Federal courts have no criminal jurisdiction at common law.¹⁵ They can punish no crimes not created by acts of Congress.¹⁶ By the Federal Penal Code, whoever, within the territorial limits of any State, organized Territory, or district, but within or upon any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building, shall do or omit the doing of any act or thing which is not made penal by any act of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the

¹⁰ *Riggs v. Supervisors*, Woolworth, 377.

¹¹ *U. S. v. McAvoy*, 4 Blatchf. 418; *U. S. v. Doughty*, 7 Blatchf. 424.

¹² *U. S. v. Schumann*, 2 Abb. U. S. 523.

¹³ *U. S. v. Ford*, 99 U. S. 594, 25 L. ed. 399; *U. S. v. Lee*, 4 McLean, 103.

^{13a} See *supra* § 471, *infra* § 488.

¹⁴ *U. S. R. S.*, § 1014; *Bagnall v. Ableman*, 4 Wis. 163; *Ex parte Gist*, 26 Ala. 156.

¹⁵ *U. S. v. Worrall*, 2 Dallas, 384, 1 L. ed. 426; *U. S. v. Hudson*, 7 Cranch. 32, 3 L. ed. 259; *U. S. v. Coolidge*, 1 Wheaton, 415, 4 L. ed. 124; *Manchester v. Mass.*, 139 U. S. 240-262, 35 L. ed. 159-166; *DuPonueau on Jurisdiction*, For the jurisdiction to punish common law crimes in the District of Columbia, see *Tyner v. U. S.*, 23 App. D. C. 325.

¹⁶ *Ibid.*

laws thereof "now in force would be penal," shall be deemed guilty of a like offense and be subject to a like punishment; "and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District."¹⁷ This is limited to the criminal laws in force at the time of its enactment,¹⁸ or at least at the time when it took effect. It does not authorize an indictment for a circulation of a libel, published elsewhere within the State, where the State law forbids more than a single prosecution and conviction for different publications of the same libel.¹⁹ It does not incorporate into the Federal law the general statute of limitations of the State relating to crimes, but a prosecution thereunder is governed as to limitation by the Federal statute upon the subject.²⁰ By the sixty-second Article of War, "All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offense, and punished at the "discretion of such court."²¹ The civil courts of the United States have concurrent jurisdiction with the courts-martial of the crimes specified in this article, when they are punishable by the statutes of the United States.²² Unless the Federal statutes expressly so direct, State statutes and decisions are not binding upon the courts of the United States

¹⁷ Act of March 4, 1909, 35 St. at L. 1088, §§ 289, 272, Pierce Fed. Code Supp., §§ 951, 934. This Act took effect January 1, 1910. Ibid., § 345, Pierce Fed. Code Supp., § 1007. It re-enacted the Act of March 3, 1825, ch. 65, 4 St. at L. 115; Act of April 5, 1866, ch. 24, 14 St. at L. 13, U. S. R. S., § 5391; Act of July 7, 1898, ch. 576, 30 St. at L. 717. The original statute was drawn by Judge Story and Daniel Webster, Story's Life, I, pp. 293, 338.

¹⁸ U. S. v. Paul, 6 Peters 141, 143, 8 L. ed. 348, 349; Franklin v. U. S., 216 U. S. 559, 54 L. ed. 615, affirming 174 Fed. 163.

¹⁹ U. S. v. Press Pub. Co., 219 U. S. 1, 55 L. ed. 65.

²⁰ U. S. v. Andem, 158 Fed. 996. See § 180, *supra*.

²¹ U. S. R. S., § 1342.

²² Franklin v. U. S., 216 U. S. 559, 54 L. ed. 615.

in criminal cases, although the decisions of the State courts upon similar subjects are treated with great respect.²³

§ 484. Arrests without warrants. The act of March 1, 1879 provides: "Where any marshal or deputy-marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy-marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest, or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of said Revised Statutes."¹ Under the former election law, it was held that a supervisor of elections might arrest without a warrant in certain cases.² Neither a police officer of a State, nor a private citizen, has authority without any warrant or military order to arrest and detain a deserter from the army of the United States.³

§ 485. The complaint. No warrant of arrest can be issued before an indictment or an information has been filed, except upon a complaint showing probable cause, which is supported by oath or affirmation.¹ It has been held that a certified copy of an information without a copy of any oath or affirmation to the facts showing probable cause for belief in the defendant's guilt, does not authorize the issue of a warrant.² The complaint need not, however, be sworn to before the magistrate who issues the warrant. If verified before another magistrate, that will be sufficient.³ But, it has been said, that, before issuing the warrant, he should satisfy himself as to its truth beyond a reasonable doubt.⁴ A complaint making a charge upon belief,⁵ or upon information and belief, is ordinarily insufficient, unless it states facts within deponent's knowledge, upon which his be-

²³ Jones v. U. S., C. C. A., 162 Fed. 417.

§ 484. 120 St. at L. 341, § 9.

² *Ex parte* Geissler, 9 Biss. 492.

³ Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458.

§ 485. 1 U. S. v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16,273.

² U. S. v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16,273.

³ Burr's Trial, Vol. I, 97.

⁴ Burr's Trial, Vol. I, 97.

⁵ U. S. v. Tureaud, 20 Fed. 621.

lief is based;⁶ but a count upon information and belief will not vitiate others in the same complaint made upon personal knowledge.⁷ The statutes seem to authorize an arrest under the internal revenue acts, upon a sworn complaint by the States District Attorney, collector or deputy-collector of internal revenue, or revenue agent, setting forth the facts upon information and belief.⁸ Any person with personal knowledge of the fact that an offense has been committed against the United States may present a complaint, under oath, to the commissioner or other committing magistrate, who will authorize the issue of a warrant for the arrest of the accused.⁹ The sanction of the District Attorney of the United States is not a prerequisite to the issue of the warrant.¹⁰ It has been held to be the proper practice for the commissioner, where practicable, before the issue of his warrant, to submit his complaint to the District Attorney for the latter's determination as to whether the ends of public justice require the prosecution;¹¹ and that a magistrate is not bound to investigate charges, which have been made known to the District Attorney, and which the latter has declined to prosecute.¹² A complaint of a criminal offense cannot be amended¹³ except in summary proceedings under the navigation laws.¹⁴

§ 486. The warrant. The Revised Statutes provide that, in case of any crime against the United States, the offender may, "agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the

⁶ U. S. v. Sapinkow, 90 Fed. 654; Matter of a Rule of Court, 3 Woods, 502; Fed. Cas. No. 12, 126.

⁷ Rice v. Ames, 180 U. S. 371, 45 L. ed. 577.

⁸ Appropriation Act of August 18, 1894, c. 301; 28 St. at L. 372, par. 18; 2 Suppl. U. S. R. S., § 258. See also Appropriation Act of March 3, 1893, c. 208, par. 19; 27 St. at L. 572; 2 Suppl. U. S. R. S., § 123.

⁹ U. S. v. Skinner, 2 Wheeler, Crim. Cas. (N. Y.) 232, Fed. Cas. No. 16,309; U. S. v. Mackenzie, 1 N. Y. Legal Observer, 227, Fed. Cas.

No. 15,690; U. S. v. Burr, 2 Wheeler, Crim. Cas. (N. Y.) 573, Fed. Cas. No. 14,692.

¹⁰ U. S. v. Skinner, 2 Wheeler's Crim. Cas. (N. Y.) 232, Fed. Cas. No. 16,309.

¹¹ U. S. v. Skinner, 2 Wheeler, Crim. Cas. (N. Y.) 232, Fed. Cas. No. 16,309.

¹² U. S. v. Mackenzie, 1 N. Y. Legal Observer, 227, Fed. Cas. No. 15,690.

¹³ U. S. v. Tureaud, 20 Fed. 621.

¹⁴ *Infra*, § 528.

offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."¹ A court may issue a bench warrant upon probable cause, supported by oath.² A warrant of arrest, which issues from the Supreme Court must be witnessed in the name of the Chief Justice; or, when that office is vacant, of the Associate Justice next in precedence.³ A warrant issued from a District Court must be witnessed in the name of the judge of that court; or, when that office is vacant, of the clerk thereof.⁴ It must specifically name or describe the person to be seized.⁵ Where the marshal, under a warrant directing him "to arrest the body of James West," arrested Vandy M. West, whom he knew to be the person intended, but who had never been known nor called by the name of James West; it was held that he was liable to an action for false imprisonment.⁶ The warrant must be returnable at some specified time or before some specified person.⁷ A general order of the court, prepared by the Attorney General of the United States, has been adopted by most of the District Courts, and provides, amongst other things, as follows: "That whenever a warrant shall be issued by a Commissioner for the arrest of any person it shall be made returnable before him, provided he be the commissioner nearest or most convenient to the residence of the accused. If he is not, then he shall retain a copy of the affidavit on which the warrant is issued and make the warrant, accompanied by the original affidavit, returnable before a commissioner having an office and acting nearest to the

§ 486. ¹ U. S. R. S., § 1014.

² U. S. v. Bollman, 1 Cranch C. C. 373, Fed. Cas. No. 14,622.

³ U. S. R. S., § 911; *supra*, § 455.

⁴ U. S. R. S., § 911; *supra*, § 455.

⁵ West v. Cabell, 153 U. S. 78, 38 L. ed. 643.

⁶ West v. Cabell, 153 U. S. 78, 38 L. ed. 643. But see Williams v. Tidball, 2 Arizona, 50, 8 Pac. 351.

⁷ U. S. v. Almeida (U. S. C. C. N. Y.), 2 Wheeler's Crim. Cas. 576, Fed. Cas. No. 14,433.

residence of the accused; and such commissioner shall make the examination of the party, and discharge, commit to prison, or admit to bail, as the case may be.”⁸ A warrant is probably void unless it is under seal.⁹ Certainly so if the State practice requires the seal.¹⁰ It has been held that a warrant cannot be signed with a lead pencil.¹¹ “When two or more charges are made or more indictments are found against any person only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses; or to refer to them only in very general terms.”¹² “Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer as his authority to hold the prisoner, and the original writ, warrant or mittimus shall be returned to the proper court or officer, with the officer’s return thereon.”¹³

§ 487. Search warrants. The Fourth Amendment ordains: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” This only applies to warrants in criminal proceedings,¹ including proceedings to forfeit property for fraud against the United States.² It has been said to forbid the compulsory production of a person’s books and papers to be used against himself and his property in a penal or criminal proceeding or a proceeding for a forfeiture,³ and a *subpoena duces tecum* against a corporation charged with a crime directing the production before a Grand Jury of all its papers or substantially all its correspondence since its organization,⁴ unless the organization and each act of the corpora-

⁸ Roe’s Criminal Procedure, p. 25.

⁹ U. S. R. S., § 911, *supra*, § 455.

¹⁰ U. S. v. Clough, C. C. A., 55 Fed. 373.

¹¹ U. S. v. Thompson, 2 Cranch C. C. 409, Fed. Cas. No. 16,484.

¹² U. S. R. S., § 1027.

¹³ U. S. R. S., § 1028.

§ 487. ¹ Murray v. Hoboken

Land & Improvement Co., 18 How. 272, 287, 15 L. ed. 372, holding that it does not apply to a distress warrant.

² Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746.

³ Ibid.

⁴ Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. ed. 562.

tion is a violation of the law.⁵ By the Revised Statutes: "It shall be lawful for any officer of the customs, including inspectors, or of a revenue-cutter, or authorized agent of the Treasury Department, or other persons specially appointed for the purpose in writing by a collector, naval officer, or surveyor, to go on board of any vessel, as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope on board, and to this end to bail and stop such vessel if under way, and to use all necessary force to compel compliance; and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel, or the merchandise, or any part thereof, on board of or imported by such vessel, is liable to forfeiture, to make seizure of the same, or either or any part thereof, and to arrest, or in case of escape, or any attempt to escape, to pursue and arrest any person engaged in such breach or violation."⁶ The several judges of the Circuit and district courts of the United States, and commissioners of the circuit courts, may, within their respective jurisdictions, issue a search-warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises."⁷ "If any collector, naval officer, surveyor, or other person specially appointed by either of them, or inspector, shall have cause to suspect a concealment of any merchandise in any particular dwelling-house, store-building, or other place, they, or either of them, upon proper application on oath to any justice of the peace, or district judge of cities, police judge, justice or any judge of the District Court of the United States or any United States Commissioner, shall be entitled to a warrant to enter such house, store, or other place, in the day-time only, and there to search "for such merchandise; and if any shall be found, to seize and secure the same for trial; and all such mer-

⁵ See *supra*, §§ 426, 428, 430.

⁷ U. S. R. S., § 3462.

⁶ U. S. R. S., § 3059.

chandise, on which the duties shall not have been paid, or secured to be paid, shall be forfeited.”⁸

It has been held that an affidavit is insufficient which alleges merely that the officer believes, and has good reason to believe, that the accused is unlawfully engaged in manufacturing oleo-margarine on the premises therein described;⁹ that a search warrant may be issued from the clerk's office upon a bench warrant, after direction by the judge on a verified petition;¹⁰ that a United States Commissioner does not act judicially in issuing a warrant authorizing a customs inspector to search certain premises for merchandise fraudulently imported and to seize the same if found;¹¹ that a warrant for the arrest of a person on the charge of using the mails in aid of a scheme of fraud, does not authorize the destruction of property, the cutting of telegraph wires, the seizure of instruments, books and records, the breaking open of a safe, or, when there is no resistance, the pointing of a revolver at the occupants of the office.¹² Papers thus seized, however, if otherwise competent and in the possession of the District Attorney at the time of the trial, may be offered in evidence;¹³ but it has been held, that the criminal court has the power, upon petition, to direct a return of papers improperly seized.¹⁴

§ 488. Preliminary examination. A person arrested under process of a Federal court has the right to a preliminary investigation of the charge against him and to proof of probable cause, before he is committed to await an indictment or for trial.¹ The hearing is usually held in the presence of the magistrate before whom the warrant is returnable, who is ordinarily

⁸ U. S. R. S., § 3066, as amended, 22 St. at L. 49, 2 Fed. St. Ann. 743.

⁹ *Ripper v. U. S.*, C. C. A., 178 Fed. 24.

¹⁰ *U. S. v. McHie*, 194 Fed. 894.

¹¹ *Re Chin K. Shue*, 199 Fed. 282.

¹² *U. S. v. McHie*, 194 Fed. 894; *Re Chin K. Shue*, 199 Fed. 282. See *Dillon v. O'Brien*, (Irish Exch. Div.) 16 Cox. Crim. Cas. 245.

¹³ *Ripper v. U. S.*, C. C. A., 178 Fed. 24. *Contra*, *U. S. v. Wong Quong Wong*, 94 Fed. 832, See § 426, *supra*.

¹⁴ *Wise v. Mills*, C. C. A., 189 Fed. 583; affirming 185 Fed. 318; *aff'd*. 220 U. S. 549, 557; *U. S. v. McHie*, 194 Fed. 894.

§ 488. ¹ *U. S. v. Shepard*, 1 Abb. U. S. 431, Fed. Cas. No. 16,273. A defendant has no right to a preliminary hearing when he is indicted for an information presented against him before his arrest. *U. S. v. Kerr*, 159 Fed. 185.

a United States Commissioner. It is the duty of a United States Commissioner, who issues a warrant, to make the same returnable before him, provided that he is the commissioner nearest or most convenient to the residence of the accused. Otherwise, he should make the same returnable before the commissioner having an office, and acting, nearest to the residence of the accused.² When a United States Judge conducts the proceedings, he acts as a committing magistrate only, and perjury then committed is not perjury committed in a court of the United States.³ The statutory provision authorizing a State judge or magistrate to conduct the proceedings is constitutional.⁴ The proceedings must take place agreeably to the usual mode of process against defendants, in the State where the accused is arrested.⁵ "It was the intention of Congress by these words 'Agreeably to the usual mode of process against offenders in such State,' to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the State where the proceedings should take place."⁶ The United States Commissioner, upon such a hearing, acts as a committing magistrate.⁷ He has the same power as a State magistrate and no greater power.⁸ The commissioner must proceed according to the State law concerning committing magistrates in similar cases.⁹ In States where a magistrate has such power, the commissioner may order the accused to give a recognizance to appear before him upon a specified day;¹⁰ but, it has been held, that in New York he cannot do this.¹¹ Where the

² General Order of Court Governing the Conduct of United States Commissioners, Equity, *supra*, § 486.

³ U. S. v. Clark, 1 Gallison, 497 Fed. Cas. No. 14,804.

⁴ *Ex parte Gist*, 26 Ala. 156; *Bag-nall v. Ableman*, 4 Wis. 163.

⁵ U. S. R. S., § 1014.

⁶ U. S. v. Rundlett, 2 Curtis C. S. 41, Fed. Cas. No. 16,208, per Mr. Justice Curtis.

⁷ U. S. v. Walker, 6 Pitts. L. J. 37; U. S. v. Martin, 17 Fed. 150 (9 Sawyer, 90).

⁸ U. S. v. Horton, 2 Dillon, 94, Fed. Cas. No. 16,393; *Re Kaine*, 10 N. Y. Leg. Obs. 257, Fed. Cas. No. 7,598.

⁹ U. S. v. Martin, 17 Fed. 150 (9 Sawyer, 90).

¹⁰ U. S. v. Rundlett, 2 Curtis C. 41, Fed. Cas. No. 16,208; U. S. v. Walker, 6 Pitts. L. J. 37; U. S. v. Evans, 2 Fed. 147.

¹¹ U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742.

State statute so authorizes, he may adjourn the hearing to a different time and place.¹² It has been held that he has no power to commit the prisoner, pending the examination, for more than twenty-four hours, except for cause shown or at the prisoner's request.¹³ The General Order, to which reference has previously been made, also provides: "That each commissioner shall keep a well bound book as a docket, in which he shall enter, on the day the transactions occur, the issuing of each warrant, upon whose complaint and request the same was issued, the nature of the offense, and the officer to whom the warrant was delivered for service, together with the proceedings had under said warrant; there shall be entered the names of the witnesses present and examined, and their fees, the name of the guard, if any, and his fees, together with the marshal's fees; and all of said fees, together with mileage and expenses allowed by law, and a statement of the commissioner's own fees, shall be properly entered upon the warrant when returned to the commissioner. After the close of such examination the commissioner shall forward to the Clerk of the U. S. District Court for the proper district all the papers in the case, with a proper transcript of the proceedings, in which he shall schedule the papers forwarded."¹⁴ He has no power to punish for contempt.¹⁵ He has the power to take evidence in accordance with the practice of the State where he sits.¹⁶ In the districts of New York, he may issue a subpoena at the request of the Government, which may be served anywhere in the State.¹⁷ It has been held there that a subpoena issued by him, upon the application of a defendant, cannot be served outside the county

¹² U. S. v. Rundlett, 2 Curtis C. C. 41, Fed. Cas. No. 16,208.

¹³ U. S. v. Worms, 4 Blatchf. 332, Fed. Cas. No. 16,765.

¹⁴ Roe's Criminal Procedure, p. 25. In Alabama, it is his duty to reduce to writing the testimony of the witnesses. Strong v. U. S., 34 Fed. 17. It has been held that, in Indiana, he is not bound to accept an offer of the accused to waive examination; but that he may suspend the examination or not as he

deems best for the public interest. Van Buren v. U. S., 36 Fed. 77. In Maine, it is his duty to keep a record that will show what warrants were issued and who were arrested, imprisoned, bailed or discharged. Frost v. Holland, 75 Maine, 108.

¹⁵ *Ex parte* Perkins, 29 Fed. 900, 910; U. S. v. Beavers, 125 Fed. 778.

¹⁶ U. S. v. Smith, 17 Fed. 510.

¹⁷ U. S. v. Beavers, 125 Fed. 778, 782.

where the hearing takes place, unless the court makes an order for the attendance of such witness or endorses such an order on the subpoena, which can only be done upon an affidavit by the defendant or his counsel stating that he believes that the evidence of the witness is material, and that the attendance of the witness at the examination is necessary.¹⁸

The accused may be represented by counsel upon the preliminary examination and can call witnesses to contradict or to explain the testimony of the witnesses for the prosecution;¹⁹ but, it has been held, that he cannot offer evidence to impeach the character of a witness.²⁰ It has been said that when documentary proof is given it is not an essential prerequisite to the commitment, that witnesses also be examined before the magistrate in the presence of the accused.²¹ A certified copy of the indictment is sufficient evidence to authorize the magistrate to permit the accused to be committed for trial in the district where the indictment is pending.²² So is a confession of the accused.²³ The warrant of commitment must state that there is probable cause.²⁴ The District Attorney, without the consent of the commissioner and prosecutor, has no power to dismiss a criminal charge, while the examination of the accused is proceeding before a commissioner.²⁵ The discharge of the accused by the commissioner is not a bar to subsequent proceedings.²⁶ A commitment, made before the assemblage of the grand jury,

¹⁸ U. S. v. Beavers, 125 Fed. 778, 782.

¹⁹ U. S. v. Bollman, 1 Cranch C. C. 373, Fed. Cas. No. 14,622; U. S. v. White, 2 Wash. C. C. 29, Fed. Cas. No. 16,685.

²⁰ U. S. v. Walker, 6 Pitts. L. J. 37.

²¹ *Re* Alexander, 1 Lowell, 530, Fed. Cas. No. 162.

²² *Re* Alexander, 1 Lowell, 530, Fed. Cas. No. 162; U. S. v. Jacobi, 4 Am. L. T. U. S. 148, Fed. Cas. No. 15,460; U. S. v. Haskins, 3 Sawyer, 262, Fed. Cas. No. 15,322; U. S. v. Pope, 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069. *Contra*, Bagnall v. Ableman, 4 Wis. 163.

²³ U. S. v. Bloomgart, 2 Benedict, 356, Fed. Cas. No. 14,612.

²⁴ *Ex parte* Burford, 1 Cranch C. C. 276, Fed. Cas. No. 2,148; *Ex parte* Sprout, 1 Cranch C. C. 424, Fed. Cas. No. 13,267; U. S. v. Lumsden, 1 Bond, 5, Fed. Cas. No. 15,641; U. S. v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16,273; *Re* Van Campen, 2 Benedict, 419, Fed. Cas. No. 16,835.

²⁵ U. S. v. Schumann, 2 Abb. U. S. 523, Fed. Cas. No. 16,235.

²⁶ *Re* Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151; U. S. v. Burr, 1 Burr's Trial, 1179.

remains in force while the grand jury is in session;²⁷ and a commitment may be made during a session of the grand jury.²⁸ After an indictment is quashed, the accused may be committed to await a new indictment.²⁹

"When two or more charges are made, or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms."³⁰

"Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff, or jailer, as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon."³¹

§ 489. Warrants of removal. "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, Judge of a Supreme or Superior Court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."¹ The proceedings upon such a removal may be

²⁷ U. S. v. Burr, 1 Burr's Trial, 1179.

²⁸ U. S. v. Burr, 1 Burr's Trial, 1179.

²⁹ U. S. v. Town-Maker, Hemp.

299; U. S. v. Smith, 2 Cranch C. C. 111, Fed. Cas. No. 16,326.

³⁰ U. S. R. S., § 1027.

³¹ U. S. R. S., § 1028.

§ 489. ¹ U. S. R. S., § 1014.

reviewed by *habeas corpus* and *certiorari*.² The decisions upon proceedings for extradition to foreign countries do not necessarily apply to those for a removal from one to another Federal district of the United States.³ "Obviously very different considerations are applicable to the two cases. In an extradition the nation surrendering relies for future protection of the alleged offender upon the good faith of the nation to which the surrender is made, while here the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial."⁴ The application for removal cannot be granted until after the accused has been arrested and committed to jail for want of bail.⁵ He is entitled to a reasonable opportunity in which to obtain the bail.⁶ A prisoner may be committed by one magistrate upon an affidavit made before another.⁷ It was held that the arrest is justified, although the party arrested is described in the warrant by a fictitious name, if he is in fact the person against whom the complaint is made.⁸ A preliminary examination is necessary before the issue of the warrant of removal, unless the same is waived by the accused.⁹ The accused is entitled to a hearing before the commissioner and the judge who signs the order.¹⁰ It has been held that, in such a proceeding, neither the judge nor the commissioner can compel the attendance of a witness by a subpoena served outside the district, although within one hundred miles of the hearing.¹¹

An indictment is *prima facie* evidence of probable cause for the removal.¹² The accused may, however, offer evidence in op-

² *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689; *supra*, §§ 460, 467.

³ *Beavers v. Henkel*, 194 U. S. 73, 83, 48 L. ed. 882, 886.

⁴ *Beavers v. Henkel*, 194 U. S. 73, 83, 48 L. ed. 882, 886, per Brewer, J.

⁵ *Bagnall v. Albeman*, 4 Wis. 163; *U. S. v. Shepard*, 1 *Abbott's U. S.* 431; *U. S. v. Jacobi*, 4 *Am. L. T.* U. S. 148, 14 *Int. Rev. Rec.* 45.

⁶ *Bagnell v. Ableman*, 4 Wis. 163.

⁷ *Ex parte Bollman*, 4 *Cranch*, 75, 2 *L. ed.* 554.

⁸ *Williams v. Tidball* 2 *Arizona* 50, 8 *Pac.* 351.

⁹ *Re Burkhardt*, 33 *Fed.* 25; *Re Bailey*, *Woolworth*, 422.

¹⁰ *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689; *U. S. v. Shepard*, 1 *Abbott's U. S.* 431; *U. S. v. Jacobi*, 4 *Am. L. T. U. S.* 148.

¹¹ *U. S. v. Stern*, 177 *Fed.* 479.

¹² *Green v. Henkel*, 183 U. S. 249, 46 L. ed. 177; *Beavers v. Henkel*, 194 U. S. 73, 48 L. ed. 882; *Benson v. Henkel*, 198 U. S. 1, 49 L. ed. 919; *Hyde v. Shine*, 199 U. S. 62, 51 L. ed. 689; *U. S. v. Green*, 100 *Fed.* 941.

position to the indictment, tending to show that he did not commit the offense charged within the district where the indictment alleges that it occurred.¹³ If he is denied this right, he will be discharged upon *habeas corpus*.¹⁴ An indictment is not a condition precedent to the removal.¹⁵

When the indictment is valid upon its face and purports to have been found by a grand jury acting, in fact, as such, at a regular term of a court of the United States, presided over by one of its judges, and hearing testimony in the ordinary way, the commissioner is not entitled to consider evidence tending to show that the grand jurors were improperly selected.¹⁶ Upon such an application, the accused cannot prove that there was no evidence before the grand jury, which justified an indictment.¹⁷ Formal defects in the indictment will be disregarded.¹⁸ It has been said that the indictment cannot be attacked as a pleading, but may be as a piece of evidence.¹⁹ If one count in the indictment is good, the removal will be made, although the rest are bad.²⁰ Defects and uncertainties in the indictment may be supplemented or cured by testimony tending to show probable cause.²¹ Probable cause may be proved before the commissioner by oral and documentary evidence.²² When the indictment or testimony fails to prove that an offense was, in fact, committed within the district, to which it is sought to remove the accused, the application will be denied. For example,

¹³ *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689; *U. S. v. Campbell*, 179 Fed. 762.

¹⁴ *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689.

¹⁵ *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177. It was the former practice of the District Court for the Northern District of Texas, not to entertain such an application until after indictment. *U. S. v. White*, 25 Fed. 716.

¹⁶ *Greene v. Henkel*, 183 U. S. 249, 262, 46 L. ed. 177, 189.

¹⁷ *Beavers v. Henkel*, 194 U. S. 73, 88, 48 L. ed. 882, 888.

¹⁸ *Re Clark*, 2 Benedict, 540; *U. S. v. Lyman*, 190 Fed. 414. "So far

as respects technical objections, the sufficiency of the indictment is to be determined by the court in which it was found and is not a matter of inquiry in removal proceedings." *Beavers v. Henkel*, 194 U. S. 73, 87, 48 L. ed. 882, 887, per Brewer, J.

¹⁹ *U. S. v. Reddin*, 193 Fed. 798.

²⁰ *Price v. Henkel*, 216 U. S. 488, 54 L. ed. 581.

²¹ *Greene v. Henkel*, 183 U. S. 249, 260, 46 L. ed. 177, 189; *Price v. McCarty*, C. C. A., 89 Fed. 84, 32 C. C. A. 162.

²² *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177; *Price v. McCarty*, C. C. A., 89 Fed. 84, 32 C. C. A. 162.

when it is fatally deficient in essential averments,²³ or alleges an act, which does not constitute an offense against the United States;²⁴ or acts which, although they constitute an offense against the United States, are not triable within the district to which the removal is sought;²⁵ or where the indictment is vague or uncertain as to the place of the commission of the offense;²⁶ or, it has been said, when the indictment sets forth an impossible offense.²⁷

It has been held that the accused may not be removed if he was in the custody of a State court before the Federal court obtained jurisdiction.²⁸ The same rule applies when he is, at that time, in the custody of a court of the United States, in the district from which it is sought to remove him;²⁹ unless such court relinquishes its jurisdiction, which it may do with the consent of the government; and if it does so, the accused will be removed.³⁰ Where the first court declines to relinquish its jurisdiction, it has been held that the practice is for the marshal to hold, but not to execute, the second warrant, until it is determined whether the accused shall be held under that first issued.³¹ The fact that the crime is triable in the district where the application is made, is no objection to the removal when the court of the other district has also jurisdiction of the same.³² A previous indictment in the district where the application is made is no ground for an objection by the accused to the removal,³³ although it might exonerate his sureties.³⁴

²³ *Re Clark*, 2 Ben. 540; *Re Buell*, 3 Dillon, 116. See *Bagnall v. Ableman*, 4 Wis. 163.

²⁴ *Re Doig*, 4 Fed. 193.

²⁵ *Re Doig*, 4 Fed. 193; *Re Dana*, 68 Fed. 886, 7 Benedict, 1.

²⁶ *Re Dana*, 68 Fed. 886, 7 Benedict, 1.

²⁷ *U. S. v. Pope*, 24 Int. Rev. Rec. 29.

²⁸ *Re James*, 18 Fed. 853; *U. S. v. Corre*, 23 L. Rep. 145; *U. S. v. Burr*, 2 Burr's Trial, 455.

²⁹ *Re Johnson*, 137 U. S. 120, 124, 42 L. ed. 103, 104.

³⁰ *Beavers v. Haulbert*, 198 U. S. 77, 49 L. ed. 950; *Re Beavers*, 125

Fed. 988; *Haas v. Henkel*, 216 U. S. 462, 54 L. ed. 569; *Peckham v. Henkel*, 216 U. S. 483, 54 L. ed. 579, affirming 166 Fed. 627; *Price v. Henkel*, 216 U. S. 488, 54 L. ed. 581.

³¹ *Re Beavers*, 125 Fed. 988.

³² *Haas v. Henkel*, 216 U. S. 462, 54 L. ed. 569; *Hyde v. U. S.*, 225 U. S. 347, 56 L. ed. 1114.

³³ *Peckham v. Henkel*, 216 U. S. 483, 54 L. ed. 579, affirming 166 Fed. 627; *Price v. Henkel*, 216 U. S. 488, 54 L. ed. 581.

³⁴ *Peckham v. Henkel*, 216 U. S. 483, 54 L. ed. 579, affirming 166 Fed. 627.

A removal to the District of Columbia was denied when it appeared that it was the intention there to try the accused before a police court without a jury.³⁵ It has been held that the strict rules of evidence need not be applied upon a hearing before a commissioner, on an application for a removal, where fraud is charged.³⁶ A previous decision by a United States Commissioner refusing to commit a prisoner for removal is not *res adjudicata*, although another commissioner will usually follow the same.³⁷ When the application for a removal is denied, the accused is entitled to an order discharging him under a previous commitment pending the proceedings for his removal.³⁸ A judge to whom application is made for the warrant of removal after the commitment, does not exercise a mere ministerial function. He must look into the indictment, warrant or complaint to ascertain whether an offense against the United States is charged, and whether there is probable cause.³⁹

The application to the judge for a warrant of removal may be heard with or without the aid of a writ of *habeas corpus*.⁴⁰ If the judge thinks the bail excessive, he may reduce the same without a writ of *habeas corpus*.⁴¹ The judge may take further evidence offered on behalf of the accused.⁴² The decision of

³⁵ *Re Cross*, 20 Fed. 824. The fact that the crime is not punishable by any Federal statute, but is merely criminal by the common law, is no objection to the removal to the District of Columbia, where the common law still prevails in criminal cases. *U. S. v. Wimsatt*, 161 Fed. 586.

³⁶ *U. S. v. Greene*, 108 Fed. 816. If there is competent legal evidence, upon which the commissioner might base his decision, it will not be reviewed by *habeas corpus*, because of improper rulings as to the admission of other evidence. *Bryant v. U. S.*, 167 U. S. 104, 42 L. ed. 94; *Greene v. Henkel*, 183 U. S. 249, 261, 46 L. ed. 177, 189.

³⁷ *U. S. v. Haas*, 167 Fed. 211; sustained upon *habeas corpus*, *Haas*

v. Henkel, 216 U. S. 462, 54 L. ed. 569.

³⁸ *U. S. v. Black*, C. C. A., 160 Fed. 431.

³⁹ *Tinsley v. Treat*, 205 U. S. 20, 29, 51 L. ed. 689, 694. It has been said to be sufficient if the indictment is framed in the language of the statute, with ordinary averments of time and place, and sets out the substance of the offense in language sufficient to apprise the accused of the nature of the charge against him. *U. S. v. Wimsatt*, 161 Fed. 586.

⁴⁰ *U. S. v. Brawner*, 7 Fed. 86; *Re James*, 18 Fed. 853; *U. S. v. Rogers*, 23 Fed. 658.

⁴¹ *Re Martin*, 5 Blatchf. 303; *U. S. v. Brawner*, 7 Fed. 86.

⁴² *Price v. McCarty*, C. C. A., 89 Fed. 84, 32 C. C. A. 162.

the court to which the application for removal is made that probable cause is shown, is not reviewable by *habeas corpus*, unless the indictment is clearly defective.⁴³

The warrant of removal is not vitiated because it directs the prisoner to be delivered for trial for the larceny of a part only of the property, which the commissioner committed him for stealing;⁴⁴ nor because it directs a marshal to remove the prisoner "to be tried in said district upon such counts in the indictment" as he "can be legally tried upon."⁴⁵

It has been held that, in criminal proceedings to punish a person for contempt, the accused may be removed under this statute;⁴⁶ and that, in such a case, a certified copy of the contempt proceedings and attachment are sufficient to authorize the issue of the warrant.⁴⁷ It seems that, if he is imprisoned in one district for a contempt of court of the United States there, he can be arrested in another district, from which he has escaped, and will be returned.⁴⁸ It has been held that no removal will be ordered in a case where the accused, who has not been arrested in another district, has failed to obey an order of a Federal court there, directing him to pay money to the clerk thereof for the benefit of parties to a civil suit.⁴⁹

It seems that the statute does not apply to proceedings before military courts.⁵⁰ A warrant for the arrest of a person on trial before a naval court of inquiry was refused.⁵¹ The statute applies to a removal to the District of Columbia,⁵² and from a district in a State to a district within a Territory.⁵³ "Only one writ or warrant is necessary to remove a prisoner from one dis-

⁴³ *Re Quinn*, 176 Fed. 1020. A statement in the opinion of a District Judge that, upon the evidence before him, the case is a proper one for submission to a jury, is equivalent to a finding of probable cause, although he does not use those two words in his order or opinion. *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177.

⁴⁴ *Price v. McCarty*, C. C. A., 89 Fed. 84, 32 C. C. A., 162.

⁴⁵ *U. S. v. Horner*, 44 Fed. 677; *aff'd Horner v. U. S.*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. 407.

⁴⁶ *U. S. v. Jacobi*, 4 Am. L. T. U. S. 148; *Re Manning*, 44 Fed. 275, in which the author was counsel.

⁴⁷ *Ibid.*

⁴⁸ *Fanshawe v. Tracy*, 4 Biss. 490.

⁴⁹ *Re Graves*, 29 Fed. 60.

⁵⁰ *Kurtz v. Moffitt*, 115 U. S. 487, 500, 29 L. ed. 458, 461.

⁵¹ *U. S. v. Mackenzie*, 1 N. Y. Leg. Obs. 227.

⁵² *Re Buell*, 3 Dillon, 116.

⁵³ *U. S. v. Haskins*, 3 Sawyer, 262.

trict to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed."⁵⁴ It is provided by the Act of February 9, 1903: "The provisions of section ten hundred and fourteen of the Revised Statutes, so far as applicable, shall apply throughout the United States for the arrest and removal therefrom to the Philippine Islands of any fugitive from justice charged with the commission of any crime or offense against the United States within the Philippine Islands, and shall apply within the Philippine Islands for the arrest and removal therefrom to the United States of any fugitive from justice charged with the commission of any crime or offense against the United States. Such fugitive may, by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process against offenders therein, be arrested and imprisoned, or bailed, as the case may be, pending the issuance of a warrant for his removal to the United States, which warrant it shall be the duty of a judge of the court of first instance seasonably to issue, and of the officer or agent of the United States designated for the purpose to execute. Such officer or agent, when engaged in executing such warrant without the Philippine Islands, shall have all the powers of a marshal of the United States so far as such powers are requisite for the prisoner's safe-keeping and the execution of the warrant."⁵⁵

§ 490. Extradition to foreign countries. "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the appre-

⁵⁴ U. S. R. S., § 1029.

L. 806, 10 Fed. St. Ann. 259,

⁵⁵ Act of Feb'y. 9, 1903, 32 St. at

Pierce Fed. Code, § 4026.

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hension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty for convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."¹ "Provided, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other

§ 490. 1 U. S. R. S., § 5270, 3 Fed. St. Ann. 68, Pierce Fed. Code, § 4009. The complaint may be made by anyone authorized by the Executive of the foreign government. *Re Ferrelle*, 28 Fed. 878. When made by a consul, his official character is sufficient evidence of such authority. *Ornelas v. Ruiz*, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787; *Re Grin*, 112 Fed. 790 (affirmed in 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130); *Re Adutt*, 55 Fed. 376. When made by a private individual, it must appear that he is acting under the authority of the foreign government. *Re Herres*, 33 Fed. 165; *Re Ferrelle*, 28 Fed. 878; *Commonwealth v. Deacon*, 10 S. & R. (Pa.) 125. The complaint may precede the requisition. *Benson v. McMahon*, 127 U. S. 457, 8 S. Ct.

1240, 32 L. ed. 234; *Re Adutt*, 55 Fed. 376. The complaint need not set forth the crime with the particularity of an indictment, provided that it sets forth the substance of the offense charged and clearly apprises the party of his accusation. *Grin v. Shine*, 187 U. S. 181, 23 St. Ct. 98, 47 L. ed. 130 (affirming 112 Fed. 790); *Re Macdonnell*, 11 Blatchf. 79, 16 Fed. Cas. No. 8,771; *Ex parte Van Hoven*, 4 Dill. 411, 28 Fed. Cas. No. 16,858. See, also, *Re Adutt*, 55 Fed. 376. Where the charge is forgery, the time, place and nature of the forgery should be specified. *Re Farez*, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107. See *Re Charleston*, 34 Fed. 531; *Re Nonrich*, 5 Blatchf. 414, 11 Fed. Cas. No. 6,369. See 19 Cyc. 66.

instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered, embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery; burglary, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering, or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: Provided further, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged And provided further, That no return or surrender shall be made of any person charged with the commission of

any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.”² “In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section.”³ “It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall so so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so

² Act of June 6, 1900, 31 St. at L. 626, Comp. St. 3591.

³ U. S. R. S., § 5271, 3 Fed. St. Ann. 76, Pierce Fed. Code, § 4010. The authentication in the language of the statute is sufficient. *Re Krejanker*, 44 Fed. 482; *Re Herres*, 33 Fed. 165; *Re Behrendt*, 22 Fed. 699.

23 Blatchf. 40; *Re Wadge*, 15 Fed. 864; *Re Farez*, 3 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107; 10 Op. Atty.-Gen. 501. It is sufficient if it recites that the papers “are properly and legally authenticated, so as to entitle them to be received in evi-

dence for similar purposes" in the foreign country. *Re Breen*, 73 Fed. 458. See, also, *Re Grin*, 112 Fed. 790. No further proof is required that the law of the foreign country permits copies of depositions taken before a magistrate to be received as proof of criminality. *Re Charleston*, 34 Fed. 531. Where the certificate of a minister to a foreign country stated that the documents were legally and properly authenticated, so as to entitle them to be received in evidence in support of the criminal charges therein mentioned and for similar purposes mentioned in the statute, and they were also authenticated by functionaries of the country to which he was committed as records of its tribunals; it was held that they should properly be received in evidence, although the minister's certificate did not state to what country he referred. *Re Stupp*, 12 Blatchf. 509, 23 Fed. Cas. No. 13,563. Where the certificate was signed by a person describing himself as "*charge d'affaires ad interim*," the court took judicial notice that he was, when he gave the certificate, the principal diplomatic officer of the United States in the country where it was executed. *Re Orpen*, 86 Fed. 760. It seems that it is not essential that each deposition should be separately certified, when the court can ascertain with reasonable certainty to what papers the certificate refers. *Re Farez*, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107. But see *Re Heinrich*, 5 Blatchf. 414, 11 Fed. Cas. No. 6,369. Papers which purported to be depositions and were so certified, were held to be admissible, although, according to their recitals, they were statements and not depositions.

Re Ezeta, 62 Fed. 972. A certificate that the depositions were authenticated so as "to enable them to be used in evidence, and as proof that the originals were duly received in evidence . . . in proof of the criminality" of the accused, was held to be insufficient. *Re McPhun*, 30 Fed. 57. It has been said that where the authentication of the officer of the United States does not comply with the statutory requirements, the defects therein may be supplemented by other proof. *Re Wadge*, 15 Fed. 864; s. c., 16 Fed. 332, 21 Blatchf. 300; *Re McPhun*, 30 Fed. 57, 63; *Re Benson*, 34 Fed. 649. It was held under a treaty with Switzerland, that original papers, such as forgeries, which were identified by witnesses who gave the depositions in the foreign country, need not be produced before the commissioner. *Re Farez*, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107. Circumstantial evidence is admissible. *Re Bryant*, 80 Fed. 282. "The evidence to detain a party, for the purpose of surrender, must be sufficient to commit the party for trial, if the offense was committed here. The admonition in Grotius is not to be forgotten—*non decet homines dedere causa non cognito*." Chancellor Kent in *Matter of Washburn*, 4 J. Ch. 106, 114. See, also, *Pettit v. Walshe*, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. ed. 938 (affirming 125 Fed. 572); *Wright v. Henkel*, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; *Re Frank*, 107 Fed. 272; *Re Ezeta*, 62 Fed. 972; *Re Muller*, 17 Fed. Cas. No. 9,913, 5 Phila. (Pa.) 289; *U. S. v. Warr*, 28 Fed. Cas. No. 16,644, 3 N. Y. Leg. Obs. 346; *Matter of Calder*, 2 Edmonds' Select Cases (N. Y.) 374, 376. The usual

escape, may be retaken on an escape.”⁴ “Whenever any person who is committed under this Title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered

method of proving the identity of the prisoner is by the oral testimony of a witness from the country which demands him; but his identity may be proved by his admission and otherwise. *Re* Charleston, 34 Fed. 531. In *Ex parte* Geissler, 196 Fed. 168 (where the writer was counsel). Commissioner Alexander held that identification by a photograph was sufficient. The commitment was set aside upon another ground. Circumstantial evidence of the commission of the offense may be sufficient. *Re* Bryant, 80 Fed. 282. The accused has the right to call witnesses in his defense, *Re* Kelley, 25 Fed. 268; and to testify in his own behalf, *Re* Farez, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107; but it has been said that he cannot offer, on his own behalf, depositions taken abroad, *Re* Wadge, 15 Fed. 864; s. c., 16 Fed. 332, 21 Blatchf. 300. See *Oteiza v. Jacobus*, 136 U. S. 330, 10 S. Ct. 330, 34 L. ed. 464. Where the treaty contains no definition of the offense, what constitutes the same is usually determined by the law of the State where the prisoner is found. *Wright v. Henkel*, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; *Re* Walshe, 125 Fed. 572; *aff'd*. 194 U. S. 217, 24 S. Ct. 657, 48 L. ed. 938. In *Re* Adutt, 55 Fed. 376, it was held that, under the treaty between the United States and Austria-Hungary, forgery should have, in extradition proceedings, its common law definition. See, also, *Cohn v. Jones*, 100 Fed. 639; *Re* Ezeta, 62 Fed. 972; *Re* Cross, 43 Fed. 517; *Re* Windsor, 6 B. & S. 522, 10 Cox C.

C. 118, 11 Jur. N. S. 807, 34 L. J. M. C. 163, 12 L. T. Rep. N. S. 307, 13 Wkly. Rep. 655, 118 E. C. L. 522; *Reg. v. Phipps*, 3 Can. L. T. 55. Where the treaty provides for extradition for acts “made criminal by the laws of both countries,” an act made criminal by the law of the foreign country and the law of the State in which a fugitive is found is extraditable, although it is not a crime against the United States. *Wright v. Henkel*, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; *affirming* 123 Fed. 463. Absolute identity of the statutes in both countries is not required, provided that the transaction is by the law of both such an offense as the treaty describes. *Ibid*. See *Re* Farez, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107. In *Ex parte* Geissler, 196 Fed. 168, it was held that the relator could not be extradited to Germany for the offense of forgery, upon proof that he filled into a blank check, endorsed by his partner, a larger sum than he was authorized to write in the same. In *Benson v. McMahon*, 127 U. S. 457, 8 S. Ct. 1240, 32 L. ed. 234, it was held that the relator could be extradited for printing and selling, without authority, tickets of admittance to performances by a dramatic company. It is no valid objection to the extradition that other charges are pending against the prisoner in a foreign country for an offense not included in the treaty. *Re* Roth, 15 Fed. 506.

⁴ U. S. R. S., § 5272, 3 Fed. St. Ann. 77, *Pierce* Fed. Code, § 4011.

up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.”⁵ “The provisions of this Title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer.”⁶ “Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.”⁷ “Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such

⁵ U. S. R. S., § 5273, 3 Fed. St. Ann. 77, Pierce Fed. Code, § 4012.

⁶ U. S. R. S., § 5274, 3 Fed. St. Ann. 77, Pierce Fed. Code, § 4013.

⁷ U. S. R. S., § 5275, 3 Fed. St. Ann. 78, Pierce Fed. Code, § 4014.

power is requisite for the prisoner's safe-keeping."⁸ "Every person who knowingly and wilfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment of not more than one year."⁹ "That all hearings in cases of extradition under treaty stipulation shall be held on land, publicly, and in a room or office easily accessible to the public."¹⁰ "That the following shall be the fees paid to commissioners in cases of extradition under treaty stipulation or convention between the Government of the United States and any foreign government, and no other fees or compensation shall be allowed to or received by them: For administering an oath, ten cents. For taking an acknowledgment, twenty-five cents. For taking and certifying depositions to file, twenty cents for each folio. For each copy of the same furnished to a party on request, ten cents for each folio. For issuing any warrant or writ, and for any other service, the same compensation as is allowed clerks for like services. For issuing any warrant under the tenth article of the treaty of August ninth, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offense as set forth in said article, two dollars. For issuing any warrant under the provision of the convention for the surrender of criminals, between the United States and the King of the French concluded at Washington November ninth, eighteen hundred and forty-three, two dollars. For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of any treaty or convention, five dollars a day for the time necessarily employed."¹¹ "That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are

⁸ U. S. R. S., § 5276, 3 Fed. St. L. 215, 3 Fed. St. Ann. 89, Comp. Ann. 78, Pierce Fed. Code, § 4015. St. 3593, Pierce Fed. Code, § 4020.

⁹ U. S. R. S., § 5277, 3 Fed. St. ¹¹ Ibid., § 2, Pierce Fed. Code, Ann. 78, Pierce Fed. Code, § 4016. § 4021.

¹⁰ Act of Aug. 3, 1882, 22 St. at

witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.”¹² “That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the Government of the United States by the foreign government by whom the proceedings for extradition may have been instituted.”¹³ “That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under § 4009 Title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act.”¹⁴ By the Act of February 6, 1905, it is provided that those statutes shall apply to the Philippine Islands. “Such fugitive from justice of a foreign country “may, upon warrant duly issued

¹² Ibid., § 3, Pierce Fed. Code,
§ 4022.

¹⁴ Ibid., § 5, Pierce Fed. Code,
§ 4024.

¹³ Ibid., § 4, Pierce Fed. Code,
§ 4023.

by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process against offenders therein, be arrested and brought before such judge or magistrate, who shall proceed in the matter in accordance with the provisions of the Revised Statutes hereby made applicable to the Philippine Islands: Provided, That for the purposes of this section the order or warrant for delivery of a person committed for extradition prescribed by section fifty-two hundred and seventy-two of the Revised Statutes shall be issued by the governor of the Philippine Islands under his hand and seal of office, and not by the Secretary of State.”¹⁵ “On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship’s roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserted shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into

¹⁵ Act of Feb. 6, 1905, 33 St. at St. Supp. 714, Pierce Fed. Code, § L. 698, 10 Fed. St. Ann. 260, Comp. 4028.

effect."¹⁶ If the commissioner commits the prisoner, his proceedings may be reviewed by the writ of *habeas corpus*.¹⁷

§ 491. Extradition from one state to another. The Constitution ordains: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon claim of the party to whom such service or Labour may be due."¹ The Revised Statutes provide: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charged the person demanded with having committed treason,

¹⁶ U. S. R. S., § 5280, 3 Fed. St. Ann. 86, 6 Fed. St. Ann. 916, Pierce Fed. Code, § 4019.

¹⁷ See § 462, *supra*.

§ 491. ¹ Art. IV, Section 2. A person may be extradited as a fugitive from justice although he has left the State on legitimate business (*Re White*, C. C. A., 55 Fed. 54, 5 C. C. A. 29; *Roberts v. Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544, affirming 24 Fed. 132; *Re Bruce*, 132 Fed. 390; *Re Bloch*, 87 Fed. 981; *Ex parte Brown*, 28 Fed. 653. But see *Re Tod*, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L.R.A. 566), or upon his return to his home in another State (*Roberts v. Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544, affirming 24 Fed. 132; *Ex parte Brown*, 28 Fed. 653; *Re Keller*, 36 Fed. 681; *Re White*, C. C. A., 55 Fed. 54, 5 C. C. A. 29; *Re Bloch*, 87 Fed. 981; *Re Bruce*, 132 Fed. 390. But see *Re Tod*, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47

L.R.A. 566); but not if, at the time the crime was committed, he was only constructively in a State which demands him and not personally within its borders (*Hyatt v. People*, 188 U. S. 691, 713, 23 S. Ct. 456, 47 L. ed. 657 affirming 172 N. Y. 176, 60 L.R.A. 774, 64 N. E. 825, 92 Am. St. Rep. 706; *Tennessee v. Jackson*, 36 Fed. 258, 1 L.R.A. 370. But see *Adams v. People*, 1 N. Y. 173). But where the crime consists of several acts, and the accused commits one of them within the State, but departs before the others, which he authorized or contemplated, he is a fugitive from justice within the meaning of the Constitution. *Re Sultan*, 115 N. C. 57, 20 S. E. 375, 44 Am. St. Rep. 433, 28 L.R.A. 294 (false pretenses); *Re Cook*, 49 Fed. 833; aff'd. 146 U. S. 983, 13 S. Ct. 40, 36 L. ed. 934 (taking deposits when a bank is insolvent); *Hayes v. Palmer*, 21 App. Cas. (D. C.) 450 (running a

felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."² "Any agent so appointed who receives the fugitive

gambling-house). See *State v. Clough*, 71 N. H. 594, 43 Atl. 1086, 67 L.R.A. 946; 19 Cyc. 87, 88.

² U. S. R. S., § 5278, 3 Fed. St. Ann. 78, *Pierce Fed. Code*, § 4017. A statement in the affidavit annexed to the requisition that the accused is a fugitive, is *prima facie* evidence of that fact (*Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250); but it may be rebutted by the accused (*Ibid.*; *Tennessee v. Jackson*, 36 Fed. 258, 1 L.R.A. 370). An indictment should set out the substance of the crime against the law of the demanding State. *Roberts v. Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544, affirming 24 Fed. 132; *Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250. An extradition proceeding, however will not be dismissed because of technical defects therein. *Ibid.* If an affidavit is presented in the place of an indictment it must set out the crime charged sufficiently to apprise the receiving governor of the facts that constitute the offense. *Webb v. York*, C. C. A., 79 Fed. 616, 25 C. C. A. 133; *People v. Brady*, 56 N. Y.

182; *Ex parte Slausen*, 73 Fed. 666. It need not, however, have the technical exactness of an indictment. *Ex parte Manchester*, 5 Cal. 237; *State v. Goss*, 66 Minn. 291, 68 N. W. 1089. It must have sufficient certainty to justify a magistrate in committing the accused (*Ex parte Morgan*, 20 Fed. 298) for a sufficient charge of embezzlement (See *Re Keller*, 36 Fed. 681), of false pretenses (*Re Strauss*, C. C. A., 126 Fed. 327, 63 C. C. A. 99). Where there is no indictment, the affidavit must be sworn to upon knowledge. *Ex parte Smith*, 3 McLean 121, 22 Fed. Cas. No. 12,968; *Ex parte Morgan*, 20 Fed. 298; *Ex parte Spears*, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341; *Ex parte Rowland*, 35 Tex. Cr. 108, 31 S. W. 651. Statements "on information" or "on belief," are insufficient to support a requisition. *Ibid.* So are statements that the deponent "verily believes and has good reason to believe." *Ex parte Baker*, 43 Tex. Cr. 281, 65 S. W. 91, 96 Am. St. Rep. 871. But it has been said that an affidavit charging a crime directly

into his custody, shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year.”³ The removal should be made where the act charged is a crime by the laws of the State from which the accused has fled, although it is not a crime in the State in which he has come.⁴ A person charged with a misdemeanor may be thus removed.⁵ The governor of a State cannot be compelled, by the writ of mandamus, to surrender a fugitive.⁶

and positively is not vitiated by the conclusion, “as said deponent verily believes.” *Re Keller*, 36 Fed. 681. It has been said that the original affidavit need not be forwarded with the requisition if a copy thereof, duly authenticated, is submitted. *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173; *Johnston v. Vanamringe*, 5 Blackf. (Ind.) 311. It has been held that an information unaccompanied by an affidavit is insufficient. *Ex parte Hart*, C. C. A., 63 Fed. 249, 11 C. C. A., 165, 28 L.R.A. 801; reversing 59 Fed. 894. The warrant of surrender should show compliance with the requirements of the statute, namely, that the person seized has been charged with crime and is demanded as a fugitive from justice, and that the requisition was accompanied by a copy of an indictment or of an affidavit, made before a magistrate and certified to be authenticated. *Roberts v. Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; *Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250; *Ex parte Dawson*, C. C. A., 83 Fed. 306, 28 C. C. A. 354; *Re Romaine*, 23 Cal. 585; *Re Sylvester*, 21 Wash. 263, 57 Pac. 829; *Re Baker*, 21 Wash. 259, 57 Pac. 827; *Re Foye*, 21 Wash. 250, 57 Pac. 825. It must specify

the offense charged (*Ex parte Cubreth*, 49 Cal. 435) in substance (*State v. Clough*, 71 N. H. 594, 53 Atl. 1086, 67 L.R.A. 946. See *People v. Stockwell*, 135 Mich. 341, 97 N. W. 765); but it seems that it need not show that the act charged is a crime by the laws or statutes of the demanding State (*Re Leary*, 10 Benedict, 197, 15 Fed. Cas. No. 8162). 19 Cyc. 93. The copy of an indictment or affidavit that accompanied the requisition need not be annexed to the warrant, nor set forth therein. *Ex parte Dawson*, C. C. A., 83 Fed. 306, 28 C. C. A. 354; *Re Leary*, 10 Benedict, 197, 15 Fed. Cas. No. 8,162; 19 Cyc. 93. *Contra*, *Re Doo Woon*, 18 Fed. 898, 9 Sawyer, 417.

³ U. S. R. S., § 5279, 3 Fed. St. Ann. 88, Pierce Fed. Code, § 4018.

⁴ Commonwealth of Kentucky v. Dennison, 24 How. 66, 103, 16 L. ed. 717, 727. Cf. *Holmes v. Jennison*, 14 Peters, 540, 10 L. ed. 579.

⁵ *Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250.

⁶ Commonwealth of Kentucky v. Dennison, 24 How. 66, 103, 16 L. ed. 717, 727. In *Shevlin's Case*, (A. D. 1840) Governor Seward, of New York, refused an extradition upon the charge of a resistance to arrest

§ 492. **Summons in criminal cases.** Unless some statute otherwise provides, the proper original process against a corporation,¹ and, it seems, against a *quasi* corporation,² in a criminal prosecution is a writ of summons. It has been held that, where it is charged that a foreign corporation committed a crime within the district, service of the summons may be made upon its manager or highest officer within the district.³ Jurisdiction thus acquired was sustained in a criminal prosecution for a violation of the Interstate Commerce law by accepting unlawful preferential rates,⁴ and for a violation of the Anti-Trust law by a conspiracy in restraint of trade.⁵

§ 493. **Bail.** The Revised Statutes provide: "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a supreme or Superior Court, chief or first judge of Common Pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the

in a civil action by a Pennsylvania writ, while touching in that State upon a voyage from Detroit to Buffalo. In 1842, the same Governor refused to surrender to Virginia three men who were charged with assisting a slave to escape. In *Curry's Case*, in the following year, the Governor of Virginia, in return, refused to surrender a man demanded by Governor Seward, although the latter Governor had complied with the previous Virginia requisition. He was overruled, however, by the House of Delegates. The surrender was made and the Governor resigned. In *Large's Case*, (A. D. 1860) Governor Dennison, of Ohio, refused to honor a requisition from

Kentucky charging the enticement of a slave to escape. *Moore on Extradition*, §§ 522, 523.

§ 492. ¹ U. S. v. *John Kelso Co.*, 86 Fed. 304; U. S. v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66; U. S. v. *Standard Oil Co. of Indiana*, 154 Fed. 728.

² See U. S. v. *Am. Express Co.*, 199 Fed. 321.

³ U. S. v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66; U. S. v. *Standard Oil Co. of Indiana*, 154 Fed. 728.

⁴ U. S. v. *Standard Oil Co. of Indiana*, 154 Fed. 728.

⁵ U. S. v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66.

clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."¹ "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."² "Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a Circuit Court, or by a justice of the Supreme Court, a circuit judge, or a judge of a District Court, who shall exercise their discretion therein, having regard to the nature and circumstances of the offense, and of the evidence, and to the usages of law."³ "When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error."⁴ "Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and *exoneratur* of such

§ 493. 1 U. S. R. S., § 1014.

3 U. S. R. S., § 1016.

2 U. S. R. S., § 1015.

4 U. S. R. S., § 1017.

bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.”⁵ “When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.”⁶ “When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced.”⁷

“When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterwards arrested in any other district and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending, shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or to his attorney a duplicate thereof. Upon the return of said certificate, the court which made the order, or any judge thereof, may direct that an *exoneratur* be entered upon the bail-piece, where special bail shall have been found, or otherwise discharge such bail.”⁸ “When a defendant is

⁵ U. S. R. S., § 1018.

⁷ U. S. R. S., § 1020.

⁶ U. S. R. S., § 1019.

⁸ U. S. R. S., § 943.

committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be held in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is.”⁹ “Bail and affidavits, when required or allowed in any civil cause in any Circuit or District Court, may be taken by a commissioner of the Circuit Court for the district; and such acknowledgments of bail and affidavits shall have the same effect as if taken before any judge of such courts.”¹⁰ “When a bail-bond is given for the appearance of any person to answer in the District or Circuit Court for the District of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies.”¹¹ “Recognizances of special bail may be taken *de bene esse* by the clerks of the Circuit and District Courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable.”¹² The act of March 3, 1879, giving the Circuit Courts jurisdiction over writs of error to certain judgments of conviction of crime, provides: “Within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from the judgment of the district court in the cases named in the preceding section, which petition shall be presented to the circuit judge or circuit justice in term or vacation, who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay for proceedings under the sentence; but the allowance of such writ shall not so operate without

⁹ U. S. R. S., § 944.

¹¹ U. S. R. S., § 946.

¹⁰ U. S. R. S., § 945.

¹² U. S. R. S., § 947.

such order. The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same shall be prosecuted to effect, and that the respondent shall abide the judgment of the Circuit Court thereon. And if the writ shall be allowed to operate as a stay in proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent of the term of the Circuit Court to which such writ of error shall be returnable, and that he will not depart without leave of court.”¹³ This applies to a certain extent to the review by the Circuit Court of Appeals of convictions of crime.¹⁴ The Supreme Court Rules provide: “1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoners shall not be disturbed. 2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided. 3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.”¹⁵ “Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6,¹⁶ the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.”¹⁷

The Eighth Amendment to the Federal Constitution ordains: “Excessive bail shall not be required.”¹⁸

¹³ 20 St. at L. 354, c. 176, § 2.

¹⁴ *Hudson v. Parker*, 156 U. S. 277, 39 L. ed. 424.

¹⁵ Supreme Court Rule 34; *supra*, § 467.

¹⁶ In reference to writs of error direct from a District Court to the Supreme Court.

¹⁷ Supreme Court Rule 36, subdivision 2.

¹⁸ *U. S. v. Lawrence*, 4 Cranch C. C. 518, Fed. Cas. No. 15,577.

In *U. S. v. Brawner*, 7 Fed. 86, the amount of bail was reduced from \$5,000 to \$2,500.

For authorities on the amount of bail, see *U. S. v. Petit*, 11 Fed. 58; *Smith v. Lee*, 13 Fed. 28.

Bail is the taking of security for the appearance of the party accused at the court at the time and place for trial or arraignment.¹⁹ Previously to the Revised Statutes, it was said to be doubtful whether the court had the right to bail anyone indicted for high treason.²⁰ A prisoner held for conspiracy may be bailed.²¹ The court in its discretion may, pending deportation proceedings or proceedings to review the same, allow the prisoner to be at large on bail,²² but not, it has been held, in extradition proceedings.²³ Where a prisoner has been remanded to the custody of State officers, in pursuance of the Supreme Court rules, pending an appeal from a decision of a court of the United States, discharging his writ of *habeas corpus*, the Federal court has no jurisdiction to admit him to bail.²⁴ When a party, who is under bail, absconds, he cannot, when he is captured, demand that he be committed to bail as a matter of right;²⁵ but the court has discretionary power to do so.²⁶ In the latter case, an additional recognizance is usually required.²⁷ A prisoner may be admitted to bail, although his plea of not guilty has been stricken out during the term that it was entered.²⁸ The bail must be taken "agreeably to the usual mode of process against offenders in such State."²⁹ Where the magistrates have the power to admit to bail, the United States Commissioner, before whom the accused is brought after his arrest, may do so;³⁰ but where the magistrates have no such power, it has been held that the United States Commissioners have not.³¹

¹⁹ U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742.

²⁰ Burr's Trial, I, pp. 18, 104, 310; U. S. v. Hamilton, 3 Dallas, 17, 1 L. ed. 490.

²¹ U. S. v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15,495.

²² *Re Chin Wah*, 182 Fed. 256; *Ex parte De Castro*, S. D. N. Y., 1913.

²³ *Wright v. Henkel*, 190 U. S. 40, 62, 47 L. ed. 948, 956; *Re Kaine*, 10 N. Y. Leg. Obs. 257, Fed. Cas. No. 7,598; *Re Carrier*, 57 Fed. 578. But see *Re Mitchell*, 171 Fed. 289.

²⁴ *Re Bissert*, 113 Fed. 12.

²⁵ *Case of Robt. M. Lee*, 6 Phila.

96.

²⁶ *Case of Robt. M. Lee*, 6 Phila. 96.

²⁷ U. S. v. Feely, 1 Brock. 255, Fed. Cas. No. 15,082.

²⁸ *Bassett v. U. S.*, 9 Wall. 38, 19 L. ed. 548. See U. S. v. Horton's Securities, 2 Dillon, 94, Fed. Cas. No. 15,393.

²⁹ U. S. R. S., § 1014; U. S. v. Rundlett, 2 Curtis, 41, Fed. Cas. No. 16,208.

³⁰ U. S. v. Rundlett, 2 Curtis, 41, Fed. Cas. No. 16,208; U. S. v. Sauer, 73 Fed. 671.

³¹ U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742. See U. S. v. Sauer, 73 Fed. 671.

In a later case, however, it was said: "The power to take bail for the appearance for trial before the proper court, of one charged with crime against the United States, is expressly conferred upon—among other officers—any Commissioner of a Circuit Court of the United States."³² It has been held that a justice of the peace has no power to admit to bail after a commitment;³³ but a commissioner, after a commitment to await the issue of a warrant of removal by a District judge, may admit to bail the person committed by him.³⁴ It has been held that a commissioner may admit the accused to bail after an indictment.³⁵ The clerk of the court,³⁶ or it seems a United States Commissioner,³⁷ may take the acknowledgment and justification of the principal and sureties upon a bail bond or recognizance, when he is required by the court to do so. No person has an absolute right to bail during his trial, although bail may be allowed in the discretion of the court in a case where the punishment is not capital.³⁸ The trial court may in its discretion grant a *supersedeas*, after conviction, in order to allow the convict to sue out a writ of error.³⁹ Upon a writ of error from the Supreme Court of the United States to review a judgment of conviction of an infamous crime which is not capital, or persons with whom any justice of the Supreme Court, or any Circuit or District Judge, may, after the citation is served, admit the accused to bail.⁴⁰ The justice who signs the citation and grants a *supersedeas* may order the prisoner, after the service of the citation to be admitted to bail by the judge before whom the conviction was had, upon giving a bond in a certain sum, in proper form and with sufficient sureties.⁴¹ An appearance bond in addition to a *supersedeas*

³² U. S. v. Dunbar, C. C. A., 83 Fed. 151, 154, 27 C. C. A. 488; U. S. v. Louis, 149 Fed. 277.

³³ U. S. v. Faw, 1 Cranch C. C. 486, Fed. Cas. No. 15,078.

³⁴ U. S. v. Volz, 14 Blatchf. 15, Fed. Cas. No. 16,627.

³⁵ Hoeffner v. U. S., C. C. A., 87 Fed. 185, 30 C. C. A. 610.

³⁶ U. S. v. Evans, 2 Fed. 147; Hunt v. U. S., C. C. A., 63 Fed. 568, 11 C. C. A. 340.

³⁷ U. S. v. Louis, 149 Fed. 277.

³⁸ U. S. v. Rice, 192 Fed. 720.

³⁹ U. S. v. Gibson, 188 Fed. 396.

⁴⁰ Hudson v. Parker, 156 U. S. 277, 285, 15 Sup. Ct. 450, 39 L. ed. 424; s. c. below, U. S. v. Hudson, 65 Fed. 68.

⁴¹ Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424.

bond is necessary to allow the prisoner to go at large.⁴² If that judge refuses to admit the prisoner to bail, he may be compelled to do so by the writ of mandamus, issued from the Supreme Court of the United States.⁴³ The Circuit Court of Appeals may admit to bail, pending a writ of error, a prisoner, after his conviction of a crime that is not capital.⁴⁴ After the conviction has been affirmed, pending a motion for a rehearing, the prisoner may be allowed to remain at large on bail;⁴⁵ but the Circuit Court of Appeals has no power, when its judgment is final, to continue his bail or to admit him to new bail pending his application to the Supreme Court for a writ of certiorari,

⁴² *Hardesty v. U. S.*, C. C. A., 184 Fed. 269.

⁴³ *Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424; *supra*, § 457.

⁴⁴ *McKnight v. U. S.*, C. C. A., 113 Fed. 451, 453, 51 C. C. A. 285; per Lurton, J.: It has been said by the Circuit Court of Appeals for the Sixth Circuit: "Detention pending the writ is only for purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief. This seems to be the view taken of the thing and policy of the statute of the United States; for in *Hudson v. Parker*, cited above, the court said. 'The statutes of the United States have been framed upon this theory; that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.' The fact that bail has been refused by the trial judge, though not conclusive, is a fact

which would make it more seemly, in the absence of some great urgency, that further application should be made to the appellate court, which, by virtue of its appellate jurisdiction, may properly be called upon to make all proper orders for the custody of the defendant pending the hearing of his writ or error. We quite agree with the counsel for the government, that all presumption of innocence is gone after conviction, and that proceedings resorted to for the mere purpose of delay should be discouraged. We do not, however, deem it wise, or in harmony with the humane principles of our law, that proceedings to review alleged error committed upon the trial of a defendant should be so far discouraged as to altogether deny the right to bail in that class of cases deemed bailable before conviction." The Circuit Court of Appeals for the Second Circuit will rarely, before a bill of exceptions has been prepared, admit a prisoner to bail after conviction, pending a writ of error, when the trial judge has refused to do so. *U. S. v. Morse*, C. C. A., Second Circuit, Nov. 1.

⁴⁵ *Walsh v. U. S.*, C. C. A., 174 Fed. 621.

although it may, for good cause shown, defer the beginning of his sentence for a reasonable time.⁴⁶ A judge of a District Court, after a writ of error to review a judgment of conviction, may grant a stay of proceedings, when the punishment was imprisonment in a penitentiary, so as to keep the prisoner in the county jail pending proceedings upon his writ of error.⁴⁷ It has been held that, pending a writ of error, bail should be allowed only for a time sufficient to insure the filing of the transcript in the court of review within a reasonable time, reserving the question of further bail until the lapse of the time thus fixed.⁴⁸ Bail has been denied pending a writ of error until after an application had been made to the Supreme Court for the advancement of the cause, because the plaintiff in error was imprisoned.⁴⁹ It has been held that three successive convictions of a defendant, upon the same indictment, is no sufficient ground for denying him bail pending his third writ of error.⁵⁰

The continuance of a case is, in itself, no cause for admission to bail;⁵¹ but if the prisoner is sick, and the nature of his disease is such that confinement must be injurious and may be fatal to him, he may be admitted to bail.⁵² Ordinarily, money will not be taken in lieu of bail,⁵³ but this has been done by a special order of the court.⁵⁴ A recognizance or bail bond is void if it does not set forth an act that is made an offense by a statute of the United States;⁵⁵ but it is sufficient if it sets out an offense punishable under an act of Congress, without stating the particulars.⁵⁶ It has been said that, where

⁴⁶ *Walsh v. U. S.*, 177 Fed. 208.

⁴⁷ *Order of Lacombe, J.*, in *U. S. v. Morse* (C. C.), S. D. N. Y., Nov. 6, 1908.

⁴⁸ *McKnight v. U. S.*, C. C. A., 113 Fed. 451, 51 C. C. A. 285.

⁴⁹ *U. S. v. Simmons*, 47 Fed. 723, 14 L.R.A. 78.

⁵⁰ *McKnight v. U. S.*, C. C. A., 113 Fed. 451, 51 C. C. A. 285.

⁵¹ *U. S. v. Jones*, 3 Wash. C. C. 224, Fed. Cas. No. 15,495.

⁵² *U. S. v. Jones*, 3 Wash. C. C. 224, Fed. Cas. No. 15,495.

⁵³ *U. S. v. Faw*, 1 Cranch C. C. 486, Fed. Cas. No. 15,078.

⁵⁴ *U. S. v. Neely*, 178 Fed. 748.

It was said to be against public policy to permit the United States to attach the deposit in a civil suit. *Ibid.*

⁵⁵ *U. S. v. Hand*, 6 McLéan, 274, Fed. Cas. No. 15,296.

⁵⁶ *U. S. v. Dennis*, 1 Bond. 103, Fed. Cas. No. 14,949. Thus, a recital that the defendant "conspired to defraud the United States," is sufficient, without stating the number of the section of the Revised Statutes alleged to have been violated, or the date of the commission of the alleged offense, *U. S. v.*

the indictment does not charge an indictable offense, the amount of bail is in the discretion of the magistrate.⁵⁷ Separate bonds or recognizances must be given for separate offenses.⁵⁸ Where the commissioner required two separate recognizances, each for a certain sum, and a single recognizance for the total amount was given, it was held that it was void and did not bind the sureties.⁵⁹ Where a person, whose name did not appear in the body of a recognizance, signed the same on a subsequent day to the signature of a surety therein named; it was held that he was not bound.⁶⁰ It has been held that, where the magistrate certifies the acknowledgment of the parties to a recognizance, it is valid, although they do not sign the same.⁶¹ Where a doubtful question of law was involved, the court accepted a single surety.⁶² It has been held that a bail bond should not be accepted when the sureties thereupon have indemnified themselves by taking bonds from the accused and others;⁶³ and sureties upon a bail bond, in a criminal case, cannot recover against the defendant or his estate the amount they are compelled to pay by reason of his default.⁶⁴ It has been held that a magistrate

Dunbar, C. C. A., 83 Fed. 151, 27 C. C. A. 488; or the person defendant conspired, or the acts of the conspiracy, U. S. v. Dunbar, C. C. A., 83 Fed. 151, 27 C. C. A. 488; and so is a recital that defendant "unlawfully aided and abetted the landing of Chinese laborers in the United States." U. S. v. Dunbar, C. C. A., 83 Fed. 151, 27 C. C. A. 488. But, where a State statute required a bail bond to name the offense, of which defendant was accused, it was held that such a bond, taken by the United States Commissioner reciting that defendant was charged with concealing smuggled goods, but not stating that he did so knowing the same to be smuggled, was invalid. U. S. v. Sauer, 73 Fed. 671.

⁵⁷ U. S. v. Smith, 4 Cranch C. C. 727; Fed. Cas. No. 16,330.

⁵⁸ U. S. v. Goldstein's Sureties, 1 Dillon, 413, Fed. Cas. No. 15,226.

⁵⁹ U. S. v. Goldstein's Sureties, 1 Dillon, 413, Fed. Cas. No. 15,226.

⁶⁰ U. S. v. Pickett, 1 Bond, 123, Fed. Cas. No. 16,043.

⁶¹ U. S. v. Pickett, 1 Bond, 123, Fed. Cas. No. 16,043.

⁶² U. S. v. Petit, 11 Fed. 58. It has been said that a bail bond, as regards its legal status, differs in no respect from a bond given by an individual surety. *Ex parte Marin*, 164 Fed. 631.

⁶³ U. S. v. Simmons, 14 L.R.A. 78, 47 Fed. 575.

⁶⁴ U. S. v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. ed. 308. *Contra*, *Moloney v. Nelson*, 158 N. Y. 351; *Carr v. Davis*, 64 W. Va. 522, 20 L.R.A. (N.S.) 58. See also *Simpson v. Roberts*, 35 Ga. 180; *Holker v. Hennessey*, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642; *People v. Skidmore*, 17 Cal. 261; *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep.

has no power to take bail requiring an appearance from day to day pending the preliminary examination;⁶⁵ but such recognizance, after an indictment, was held to be good.⁶⁶ Where the accused has given bail to appear in court, he must appear upon the first day of the term, and he does not have the whole term within which to appear.⁶⁷ Where the recognizance stipulated for the appearance of the accused at the next term, and at any subsequent term to be thereafter held, it was held that it contemplated only such subsequent term as followed in regular succession in the course of the business of the court, and that an agreement to continue the case for an indefinite period discharged the bail.⁶⁸ Where the accused appeared in conformity with his recognizance, at the next term, and the court passed away without taking any order in respect to him, it was held that he was discharged.⁶⁹ Where the undertaking provided that the sureties should produce the defendant, "whenever requested to do so," it was held that no request or notice was required to bind them, except that duly given in open court at the time regularly set for the trial.⁷⁰ Where a defendant to a criminal prosecution, in a State court, removed the cause after he had given bail, it was held that the bond was not forfeited by his failure to appear in the State court after the removal.⁷¹ Where a judicial vacancy occurred by the death of the District Judge, it was held that a bail bond was continued in force, both against the principal and sureties, until the next term after the appointment and qualification of the next incumbent.⁷²

The obligation of a surety upon a bail bond binds his estate after his death.⁷³ The death of the principal after default and

162. In *Essig v. Turner*, 60 Wash. 175, 110 Pac. 998, held that a contract to indemnify the bail upon a bond taken in criminal proceedings in a court of the United States might be enforced in the State court.

⁶⁵ *U. S. v. Case*, 8 Blatchf. 250, Fed. Cas. No. 14,742.

⁶⁶ *U. S. v. White*, 5 Cranch C. C. 368, Fed. Cas. No. 16,678.

⁶⁷ *U. S. v. Hodgkin*, 1 Cranch C. C. 510, Fed. Cas. No. 15,375.

⁶⁸ *Reese v. U. S.*, 9 Wall. 13, 19 L. ed. 541.

⁶⁹ *U. S. v. Burr*, 1 Burr's Trial, 79.

⁷⁰ *U. S. v. Dunbar*, C. C. A., 83 Fed. 151, 27 C. C. A. 488.

⁷¹ *Davis v. South Carolina*, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. ed. 574.

⁷² *U. S. v. Murphy*, 82 Fed. 893.

⁷³ *U. S. v. Keiver*, 56 Fed. 422.

forfeiture does not exonerate the sureties.⁷⁴ It has been held that the arrest, conviction and imprisonment of the accused under State laws, when they occur subsequent to the recognizance, do not exonerate the bail from their obligation to produce him;⁷⁵ but where, at the time of the arrest, under process of the United States, the accused was under bail to the State court in a previous prosecution, it was held that his bail in the Federal court were by subsequent imprisonment under the State law, relieved from their obligation.⁷⁶ The removal of a prisoner from one Federal district to another might exonerate his bail in the former district.

Where the accused has been actually surrendered the court may endorse the discharge and *exoneratur* of the bail, *nunc pro tunc*, upon the trial of a proceeding to enforce the bail bond.⁷⁸

During the term at which a bail bond or recognizance is forfeited, if he appears and submits to the jurisdiction of the court, the court may take off the forfeiture.⁷⁹

A party who has forfeited his bail may be subsequently arrested.⁸⁰

A party who has forfeited his bail cannot move in arrest of judgment until he personally appears and submits himself to the jurisdiction.⁸¹

Sureties cannot defend a proceeding to enforce their recognizance or bail bond upon the ground that the indictment against their principal was bad,⁸² or that the statute of limi-

⁷⁴ U. S. v. Van Fossen, 1 Dillon, 406, Fed. Cas. No. 16,607.

⁷⁵ U. S. v. Van Fossen, 1 Dillon, 406, Fed. Cas. No. 16,607. In *People ex rel. Am. Surety Co. v. Benham*, 71 Misc. (N. Y.) 345, Gavegan, J.; held that where, pending a writ of error to review the conviction in a Federal court in another district, the plaintiff in error was convicted, sentenced and imprisoned in the State court for another crime, his bail could not obtain the surrender by the State to the Federal court, the authorities of the United States not having joined in the application, although they were pro-

ceeding against the bail upon the bond. See *Ex parte Marrin*, 164 Fed. 631.

⁷⁶ *Re James*, 18 Fed. 853.

⁷⁷ *Peckham v. Henkel*, 216 U. S. 483, 54 L. ed. 579.

⁷⁸ U. S. v. Stevens, 16 Fed. 101.

⁷⁹ U. S. v. Feely, 1 Brock. 255, Fed. Cas. No. 15,082; U. S. v. Barger, 20 Fed. 500.

⁸⁰ *Ex parte Milburn*, 9 Peters, 704, 9 L. ed. 280.

⁸¹ U. S. v. Askins, 4 Cranch C. C. 98, Fed. Cas. No. 14,471; U. S. v. Erskine, 4 Cranch C. C. 299, Fed. Cas. No. 15,057.

⁸² U. S. v. Evans, 2 Fed. 147.

tations had run against the prosecution.⁸³ It has been held that the fact there was an appearance or discontinuance after a forfeiture of a bail bond is not a legal defense to an action thereupon.⁸⁴ It is no defense to such action that the defendant was misled or misinformed as to the contents and effects of the bond, when there is no proof of fraud nor incapacity to read.⁸⁵ A complaint in an action on a bail bond was held to be fatally defective when it did not allege that criminal proceedings had been commenced against the principal, or that there had been an examination before the proper officer, at which reasonable cause for belief in his guilt appeared, or that he had been by anyone held to bail or required to give any bail.⁸⁶ It has been held that a judgment *nisi*, without notice to the sureties, cannot be issued upon a forfeited recognizance of bail.⁸⁷ The question whether a proceeding to enforce a criminal bail bond must be taken in accordance with the practice of the State, or may proceed according to the common law by a writ of *scire facias*, is doubtful.⁸⁸

§ 494. Information. A criminal information is a written accusation of crime, preferred by a prosecuting officer, without a previous indictment or presentment by a grand jury.¹ The Revised Statutes provide that "all crimes and offenses committed against the provisions of chapter seven, title 'Crimes,' which are not infamous, may be prosecuted either by indictment or by information filed by a District Attorney."²

The Fifth Amendment ordains: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases

⁸³ U. S. v. Dunbar, C. C. A., 83 Fed. 151, 27 C. C. A. 488.

⁸⁴ U. S. v. McGlashen, 66 Fed. 537; reversed for want of jurisdiction, McGlashen v. U. S., C. C. A., 71 Fed. 434, 18 C. C. A. 172.

⁸⁵ Taylor v. Fleckenstein, 30 Fed. 99.

⁸⁶ U. S. v. Keiver, 56 Fed. 422.

⁸⁷ U. S. v. Winstead, 12 Fed. 50. Such a judgment does not merge the obligation of the surety and he may be sued upon the recognizance

that he gave. Leary v. U. S., C. C. A., 170 Fed. 941.

⁸⁸ Insley v. U. S., 150 U. S. 512, 14 Sup. Ct. 158, 37 L. ed. 1163. See *supra*, § 368b. It is too late to raise in the court of review, for the first time, the objection that the proceedings were not instituted by an original action. Hardesty v. U. S., C. C. A., 184 Fed. 269.

§ 494. ¹ Blackstone, IV, 308.

² U. S. R. S., § 1022.

arising in the land or naval forces, or in the militia in actual service in time of war or public danger." This forbids the institution of a criminal prosecution by information, in any case where the crime is punishable by imprisonment at hard labor,³ or by imprisonment in a penitentiary with or without hard labor.⁴ Offenses which are not capital, nor infamous, may be prosecuted by information.⁵ Such are cases where the offense is not punishable by imprisonment in a penitentiary, or by imprisonment elsewhere, with hard labor.⁶ An information was held to be defective when it set out the effect of a material document without reciting any of the contents of the same.⁷ An information cannot be filed without leave of the court;⁸ and the court, before granting leave, may require the prosecutor to bring the accused before the court to show cause, if cause there be, against the filing of the information.⁹ An information must be supported by an affidavit showing probable cause for the prosecution, arising from facts within the knowledge of the affiant;¹⁰ or by the depositions of witnesses taken upon a preliminary examination,¹¹ or affidavits upon which a warrant of arrest against the accused was previously issued, which may be sufficient.¹² It seems that the remedy, when an information is filed without the proper affidavits, is by a motion to quash the same.¹³ A prayer is not essential to the validity of an information.¹⁴

³ *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89.

⁴ *Mackin v. U. S.*, 117 U. S. 348, 29 L. ed. 909.

⁵ *U. S. v. Maxwell*, 3 Dillon, 275, Fed. Cas. No. 15,750; *U. S. v. Shepard*, 1 Abb. U. S. 431, Fed. Cas. No. 16,273; *U. S. v. Block*, 4 Sawyer, 211, Fed. Cas. No. 14,609; *U. S. v. Baugh*, 1 Fed. 784. But see *U. S. v. Joe*, 4 Chicago Legal News, 105, Fed. Cas. No. 15,478.

⁶ *U. S. v. Baumert*, 179 Fed. 735.

⁷ *U. S. v. Watson*, 17 Fed. 145.

⁸ *U. S. v. Smith*, 40 Fed. 755.

⁹ *U. S. v. Smith*, 40 Fed. 755;

infra, §§ 501-505.

¹⁰ *U. S. v. Tureaud*, 20 Fed. 621. Although it is supported by letters purporting but not proved to have been written or authorized by the accused. It has been suggested that a county clerk's certificate that the notary is duly appointed is also required. An affidavit containing no venue is insufficient. *U. S. v. Baumert*, 179 Fed. 735.

¹¹ *U. S. v. Polite*, 35 Fed. 58.

¹² *Ibid.*

¹³ *U. S. v. Polite*, 35 Fed. 58.

¹⁴ *Standard Oil Co. v. Missouri*, 224 U. S. 270, 285, 56 L. ed. 760, 769.

§ 495. **Indictments.** The Fifth Amendment ordains: That "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."¹ It has been said that this intends not merely an indictment in form, but a valid indictment found and presented according to the settled usage and established mode of procedure.²

An indictment is a written accusation of one or more persons of a crime or misdemeanor, which is preferred to and presented upon oath by a grand jury.³ The Revised Statutes regulate indictments in the courts of the United States as follows: "No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors."⁴ The indictment need not allege that it was found by twelve grand jurors.⁵ It is the safer practice for the defendant to move to quash the indictment, when he objects to the same on the ground that twelve grand jurors did not concur therein.^{5a} It has been held that, when the defendant pleads not guilty and goes to trial upon the merits, the objection that twelve competent jurors did not concur in the indictment is waived.⁶ Such an objection cannot be raised collaterally by *habeas corpus* after conviction.⁷ "In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which

§ 495. ¹ See *supra*, § 381i; *Burchett v. U. S., C. C. A.*, 194 Fed. 821.

² *Renigar v. U. S., C. C. A.*, 26 L.R.A.(N.S.) 683, 172 Fed. 646.

³ *Blackstone*, IV, 302; *U. S. v. London*, 176 Fed. 976. An indictment may be presented by a Grand Jury without a preliminary complaint or arrest. *U. S. v. Baumert*, 179 Fed. 735. It has been held that the submission of an indictment to a Grand Jury and the examination of witnesses before them in relation to the same, are no part of criminal

proceedings against the accused within the meaning of the Fifth Amendment, *U. S. v. Price*, 163 Fed. 904; but that they and the indictment are included within the phrase "Any suit or proceeding" in § 299 of the Judicial Code, 36 St. at L. 1087.

⁴ *U. S. R. S.*, § 1021.

⁵ *U. S. v. Laws*, 2 Lowell, 115, Fed. Cas. No. 15,579.

^{5a} *Re Wilson*, 140 U. S. 575, 35 L. ed. 513. Cf. § 515 *infra*.

⁶ *Ibid*.

⁷ *Ibid*.

the court was held, or the particular matters brought before, or intended to be brought before, said court.”⁸ “When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.”⁹ “No indictment found and presented by a grand jury in any District or Circuit or other Court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.”¹⁰ The description of a man by the initials of his christian name only is a defect in the indictment, of which advantage may be taken by a plea in abatement, unless the grand jury allege that his name is unknown to them otherwise than as set forth.¹¹ A defendant may be described in the indictment under one name, or otherwise called another name, or *alias* another name.¹²

§ 496. Caption of indictment. The caption of an indictment is a formal statement of the proceedings, which describes the court where the indictment was found, the time and place of the finding of the same and the grand jurors who found it.¹ It should also state that the grand jurors were sworn, if such was the case.² It is a part of the record.³ Statements in the caption, when referred to in the body of the indictment, may cure omissions in the latter.⁴ A clerical error in the caption of an indictment will be disregarded.⁵

⁸ U. S. R. S., § 1023.

⁹ U. S. R. S., § 1024.

¹⁰ U. S. R. S., § 1025.

¹¹ U. S. v. Upham, 43 Fed. 68. A description of the defendants who are named as doing business under a certain firm name and style does not prevent the indictment from being against such individuals. Schraubstadter v. U. S., C. C. A., 199 Fed. 568.

¹² U. S. v. Polite, 35 Fed. 58.

§ 496. 122 Cyc. 228.

² Burchett v. U. S., C. C. A., 194 Fed. 821.

³ Ibid.

⁴ U. S. v. Boyden, 1 Lowell, 266, 24 Fed. Cas. No. 14,632; Commonwealth v. Edwards, 4 Gray (Mass.) 1; Commonwealth v. Fisher, 7 Gray (Mass.) 492; Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; State v. Buralli (Nevada), 71 Pac. 532; 22 Cyc. 239.

⁵ Such are: a mistake in the year of the term, when the record shows

§ 497. **Body of indictment.** An indictment must allege every essential element of the crime charged.¹ All that is necessary is: that the indictment should charge the defendants with the commission of acts, which are, by a law of the United States, made criminal and punishable; and that it contain a sufficient statement of the particular facts to identify the offense so that the defendant may intelligently prepare his defense and plead a judgment in bar of another prosecution, and that it will enable the court to judge whether the acts alleged amount to a crime in law.² Where the statute provides a punishment for a crime

that the grand jury was in fact impanelled in the current year, *U. S. v. Bornemann*, 35 Fed. 824; an omission from the caption of anything to show the organization or composition of the court, or who were present as constituent parties thereof, when the indictment was returned; and of any express recital that it was found by the concurrence of at least twelve jurors, *Caha v. U. S.*, 152 U. S. 211, 38 L. ed. 415; and even a recital that the indictment was found in the Circuit Court of the United States for a specified district, when in fact the grand jury was impanelled in the District Court of the same district, *Ledbetter v. U. S., C. C. A.*, 108 Fed. 52.

§ 497. ¹ *U. S. v. Potter*, 56 Fed. 83. The statute providing that an indictment is not invalidated by a defect in form, *U. S. R. S.*, § 1025; quoted *supra*, § 495; *Renigar v. U. S., C. C. A.*, 172 Fed. 646. An indictment charging perjury before "a competent tribunal, to wit, before the said United States District Clerk for the Northern District of Texas," shall not be vitiated by the clerical mistake in using the word "clerk," instead of "court." *Hogue v. U. S., C. C. A.*, 192 Fed. 918. The statute applies where the only

defect of which complaint is made is that some element of the offense is stated loosely and without technical accuracy. *Horn v. U. S., C. C. A.*, 182 Fed. 721. Does not validate an indictment, which omits any matter of substance, but is applicable where the only defect of which complaint is made, is that some element of the offense is stated loosely and without technical accuracy. *Dunbar v. U. S.*, 156 U. S. 185, 39 L. ed. 390.

² *Rosen v. U. S.*, 161 U. S. 29, 40 L. ed. 606; *Price v. U. S.*, 165 U. S. 311, 41 L. ed. 727; *U. S. v. Goggin*, 1 Fed. 49; *Re Benson*, 58 Fed. 962. "It is not sufficient that the pleader state merely the facts from which an offense can be implied, or only so many of the essential elements as in the ordinary experiences of life, or even in a statute, might suggest all the other elements; but he must state in terms everything necessary to constitute a criminal act. For example, as is well known, there are no common-law offenses against the Federal authority; so that theft on shipboard on the open seas would not be punishable without a statute providing for it. It would be sufficient that such a statute set out in terms that larceny on shipboard on the high seas should

known to the common law without defining the same, the indictment therefor should contain averments setting forth the

be punishable, with a certain penalty named; but every legal mind would at once admit that, although this would be sufficient in the statute, an indictment which alleged merely that the person accused committed larceny on board a certain ship, naming it, on the high seas, embracing the entire phraseology of the statute, but without details of the property stolen and of its ownership, and the other usual details, would be wholly insufficient. So, also, there are certain offenses, especially those arising under the revenue laws, which are punishable independently of the intent; but generally there can be no crime unless there is a criminal purpose. Congress, however, in declaring offenses, does not always note this distinction in the terms of the statute. It sometimes prohibits the act and declares the penalty in quite the same terms, whether as a part of the revenue laws, where the intent is not always important, or as part of the general criminal code, where it is essential; but in the latter case the courts understand that the guilty purpose is an element which must be set out in the indictment, although not necessarily in the statute." *U. S. v. Potter*, 56 Fed. 83, 88, 89, per Putnam, J.; citing *U. S. v. Carl*, 105 U. S. 611, 26 L. ed. 1135. "Sometimes a statute, either through embracing a great many offenses of the same class, or for some other reason, is so general in its terms that the indictment must allege many particulars which the statute omits." *U. S. v. Potter*, 56 Fed. 83, 89, per Putnam, J.; citing *U. S. v. Cruikshank*, 92 U. S.

542, 557, 23 L. ed. 588. "These are a few illustrations out of many which might be made. They are sufficient to establish the proposition that, while it is ordinarily enough that the indictment declares an offense in the language of the statute, as has many times been said by all the courts, this is not universally true, and does not excuse the prosecutor from setting out every essential element constituting the crime. In order to properly inform the accused of the nature and cause of the accusation,' within the meaning of the Constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by rea-

sonable particularity and fullness of description of the alleged offense." . . . "In addition to these fundamental principles, the force of which all admit, there have been certain precedents, including precise forms of expression, some of them highly technical, in use for so long a period, not only with reference to offenses long familiar to the law, but also with reference to new offenses to which they can be applied, that they have come to have more or less the force of law. Some of them are undoubtedly the relics of what was once essential, but not unessential. Others, perhaps, were the mere fashion of the times, repeated so often that they are now in the mouth of every pleader. Some of them, to the well-trained legal mind, seem to be wholly unessential, the omission of which ought not prejudice any; yet, in view of the fact that ours is a government of laws, and not of men, and of the further fact that, when the judiciary and the courts pull away from well-known landmarks, they are not apt to enter a field where their only guides are the varying individual and sometimes crude opinion of different judges, or mere judicial discretion, liable to run into a kind of oppression and injustice most detestable, because most insidious, the courts ordinarily adhere to these forms, precedents, and expressions until common consent is united against them, or the legislature has expressly interfered." "With reference to all the principles I have stated, there seems to be no distinction concerning either the rules applicable to the construction of the statutes, or the requisites of indictments, on account of the severity of the punishment inflicted,

except in behalf of capital offenses, or those involving the liability of imprisonment for life, and possibly in behalf of felonies at common law." *U. S. v. Potter*, 56 Fed. 83, 89, 90, 91, per Putnam, J.; citing *U. S. v. Britton*, 108 U. S. 192, 27 L. ed. 703. It was held that an indictment under the election laws was fatally defective when it omitted to charge that the act complained of took place in connection with the election of a representative in Congress. *U. S. v. Morrissey*, 32 Fed. 147. So was an indictment which failed to aver that the inquiry of a supervisor of elections, which the defendant refused to answer, was made at the place assigned by the latter in the registration list as his place of residence. *U. S. v. Davis*, 6 Fed. 682. An indictment charging that the defendant, "being then and there an assistant clerk or employee" in a certain post-office, embezzled a certain sum, the property of the United States, was held to be defective because it did not allege that the money came into his possession by virtue of his employment. *Moore v. U. S.*, 160 U. S. 268, 40 L. ed. 422. It was held that an indictment charging the defendant with passing a counterfeit coin, to defraud a specified person, was not defective because it further averred that he passed the coin to that person or to another. *U. S. v. Bejandio*, 1 Woods, 294, Fed. Cas. No. 14,561. In an indictment for perjury, the materiality of the false statement must be shown in the indictment, either by setting out the facts from which this appears as a matter of law or by a direct averment that the matter falsely stated was material. *U. S. v. Nelson*, 199 Fed. 464. An indictment charging

common law ingredients thereof.³ If the crime was unknown to the common law and is originated by statute, the indictment is ordinarily sufficient if the averments are in the language of the statute; provided that such language, according to the natural import of the words, is fully descriptive of the offense;⁴ unless general or technical words or phrases are used.⁵ In the latter case, the indictment must be so specific that a defendant of ordinary understanding may comprehend what is charged.⁶ Where the statute provides that several things connected by the disjunctive "or" shall constitute a crime, the indictment should connect them by the conjunctive "and" before evidence can be admitted as to more than one act.⁷ Where the indictment contains several counts, one may be sufficient which refers to a prior count for a statement of some of the facts that it sets forth,⁸ although the count to which it refers is barred by the statute of limitations or otherwise insufficient.⁹ It is the safer practice always to use the language of the statute in charging a statutory offense;¹⁰ but that is not required if the averments bring the charge within the true meaning of the act.¹¹ When the statutory description of the crime contains exceptions, such exceptions must be negatived in the indictment;¹² but this is

a conspiracy to deprive negroes of their right to vote at a Congressional election need not allege the names of the voters whom the defendants intended to injure. *U. S. v. Stone*, 188 Fed. 836. An indictment for misbranding, in violation of the Pure Food & Drugs Act, is not invalid for failure to allege a preliminary investigation by the Department of Agriculture, a notice to defendants of their violation, or that they were offered an opportunity to be heard before the Department. *Schraubstadter v. U. S.*, C. C. A., 199 Fed. 568. For indictments for the offense of using the mails for the purposes of fraud, see *Wilson v. U. S.*, C. C. A., 190 Fed. 427; *Lemon v. U. S.*, C. C. A., 164 Fed. 953; *U. S. v. Bartholomew*, C. Fed. Prac. Vol. II.—105.

C. A., 177 Fed. 902; *Horn v. U. S.*, C. C. A., 182 Fed. 721.

³ *Ackley v. U. S.*, C. C. A., 200 Fed. 217.

⁴ *Ibid.*

⁵ *Potter v. U. S.*, 155 U. S. 438, 39 L. ed. 214; *Ackley v. U. S.*, C. C. A., 200 Fed. 217.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Bartholomew v. U. S.*, C. C. A., 177 Fed. 902.

⁹ *U. S. v. Ridgway*, 199 Fed. 286.

¹⁰ *Potter v. U. S.*, 155 U. S. 438, 39 L. ed. 214.

¹¹ *Lemon v. U. S.*, C. C. A., 164 Fed. 953.

¹² *U. S. v. Moore*, 11 Fed. 248; *U. S. v. Nelson*, 29 Fed. 202; *U. S. v. Wood*, 159 Fed. 187, against the master of a vessel for knowingly

only necessary when the exception is such as to render its negation an essential part of the definition of the offense.¹³ Where the exception or proviso is in a subsequent clause to that defining the offense, or is in a subsequent statute, it need not be negated in the indictment.¹⁴ Where the offense is charged as committed with reference to two persons, who are named, and proved as to one of them alone, the variance is not fatal.¹⁵ A citation of a statute on the margin of an indictment is not a part of the indictment itself and does not limit the crime to one described in that statute alone; but the indictment will be good if it states an offense embraced in any statute then in force.¹⁶ An averment that an offense charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," is a mere conclusion of law, the omission of which is a matter of form and immaterial.¹⁷

When the statute makes the criminality depend upon scienter, knowledge or intent, such knowledge,¹⁸ or intent, as the

bringing a Chinese within the United States and landing or attempting to land him "in contravention of the provisions of this act." Act of Sept. 13, 1888, ch. 1015, § 9, 25 St. at L. 478, Comp. St. 1901, p. 1316. It has been held that the denials of the truth of alleged false representations may be in the form of negative pregnant. *Horn v. U. S.*, C. C. A., 182 Fed. 721. For a case where the word "or," which was used in both the indictment and the statute, was construed to mean "nor," see *Lillis v. U. S.*, C. C. A., 190 Fed. 530.

¹³ *Shelp v. U. S.*, C. C. A., 81 Fed. 694, 26 C. C. A., 570. An indictment for a crime committed in the course of bankruptcy proceedings against a corporation is not objectionable for failure to deny that the corporation was, within the exceptions, not subject to bankruptcy, nor for omitting to allege that it was engaged principally in one of

the occupations specified as subject to the same. *U. S. v. Freed*, 179 Fed. 236. Thus, it was held that an indictment for selling liquor to Indians in Alaska, contrary to the act which forbade the same, "except for medicinal, mechanical and scientific purposes," need not negative the exception. *Ibid*.

¹⁴ *U. S. v. Moore*, 11 Fed. 248; *U. S. v. Nelson*, 29 Fed. 202.

¹⁵ *Bennett v. U. S.*, C. C. A., 194 Fed. 630.

¹⁶ *Williams v. U. S.*, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. ed. 509.

¹⁷ *Frisbie v. U. S.*, 157 U. S. 160, 39 L. ed. 657.

¹⁸ *U. S. v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *U. S. v. Slenker*, 32 Fed. 691. An allegation that an act was done "unlawfully, fraudulently, corruptly and feloniously" is not equivalent to an averment that it was committed knowingly. *U. S. v. Kelsey*, 42 Fed. 882. It has been held that a charge that the defend-

case may be, must be averred.¹⁹ Otherwise it is said not.²⁰ It has been said that such an omission is a defect in form, which is cured if the point is not taken until after the trial.²¹

Allegations of time should be made with approximate accuracy; but, when they do not apparently bring the case within the bar of the statutes of limitations, they are usually disregarded;²² even, it has been held, when they are inconsistent.²³

The words "then and there" are not uncertain, nor repugnant because in one place they may refer to the whole of a day and in another to only one incident thereof.²⁴

Voluminous documents need not be set forth in full, where

ant knowingly caused to be deposited in a post-office, an obscene paper, is equivalent to an averment that the defendant knew that the paper was obscene. *Rosen v. U. S.*, 161 U. S. 29, 40 L. ed. 606; *Price v. U. S.*, 165 U. S. 311, 41 L. ed. 727; *U. S. v. Clark*, 37 Fed. 106. *Contra*, *U. S. v. Chase*, 27 Fed. 807; *U. S. v. Slenker*, 32 Fed. 691; *Konda v. U. S.*, C. C. A., 166 Fed. 91; *U. S. v. Ridgway*, 199 Fed. 286, where the offense charged was a misuse of the mails in furtherance of a lottery. It has been held that the averment that the defendant "knowingly and wilfully" assaulted a deputy marshal, in the discharge of his official duty, is equivalent to the allegation that he knew the person assaulted to be a deputy marshal so engaged. *Blake v. U. S.*, C. C. A., 71 Fed. 286; *Naftzger v. U. S.*, C. C. A., 200 Fed. 494, where the allegation was that stamps were stolen from "certain post offices in the state of Kansas.

¹⁹ *U. S. v. Conant*, 9 Reporter, 36, 25 Fed. Cas. No. 14,844; *U. S. v. Jackson*, 2 Fed. 502; *U. S. v. Jackson*, 25 Fed. 548.

²⁰ *U. S. v. Jackson*, 25 Fed. 548.

²¹ *Rosen v. U. S.*, 161 U. S. 29,

40 L. ed. 606; *U. S. v. Chase*, 27 Fed. 807. *Contra*, *U. S. v. Slenker*, 32 Fed. 691 (on a motion in arrest of judgment).

²² *U. S. v. Potter*, 56 Fed. 83; *Rieger v. U. S.*, C. C. A., 107 Fed. 916. "On principle, allegations of time in criminal pleadings ought to be made with approximate accuracy; yet, by authority of a practice which has now continued so long that it must be yielded to, time need not be proved as stated and these allegations touching it are the most useless portions of criminal pleadings." *U. S. v. Potter*, 56 Fed. 83, 95, per Putnam, J. The designation of the year, in which the offense is laid, by arabic figures without the prefix, A. D., is sufficient. *Peters v. U. S.*, C. C. A., 94 Fed. 127, 36 C. C. A. 105. A charge that an offense was committed "on the — day" of a month and year named is not defective where any day of that month is prior to the finding of the indictment and within the period of limitation, unless time is of the essence of the offense. *U. S. v. Conrad*, 59 Fed. 458.

²³ *U. S. v. Jackson*, 2 Fed. 502. *Contra*, *U. S. v. Potter*, 56 Fed. 83.

²⁴ *U. S. v. Potter*, 56 Fed. 83.

their substance is alleged.²⁵ When a paper contains indecent and obscene language, which it is not proper to spread upon the records of the court, such language can be omitted, provided the crime charged is so described as reasonably to inform the accused of the nature of the charge; and, in such a case, he may apply to the court before trial for a bill of particulars, showing what parts of the paper are charged by the prosecution as being obscene.²⁶ Otherwise, a document to which reference is made in the indictment should ordinarily be set forth *verbatim*.²⁷

§ 498. Signature of indictment. The proper practice is for the District Attorney of the United States, for the district where an indictment is found, to sign the same; for otherwise there is nothing to show the court that he authorizes the criminal prosecution. "There appears to be no power, by statute or usage, conferred on the courts of the United States to recognize a suit, civil or criminal, as legally before them in the name of the United States, except the same is instituted and prosecuted by a District Attorney legally appointed and commissioned conformably to the statute."¹ It has been said: "The signature of a District Attorney constitutes no part of an

²⁵ U. S. v. French, 57 Fed. 382, per Putnam, J. 390. "To encumber indictments with voluminous documents, of which only small portions are needed for informing the accused or the court of the particularity and identity of the offense charged, tends to increase the mass of pleadings to an embarrassing extent without apparent advantage, and subjects the prosecutor to great danger of variance in unimportant details, to the defeat of justice."

²⁶ Rosen v. U. S., 161 U. S. 29, 40 L. ed. 606; Price v. U. S., 165 U. S. 311, 41 L. ed. 727; Dunlop v. U. S., 165 U. S. 486, 41 L. ed. 799; Bartell v. U. S., 227 U. S. 427, 57 L. ed. —. A count giving the date of a letter and the first and closing sentences thereof, without the name of the person to whom it

was addressed, was held to be sufficient; but not one which stated no more than that the letter was "of a certain filthy and indecent character, that it contained a certain article, designed, adapted and intended for preventing conception, and calculated to be used for and applied for an indecent and immoral purpose," without indicating even the date of the letter or the character of the article, whether it was a drug or a mechanical device. Winters v. U. S., C. C. A., 201 Fed. 845, 846, 847.

²⁷ U. S. v. Noelke, 1. Fed. 426. (where a demurrer raising this objection had been overruled).

§ 498. ¹ U. S. v. McAvoy, 18 How. Pr. 380, 382, 4 Blatchf. 418, Fed. Cas. No. 15,654, per Betts, J.

indictment, and is only necessary as evidence to the court that he is officially prosecuting the delinquents conformably to the duty imposed upon him by statute."² Where the objection appeared not to have been specially taken by demurrer, or otherwise, before the trial, it was held that the signature of the Assistant United States Attorney was sufficient.³ The absence of any signature to the indictment, which was returned at a time when the office of District Attorney was vacant, was held to be no ground for a motion in arrest of judgment, when the case had been duly prosecuted by the officer subsequently appointed.⁴ A prayer is not essential to the validity of an indictment.⁵

§ 499. Indorsement of indictment. The indictment should be endorsed with the words "a true bill," and the endorsement signed by the foreman of the grand jury. In England, this was essential to the validity of the document. "The endorsement is parcel of the indictment and the perfection of it."¹ There the practice was, when the grand jury refused to find an indictment, to endorse upon the same "ignoramus," or sometimes, in place of the latter, "not found;" and all the bills presented to them were returned to the court. "In this way the endorsement became the evidence, if not the only evidence, to the court of their action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal endorsement loses its essential character."² Where the objection was not taken by demurrer, it was held that the omission of the endorsement was a defect of form, which did

² U. S. v. McAvoy, 18 How. Pr. 380, 382, 4 Blatchf. 418, Fed. Cas. No. 15,654, per Betts, J.

³ Caha v. U. S., 152 U. S. 211, 221, 38 L. ed. 415, 419.

⁴ U. S. v. McAvoy, 18 How. Pr. 380, 4 Blatchf. 418, Fed. Cas. No. 15,654.

⁵ Standard Oil Co. v. Missouri, 224 U. S. 270, 285, 56 L. ed. 760, 769.

§ 499. ¹ King v. Ford, Yelverton, 99.

² Frisbie v. U. S., 157 U. S. 160, 163, 39 L. ed. 657, 658, per Brewer, J.

not invalidate the indictment.³ In case of a capital offense, it is the usual custom to endorse, upon the indictment, the list of the witnesses for the prosecution, which the Revised Statutes require shall be delivered to the defendant.⁴ Such an omission is a defect in form, which is waived when the objection thereto is not raised until after the trial.⁵

§ 500. Duplicity. The section of the Revised Statutes concerning the joinder of several charges in separate counts, in the same indictment,¹ does not qualify the rule as it prevailed at common law with reference to the uniting of charges in the same indictment in different counts, or the charging as a single offense in one count, a single act or transaction, which might also be treated as involving several distinct offenses.² The prosecutor is at liberty to charge in a single count as a single offense a single act or transaction in violation of law, although that act involves several similar violations of law with respect to several different persons.³ Where the statute creating an offense enumerates several things by the use of the disjunctive "or," an indictment which charges two or more thereof, joined with the conjunctive "and" is not bad for duplicity.⁴ A count in an indictment under the national banking laws, which charged a defendant with making two false entries, was held to be bad for duplicity, although they were a corresponding debit and credit on different sides of an account and related to the same transaction.⁵ A count is not bad for duplicity which charges that defendant did "make, counterfeit, forge and cause to be made, counterfeited and forged, a certain affidavit," &c., for the purpose of defrauding the United States;⁶ nor one, that defendant procured a false affidavit to be presented to the pension office in

³ *Frisbie v. U. S.*, 157 U. S. 160, 39 L. ed. 657. See *U. S. v. Cornell*, 2 Mason, 91 Fed. Cas. No. 14,868.

⁴ U. S. R. S., § 1033; quoted *infra*, § 482.

⁵ *Fisher v. U. S.*, 1 Oklahoma, 252. See *Hickory v. U. S.*, 151 U. S. 303, 307, 38 L. ed. 170, 173.

§ 500. ¹ U. S. R. S., § 1024; quoted *infra*, § 501.

² *U. S. v. Scott*, 74 Fed. 213, 216,

per Taft, J.; *U. S. v. Heinze*, 161 Fed. 425.

³ *U. S. v. Scott*, 74 Fed. 213, 215, per Taft, J.; and cases there cited.

⁴ *Ackley v. U. S.*, C. C. A., 200 Fed. 217.

⁵ *U. S. v. Morse*, 161 Fed. 429, 437.

⁶ *Crain v. U. S.*, 162 U. S. 625, 40 L. ed. 1097. See *U. S. v. Hall*, 14 Fed. 324.

a pension case,⁷ nor, under the White Slave Traffic Act,⁸ a count that two women were transported at the same time, for the same immoral purposes, from one State into another.⁹ It has been held that a person accused of violating the civil service law¹⁰ by receiving or soliciting contributions for political purposes from employees in the Internal Revenue, may be charged in a single count, when the offense was committed by a single act or series of acts at the same time and place.¹¹ It was held that a count in an indictment charging a person with seizing, carrying away and secreting a ballot box, aiding and assisting in the seizure, carrying away and secretion of the same, and counseling, advising and procuring the seizure, carrying away and secreting thereof, was not bad for duplicity, the objection being not made until after verdict; since it charged but a single offense, the unlawful interference with the officers of the election in the discharge of their duties;¹² and that a denial of a motion to require a more restricted or specific statement of the particular mode in which the defense charged was committed would not justify a reversal, unless it appeared that the substantial rights of the accused were prejudiced.¹³ A duplicity in the indictment is no ground for a motion on arrest of judgment.¹⁴ The objection is waived by going to trial without objection.¹⁵

§ 501. Joinder of counts. By the Revised Statutes, "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."¹ This authorizes the consolidation of indict-

⁷ U. S. v. Hansee, 79 Fed. 303.

⁸ Act of June 25, 1910, ch. 395, § 36 St. at L. 825.

⁹ U. S. v. Westman, 182 Fed. 1017.

¹⁰ Act of January 16, 1883, § 11, 22 St. at L. 403.

¹¹ U. S. v. Scott, 74 Fed. 213.

¹² Connors v. U. S., 158 U. S. 408, 39 L. ed. 1033.

¹³ Connors v. U. S., 158 U. S. 408, 39 L. ed. 1033.

¹⁴ Pooler v. U. S., C. C. A., 127 Fed. 509, 62 C. C. A. 307.

¹⁵ Lemon v. U. S., C. C. A., 164 Fed. 953.

§ 501. 1 U. S. R. S., § 1024. "If it is suggested that thirty-two different transactions, each alike ob-

ments against several defendants.² Under this section distinct offenses,³ which arise out of the same transaction,⁴ although

noxious under this penal statute, should not be accumulated upon the head of the offender at one time, it can be answered that the law-making power has taken a different view on that subject. It can, however, also be answered, both on reason and on authority, that it would manifestly be far more oppressive to the offender to torture him with thirty-two consecutive trials on thirty-two separate indictments than to combine them as the statute permits, and subject him to only one trial." *Gardes v. U. S., C. C. A.*, 87 Fed. 172, 174, 175, per McCormick, C. J. It is manifest to us, from the language of section 1024, that the trial court has discretion to require the government, either before it has offered proof, or after it has closed its proof, to elect certain counts on which it will ask conviction, in all cases where the counts are of such character, and so numerous, that in the judgment of the court the submitting of proof on each, and the submitting of issues to the jury on each, would or might lead to confusion, or unduly embarrass the accused in making his defense. And this discretion is doubtless a judicial discretion, and the subject of review in proper cases," *Gardes v. U. S., C. C. A.*, 87 Fed. 172, 175, 176, per McCormick, C. J.

² *Emanuel v. U. S., C. C. A.*, 196 Fed. 317.

³ *Re Lange*, 13 Blatchf. 546; *U. S. v. Mills*, 15 Int. Rev. Rec. 18; *U. S. v. Peterson*, 1 W. & M. 305; *U. S. v. Stetson*, 3 W. & M. 164; *U. S. v. Burns*, 5 McLean, 23; and authorities cited *infra*.

⁴ *U. S. v. Jacoby*, 12 Blatchf. 491; and authorities cited *infra* § 505. It has been held that the following counts may be joined in the same indictment: Charges of felony and misdemeanors forbidden by the same section of the Revised Statutes, *U. S. R. S.*, § 3397; namely, that in relation to stamps upon cigar boxes, *U. S. v. Jacoby*, 12 Blatchf. 491; or that charging misuse of the mails in furtherance of a lottery, *U. S. R. S.*, § 1024; *U. S. v. Ridgway*, 199 Fed. 286; or relating to the same transaction, *U. S. v. Dickinson*, 2 McLean, 325; *U. S. v. Spintz*, 18 Fed. 377. The joinder of distinct felonies and also of felonies of different grades, which are connected together, *U. S. v. Bickford*, 4 Blatchf. 337. Charges of offenses which have different punishments, *U. S. v. Bennett*, 17 Blatchf. 357 (offenses under *U. S. R. S.*, § 5431, with those under § 5434). A count for a revolt with another for exciting a revolt, *U. S. v. Peterson*, 1 W. & M. 305. Riot and assault and battery, *U. S. v. McFarlane*, 1 Cranch C. C. 163. Burglary and larceny in the same transaction, *Ex parte Peters*, 12 Fed. 461 (2 McCrary, 403). Bigamy and adultery charged as committed on the same day with the same woman, *U. S. v. West*, 7 Utah, 437. Charges for having counterfeit money in the defendant's possession at different times within a short period of time, *U. S. v. Howell*, 65 Fed. 402 (between the dates May 21st and June 22d of the same year). A count for counterfeiting money and aiding and assisting others in so doing; with another alleging that he caused

committed at different times,⁵ and although some are felonious and others misdemeanors⁶ may be joined in one indictment; but not if the felonies are capital offenses.⁷

§ 502. *Misjoinder of counts.* It has been held that the following counts cannot be joined in an indictment: A count for conspiracy with a count for murder.¹ A count for subornation of perjury with a count alleging the transmission of false papers to the pension office.² Four separate offenses: That the defendant carried on the business of retailing liquor without posting in his place the stamp denoting the payment of the special tax required by law; that he carried on the said busi-

and procured others so to do, U. S. v. Burns, 5 McLean, 23. The charge of feloniously taking gold metal from the mint with that of the felonious taking and embezzlement of metals at the mint, committed to the defendant's charge, U. S. v. Jones, 69 Fed. 973. Charges of the transmission of several false papers to the pension office upon an application for bounty land, U. S. v. Bickford, 4 Blatchf. 337; but it was held that these cannot be joined with counts for the subornation of perjury, therewith connected, U. S. v. Bickford, 4 Blatchf. 337. A count for making, presenting or causing to be made or presented, a false claim with another, or causing to be furnished a false affidavit in support of the same claim, Ingraham v. U. S., 155 U. S. 434, 39 L. ed. 213. That defendant received money "under a threat of informing and as a consideration for not informing," against a violation of the Internal Revenue law, U. S. v. Fero, 18 Fed. 901. The defendant, on or about a certain date, and at other times before, did sell, "to John Doe and Richard Roe, and to divers other persons," whose real names are unknown, 'an intoxicating liquor, called 'whiskey,' to wit, one

glass, pint, quart, gallon of said liquor (the real quantity is to the grand jurors unknown), Endleman v. U. S., C. C. A., 86 Fed. 456, 30 C. C. A. 186. Charges of hindering voters at an election and of conspiring to hinder them at the same election, U. S. v. Belvin, 46 Fed. 381. It has been held that an indictment for a conspiracy to injure and intimidate the United States marshal and his posse, and to deprive them of their constitutional right to arrest the defendant upon legal process, which avers that the result of the conspiracy was the killing of a deputy marshal, is not objectionable as charging the defendant with both conspiracy and murder, U. S. v. Davis, 103 Fed. 457. The joinder of offenses under the National Banking laws, *infra*, § 506; and the postal laws, *infra*, § 503; are elsewhere discussed.

⁵ U. S. v. Wentworth, 11 Fed. 52; and authorities cited *infra*, § 505.

⁶ U. S. v. Ridgway, 199 Fed. 286.

⁷ U. S. v. Sharp, Peters C. C. 131.

§ 502. ¹ U. S. v. Scott, 4 Bissell, 29.

² U. S. v. Bickford, 4 Blatchf. 337. But see Ingraham v. U. S., 155 U. S. 434, 39 L. ed. 213.

ness without having paid the special tax required by law; that he carried on the business of dealing in manufactured tobacco without posting in the place the stamp denoting the payment of the special tax required by law; that he carried on the said business without having paid the special tax required by law; the first and third offenses being misdemeanors punishable by a fine under one section of the Revised Statutes;³ the fourth a misdemeanor punishable by a fine under another section,⁴ and the second a felony punishable by a fine and imprisonment under the section last cited.⁵ It has been held to be improper, to join in the same indictment a charge of a conspiracy, on the part of the officers of the Government, under one section of the Revised Statutes,⁶ with a charge of a conspiracy against private citizens under another section,⁷ there being a difference in the punishment provided for in each section.⁸ Counts which allege offenses, of which but one person can be guilty, cannot be joined with others alleging that several persons committed an offense, which is in its nature several.⁹

§ 503. Joinder of charges of unlawful use of the mails.

The last clause of that section of the Revised Statutes, which makes it a crime to send letters through the post-office in aid of a scheme to defraud, provides: "The indictment, information or complaint may severally charge offenses, to the number of three, when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device,"¹ Where an indictment charges more than three offenses, committed within the same six months, it will not be quashed;² but the district attorney may enter a *nolle prosequi* as to the surplus counts and proceed upon the number authorized by the statute to be joined; and the court may compel him to do this, or, at the trial, direct him to

³ U. S. R. S., § 3239.

⁴ U. S. R. S., § 3242.

⁵ U. S. v. Gaston, 28 Fed. 848.

⁶ U. S. R. S., § 3169.

⁷ U. S. R. S., § 5440.

⁸ U. S. v. McDonald, 3 Dillon, 543,

Fed. Cas. No. 15,670; distinguished, U. S. v. Van Leuven, 62 Fed. 62.

⁹ U. S. v. Kazinski, 2 Sprague, 7, 26 Fed. Cas. No. 15,508.

§ 503. ¹ U. S. R. S., § 5480.

² U. S. v. Nye, 4 Fed. 888; Etheredge v. U. S., C. C. A., 186 Fed. 434.

elect upon which charges he will proceed;³ and the full statutory penalty may be imposed for each offense.⁴ An indictment for the use of the mails, to defraud, is not void because offenses not committed within the same six calendar months are joined therein; but the offenses in such case are separate and distinct and are punishable as such.⁵ It is not improper to charge in the same indictment: That defendant "did deposit and cause to be deposited," obscene matter in the mails;⁶ that defendant, on a certain day, deposited in the post-office, to be sent by mail, a number of circulars concerning the same lottery.⁷ It has been held to be proper to unite counts for the embezzlement of different letters received at a post-office from various points within a few days.⁸ A count is bad for duplicity which alleges that on a certain day, and on each and every secular day between the end of that month and a specified day more than two months later, the defendant deposited in a specified post-office, to be sent by mail, five hundred printed circulars concerning a lottery, duly addressed and postpaid, directed to divers persons beyond the limits of the district.⁹ An objection that an indictment for sending letters through the mail contains more than three offenses cannot be entertained after verdict.¹⁰

§ 504. Joinder of defendants to indictment. Two or more may be jointly indicted for offenses arising wholly out of the same joint act or omission.¹ Defendants cannot be jointly indicted for crimes committed at the same time, when they did not jointly act.² It has been said that, to authorize a joint indictment, the duty imposed upon the defendants and violated by them must be a joint duty.³ It is improper to charge two

³ Ibid.

⁴ *Re Snow*, 120 U. S. 274, 30 L. ed. 658, *Re De Bara*, 179 U. S. 316, 45 L. ed. 207.

⁵ *Hall v. U. S.*, C. C. A., 152 Fed. 420; *U. S. v. McViekar*, 164 Fed. 894.

⁶ *U. S. v. Janes*, 74 Fed. 545.

⁷ *U. S. v. Patty*, 2 Fed. 664. For separate offenses in the use of the mails in carrying out the same scheme to defraud, see *Marshall v. U. S.*, C. C. A., 197 Fed. 511.

⁸ *U. S. v. Brent*, 17 Int. Rev. Rec.

54, Fed. Cas. No. 14,640; *U. S. v. O'Callahan*, 6 McLean, 596.

⁹ *U. S. v. Patty*, 2 Fed. 664.

¹⁰ *U. S. v. Durland*, 65 Fed. 408.

§ 504. ¹ *U. S. v. McGinnis*, Abb. U. S. 120, 26 Fed. Cas. No. 15,678; *Volmer v. State*, 34 Ark. 487; *Commonwealth v. Miller*, 2 Pars. Eq. Cas. (Pa.) 480; 22 Cyc. 373.

² *U. S. v. Kazinski*, 2 Sprague, 7, 26 Fed. Cas. No. 15,508.

³ *U. S. v. Davis*, 33 Fed. 621. It has been held; that persons may be jointly indicted for signing, in their

persons in the same indictment, and in a single count, one with agreeing to receive a bribe as a member of Congress, and the other with agreeing to give such bribe.⁴

§ 505. Consolidation of indictments. Where two or more indictments are found, which contain charges, all of which might have been joined in a single indictment in separate counts, the court may order them to be consolidated.¹ It has been said that this statute vests, in the trial court, a sound discretion in deciding whether a fair and impartial trial would be prevented by a joinder, notwithstanding the same would be permitted by the general language of the section.²

Indictments may be consolidated in cases where the charges could not be joined at common law.³ The consolidation of several indictments is proper where all the counts in all of them could have been included, in the first instance, in one indictment.⁴ Where several indictments are consolidated, a general

partnership name, a false return to an assessor of Internal Revenue, *U. S. v. McGinnis*, 1 Abb. U. S. 120, 26 Fed. Cas. No. 15,678; that a judge and a clerk of an election cannot be jointly indicted for failing to sign and attest a poll ticket and to set down, at the foot thereof, the total number of persons marked "voted," *U. S. v. Davis*, 33 Fed. 621.

⁴ *U. S. v. Dietrich*, 126 Fed. 664. § 505. ¹ *U. S. R. S.*, § 1024; quoted § 501, *supra*. For a discussion of the consolidation of civil actions, see *supra*, § 472.

² *Dolan v. U. S.*, C. C. A., 133 Fed. 440, 446, 69 C. C. A., 274. "There are often circumstances which would render a uniting of several offenses unjust to a defendant, and as the old cases put it 'confound him in the making of his defense.' Whenever such a situation arises, the trial court will protect the defendant's right to a fair trial," *Dolan v. U. S.*, C. C. A., 133 Fed. 440, 446, 69 C. C. A., 274. It was held to be improper to consolidate four indict-

ments, two of which charged all of five defendants with assault with intent to kill two different persons on the same day; a third, all of them with arson of a dwelling house two weeks later; and a fourth, three only of them with arson of another dwelling house on the day of the assaults, *McElroy v. U. S.*, 164 U. S. 76.

³ *Dolan v. U. S.*, C. C. A., 133 Fed. 440, 69 C. C. A. 274.

⁴ *Turner v. U. S.*, C. C. A., 66 Fed. 280. It has been held proper to consolidate: different charges of extortion by an officer under color of his office, *Williams v. U. S.*, 168 U. S. 382 (the indictments being under *U. S. R. S.*, § 5481). See, also, *U. S. v. Folsom*, 7 New Mexico, 532. Indictments against the same persons for assaults, with intent to kill different persons, upon the same day, and a third indictment for arson of a dwelling house of a third man upon a different day about two weeks later, *McElroy v. U. S.*, 164 U. S. 76, 41 L. ed. 355. Indictments

verdict is proper, and that will be sustained if any of the counts be good and charge an offense.⁵ It has been said that whether, in such a case, the defendant may be sentenced to more than the maximum punishment for one of the offenses charged, depends upon the circumstances.⁶ Where two indictments were tried together, but there had been no order for their consolidation, it was said that the defendant might "have been lawfully sentenced to a term of imprisonment on each indictment separately, the sentences to take effect together, or one after the other, as the court in pronouncing judgment should direct."⁷ It seems that a defendant aggrieved by the consolidation should move to quash the indictments or to compel an election.⁸ The consolidation of indictments is largely within the discretion of the trial court and will rarely be reviewed upon writ of error.⁹

§ 506. Indictments for the violation of the national banking laws. The Revised Statutes provide: "No officer acting under the provisions of this Title shall countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this Title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years."¹ "Every person who mutilates, cuts, defaces, disfigures, or perforates with

against the same person for conspiracy to defraud the United States by means of illegal entries of adjacent public lands by different persons, *Olson v. U. S.*, C. C. A., 133 Fed. 849, 67 C. C. A. 21. Indictments charging the same defendants with aiding and abetting different persons in the use of false certificates of citizenship at the same election, *Dolan v. U. S.*, C. C. A., 133 Fed. 440, 69 C. C. A., 274.

⁵ *U. S. v. Stone*, 8 Fed. 232. See *U. S. v. Patterson*, 6 McLean, 466, Fed. Cas. No. 16,011; *U. S. v. Seagrist*, 4 Blatchf. 420, Fed. Cas. No.

16,245; *State v. Callicutt*, 1 Lea. (Tenn.) 714.

⁶ *Ex parte Hibbs*, 26 Fed. 421. See *ex parte Peters*, 4 Dillon, 169, Fed. Cas. No. 11,027; *U. S. v. Maguire*, 3 Cent. Law J. 273, Fed. Cas. No. 15,708; *Re Haynes*, 30 Fed. 767.

⁷ *Re Haynes*, 30 Fed. 767, 771.

⁸ *U. S. v. Bennett* 17 Blatchf. 357, Fed. Cas. No. 14,572; *Dolan v. U. S.*, C. C. A., 133 Fed. 440, 446, 39 C. C. A. 274.

⁹ *Lemon v. U. S.*, C. C. A., 164 Fed. 953.

§ 506. ¹ *U. S. R. S.*, § 5187.

holes, or unites or cements together, or does any other thing to any bank-bill, draft, note, or other evidence of debt, issued by any national banking association, or who causes or procures the same to be done, with intent to render such bank-bill, draft, note, or other evidence of debt unfit to be re-issued by said association, shall be liable to a penalty of fifty dollars, recoverable by the association.”² “Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets an officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.”³ “It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.”⁴ A later statute provides: “That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled ‘An act in reference to certifying checks by national banks,’ approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any

² U. S. R. S., § 5189.

⁴ U. S. R. S., § 5208.

³ U. S. R. S., § 5209.

fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any Circuit or District Court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.”⁵ The crimes named by these statutes are infamous and must be prosecuted by indictment.⁶ “It is evidently the intention of the statute not to use the words ‘embezzle’ and ‘wilfully misapply’ as synonymous. In order to misapply the funds of the bank it is not necessary that the officer charged should be in the actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of wilful misapplication.”⁷

Where an officer of a national bank permits a firm, of which he is a member, to overdraw its account with intent to defraud, he is punishable criminally under these sections.⁸ A charge of the embezzlement, abstraction or wilful misapplication of the funds of a national bank need not be described by the words used to describe larceny.⁹ The charge that the defendant committed the acts alleged, in his capacity “as president and agent,” does not vitiate the counts, which so describe him.¹⁰ A charge that the funds alleged to have been embezzled were at the time, in the possession of the defendant, as president and agent, is sufficient.¹¹ A charge of facts constituting a conversion is not bad because it avers that it was done with an intent to convert the money.¹² An averment that a national bank officer wrong-

⁵ Act of July 12, 1882, c. 290, 22 St. at L. 162, § 13.

⁶ U. S. v. DeWalt, 128 U. S. 393, 32 L. ed. 485.

⁷ U. S. v. Northway, 120 U. S. 327, 332, 333, 30 L. ed. 664, 665, 666.

⁸ U. S. v. Fish, 24 Fed. 585.

⁹ U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664.

¹⁰ Ibid.

¹¹ U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664.

¹² Coffin v. U. S., 156 U. S. 432, 450, 39 L. ed. 481; Morse v. U. S., 161 Fed. 429, 433.

fully used the bank's money in his care and under his control, for the purpose of bribing certain city officials in his own interest, is a sufficient charge of his appropriation to his own use, although there was a further averment that there was an attempt to convert the money to the use of such officials, and that it was so converted.¹³

A count was held to be sufficient which charged that the president of a national bank made a certain check upon it, for a specified amount, to the order of a person, and delivered the same to the latter, the vice-president, then knowing that the latter did not then have, on deposit with the said association, the amount specified therein; that the said defendant as vice-president, and the president of the bank caused to be paid upon such check the amount thereof, out of the moneys of the association, in excess of all amounts which the vice-president was then entitled to draw out of the moneys, funds and credits of the association; that those two officers then intended that the vice-president should appropriate and convert, to his own use, said sum of money, although they then well knew that said sum of money was not on deposit with the association by the vice-president, and was not due and owing by and from the association to the vice-president; and that repayment thereof to the association was not in any way secured, and the vice-president had no right and title to the same.¹⁴ An allegation of a wilful misapplication of the funds of a bank is insufficient, unless it is shown how the misapplication was made and that it was unlawful.¹⁵ It is sufficient to aver that the defendant wilfully, with intent to in-

¹³ McKnight v. U. S., C. C. A., 97 Fed. 208, 38 C. C. A., 115.

¹⁴ U. S. v. Morse, 161 Fed. 429; citing Evans v. U. S., 153 U. S. 584, 38 L. ed. 830; U. S. v. Fish, 24 Fed. 585.

¹⁵ Batchelor v. U. S., 156 U. S. 426, 39 L. ed. 478.

There, the following count was held to be *insufficient*: "And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that the said Harry F. Batchelor, on the first day of January, 1891, and at

divers times and dates between January 1, 1891, and July 8, 1893, was then and there the president and a director and agent of a certain national banking association, to-wit, the Stock Growers' National Bank of Miles City, theretofore duly organized and established and then existing doing business in the city of Miles City, in the circuit and district aforesaid, under the laws of the United States of America, did then and there, at the time aforesaid, within the said district, as such president, director, and agent, by vir-

jure and defraud the bank and without the knowledge and consent of its board of directors, for his own use and benefit and

tue of such employment and while so employed, wilfully misapply forty thousand four hundred and twenty-two dollars and seventy-nine cents, of the moneys, funds, and credits then and there belonging to and the property of said association, in the manner following, to wit: That the said Harry F. Batchelor, without the knowledge or consent of the said association or the board of directors thereof, he then and there and at all times well knowing both himself and the said John W. Batchelor, hereinafter named, to be insolvent and worthless, did then and there procure of the said John W. Batchelor divers promissory notes payable to said association, some of which were endorsed by him, the said Harry F. Batchelor, but all without other or further security; with which said notes, by and through the device and pretence of discounting the same and making loans thereon, and with the proceeds of said loans so made thereon and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the moneys so obtained, he did from time to time, during the period aforesaid, take up and satisfy the individual indebtedness of him, the said Harry F. Batchelor, to the said association; and thereafter in turn, by substituting the notes of him, the said Harry F. Batchelor, to said association, sometimes endorsed by John W. Batchelor, or by one C. L. Merrill, he, the said Harry F. Batchelor, then and there well knowing the said notes to be inadequate security for the sums they represented, and the

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said notes never having with them any other security, he did then and there take up and cancel and pretend to pay to the said association the indebtedness so created to said association by John W. Batchelor as aforesaid; and did from time to time, by the fraudulent device—and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid, which they were from time to time to satisfy, to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association; all of which said sums were misapplied wilfully, and in the manner aforesaid, out of the moneys, funds and credits of said association, and converted then and there to the use, benefit and advantage of said Harry F. Batchelor, with the intention then and there had and having in him, the said Harry A. Batchelor, to injure and defraud the said association, its depositors, and other persons, corporations and firms, then doing or who might thereafter do business with the said association; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America." A charge that the defendant, president of a national bank, "procured" a note to be discounted, well knowing the maker and endorser thereof to be insolvent, is insufficient, and so is the charge that he permitted a depositor indebted to the bank, whom he knew

that of other persons, to the grand jurors unknown, misapplied certain of its moneys by receiving and discounting therewith a certain specified promissory note, which was not secured, as he well knew, and the proceeds of which discount were wholly lost, although it does not specifically aver that he knew the signer of the note to be insolvent.¹⁶ The court may refuse to compel the prosecution to elect between counts charging conspiracy and those charging misapplication, when the facts in regard to the same are intimately connected.¹⁷ When the charge is a wilful misapplication of the bank funds by buying certain shares of its stock, the statutory exception authorizing a national bank to buy its own shares when it is necessary to prevent loss upon a debt previously contracted, in good faith, must be negatived.¹⁸ Where the indictment definitely charges the value, in lawful money of the United States, of the moneys, funds and credits of the bank misapplied, it is not defective for a failure to specify whether the misapplication was of moneys, funds or credits.^{18a}

Where the defendant directs a clerk employed in the bank to make a false entry, he is a principal in the offense, and the entries are in law made by him.¹⁹ A charge that a defendant "caused" a certain entry to be made is sufficient, without an averment of the manner in which he caused it.²⁰ An entry in a book usually means an item in an account.²¹ An allegation that the defendant made a false report of the condition of the bank, "whereby, by means of a false entry therein, by him made,"

to be insolvent, to withdraw his deposit and failed to cause it to be applied to such indebtedness, when there are no allegations showing that such actions were a violation of his official duties. *U. S. v. Briton*, 108 U. S. 192, 27 L. ed. 703.

¹⁶ *U. S. v. Heinze*, 218 U. S. 532, 54 L. ed. 1139, reversing 183 Fed. 907.

¹⁷ *U. S. v. Morse*, 161 Fed. 429, 437, 438. Where the indictment charged that the president of a bank misapplied twenty-five thousand dollars of its funds, "by causing the said sum of twenty-five thousand dollars to be credited to Grant and

Ward on the books of the bank," and a single entry showed a credit of one hundred and five thousand dollars to that firm, of which the jury found that twenty-five thousand dollars was a misapplication; it was held that the variance was immaterial. *U. S. v. Fish*, 24 Fed. 585.

¹⁸ *U. S. v. Britton*, 107 U. S. 655, 27 L. ed. 520.

^{18a} *U. S. v. Heinze*, 161 Fed. 425.

¹⁹ *Re Van Campen*, 2 Benedict, 419; *U. S. v. Harper*, 33 Fed. 471, 480.

²⁰ *McKnight v. U. S.*, C. C. A., 97 Fed. 208, 38 C. C. A. 115.

²¹ *U. S. v. Morse*, 161 Fed. 429.

&c., may support a finding that he made a false entry in a report.²² Where the indictment alleged that the false entries in question indicated that there was then, in the paying teller's department of the bank, a certain amount of money, when such amount was not there in fact; it was held not to be necessary that it should further allege that such amount was not in other departments of the bank.²³ In an indictment for making a false entry in the report of a national banking association, the preparation and completion of the report, the making of the false entry therein, its verification, its attestation, and its delivery to the comptroller, may be considered as simultaneous; and there is consequently, no repugnance in a failure to allege that they occurred in consecutive order.²⁴ An allegation that defendant "did make a certain false entry in a certain report of the said association" will not be construed to mean that the entry was an alteration made after the report was completed.²⁵ The omission of the signs for dollars and cents in the recital of the alleged false entries in the reports is a matter of form, which will not affect the validity of the indictment.²⁶ An indictment against the president of a national bank, for making false entries in its books, which charges that this was done "with intent to injure and defraud the said association and certain persons to the grand jurors unknown," is sufficient so far as concerns the allegations of intent.²⁷ It is sufficient to aver that defendant "in a certain report of the condition" of the bank, "made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain entry," which is described as being false.²⁸ It is not necessary to allege that, at the time the entry was made, an examiner had been appointed.²⁹ The erasure of figures, and the writing of additional figures in the place of those erased, is the making of an entry.³⁰

The entries must be wilfully and intentionally false. Mere clerical mistakes, or an arbitrary exercise of discretion in keep-

²² U. S. v. Bartow, 10 Fed. 874.

²⁷ L. ed. 520; U. S. v. Potter, 56 Fed. 83, 97.

²³ U. S. v. Britton, 107 U. S. 655, 27 L. ed. 520.

²⁸ Cochran v. U. S., 157 U. S. 286,

²⁴ U. S. v. French, 57 Fed. 382.

³⁹ L. ed. 704.

²⁵ U. S. v. French, 57 Fed. 382.

²⁹ U. S. v. Britton, 107 U. S. 655,

²⁶ U. S. v. Potter, 56 Fed. 83.

2 Sup. Ct. 512, 27 L. ed. 520.

²⁷ U. S. v. Britton, 107 U. S. 655,

³⁰ U. S. v. Crecilius, 34 Fed. 30.

ing the books, which does not amount to an abuse, are insufficient to constitute an offense.³¹ False entries in a statement made by a bookkeeper at the request of the bank examiner, which purports to state the balances due depositors, will not sustain an indictment; since it is the duty of the examiner, and not of the bookkeeper, to make the balances.³² Counts charging false entries by the president in reports, which allege that the reports were made in conformity with the law and then set them out by their tenor, are bad if they fail to allege specifically that the reports were verified and attested by the cashier.³³ It has been held to be proper to join charges against bank officers for making false entries in the books of a national bank, where, in some counts, the defendants are jointly charged with making false entries in the reports, and in others, the cashier is charged with making false entries in the reports and the president with aiding and abetting him therein;³⁴ and to join charges against officers and a customer of a national bank, where the officers are charged with embezzlement of the bank funds, and the customer with aiding and abetting them therein, and the cashier is charged with making false entries in the bank books, and the president and customer with aiding and abetting him in the same.³⁵ But these must be stated in different counts.³⁶ Counts were held to be bad for duplicity when they described two different entries in different parts of the same book or report, although, it seems, that they were debit and credit entries relating to the same transactions.³⁷

The word "certified" in an indictment, when applied to a bank check, is sufficient without a specification of the words written or printed upon the check.³⁸ A count is sufficient which alleges that the defendant, as president of a bank, did then and there on a specified day and place, within the district and juris-

³¹ U. S. v. Allen, 47 Fed. 696.

³² U. S. v. Ege, 49 Fed. 852.

³³ U. S. v. Potter, 56 Fed. 97.

³⁴ U. S. v. Berry, 96 Fed. 842.

³⁵ Gardes v. U. S., C. C. A., 87 Fed. 172.

³⁶ U. S. v. Cadwallader, 59 Fed. 677.

³⁷ U. S. v. Morse, 161 Fed. 429, 437.

³⁸ U. S. v. Heinze, 161 Fed. 425.

The word "certify" as applied to a bank check indicates that certain words have been written or printed thereupon, thereby causing an obligation of the bank to the holder of the same, and that it has passed from the bank's custody into the hands of some other person. *Ibid.*

diction of the court, unlawfully, knowingly and wilfully certify a certain check, set forth in full with a description of the members of the firm which signed the same; that the said persons as copartners under the firm name and style, as aforesaid, by whom said check was then and there drawn, as aforesaid, did not then and there, to wit, at the time said check was so certified by said defendant, as aforesaid, have on deposit in said association an amount of money then and there equal to the amount then and there specified in the check, as he, the said defendant, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.³⁹ Where an officer of a national bank certifies a check upon the same, believing, in good faith, that the drawer has a sufficient deposit, and having reasonable grounds for such belief, he cannot be convicted under the statute, although the drawer's account was, at the time, overdrawn.⁴⁰ A count is not bad for duplicity because it charges both the certification of a check, when the drawer had not on deposit an amount of money equal to the amount in the check specified, and the certification of a check before the amount thereof had been regularly entered to the credit of the dealer on the books of the banking association.⁴¹

The particular act by which the aiding and abetting was consummated need not be set out specifically.⁴² A charge that the

³⁹ *Potter v. U. S.*, 155 U. S. 438, 39 L. ed. 214.

⁴⁰ *Spurr v. U. S.*, 174 U. S. 728, 43 L. ed. 1150, 19 Sup. Ct. 812.

⁴¹ *U. S. v. Potter*, 56 Fed. 83; *U. S. v. Heinze*, 161 Fed. 425.

⁴² *Coffin v. U. S.*, 156 U. S. 432, 448, 39 L. ed. 481, 489.

In that case the following counts were held to be sufficient: "The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-two, the said Theodore P. Haughey

then and there being president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, in the city of Indianapolis, in the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of the said association, which were then and there under his con-

president of a bank aided and abetted one, who is alleged to be the cashier, in the misapplication, need not charge that the

trol, with intent to convert the same to the use of the Indianapolis Cabinet Company, and to other persons, to the grand jurors unknown, in a large sum, to wit, the sum of six thousand three hundred and eighteen dollars, by then and there causing said sum to be paid out of the moneys, funds, and credits of said association, upon a check drawn upon said association by the Indianapolis Cabinet Company, which check was then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said association to his credit. That said Indianapolis Cabinet Company was then and there insolvent as the said Theodore P. Haughey then and there well knew, whereby said sum became lost to said association; that all of said acts as aforesaid were done with intent to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association with the custody, control and care of the moneys, funds, credits, and assets of said association, and the general superintendence of its affairs. And the grand jurors aforesaid to further say that Francis A. Coffin, Percival D. Coffin, and Albert S. Reed did unlawfully, wilfully, knowingly, and feloniously and with intent to injure and defraud said association, on, to wit, the twenty-first day of December, in the year of our Lord

one thousand eight hundred and ninety-two, aid and abet the said Theodore P. Haughey as aforesaid to wrongfully, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association as aforesaid, to wit, the sum of six thousand three hundred and eighteen dollars. . . . The grand jurors aforesaid, upon their oaths aforesaid do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-two, the said Theodore P. Haughey, then and there being the president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, in the city of Indianapolis, in the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of the said association, without authority of the directors thereof with intent to convert the same to the use of the Indianapolis Cabinet Company and to other persons, to the grand jurors unknown, in a large sum, to wit, the sum of three thousand nine hundred and sixty dollars and eighty-four cents, by then and there paying and causing said sum to be paid out of

the moneys, funds, and credits of said association upon certain divers checks drawn upon said association by the Indianapolis Cabinet Company, which checks were then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said association to its credit. That said Indianapolis Cabinet Company was then and there insolvent as the said Theodore P. Haughey then and there well knew, whereby said sum became lost to said association; that all of said acts as aforesaid were done with intent to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association, with the custody, control, and care of the moneys, funds, credits, and assets of said association, and the general superintendence of all its affairs. And the grand jurors aforesaid do further say that Francis A. Coffin and Percival B. Coffin and Albert S. Reed at the district and State of Indiana aforesaid did unlawfully, wilfully, knowingly, and feloniously and with intent to injure and defraud said association on, to wit, the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-two, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and wilfully misapply the money, funds, and credits of said association, to wit, the sum of three thousand nine hundred and sixty dollars and eigh-

ty-four cents aforesaid. . . . The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district aforesaid, on, to wit, the first day of January, in the year of our Lord one thousand eight hundred and ninety-one, and on divers times between said date and the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-three, the said Theodore P. Haughey then and there being the president of a certain national banking association then and there known and designated as the Indianapolis National Bank of Indianapolis, in the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, and without authority of the board of directors, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association, with intent to convert the same to the use of the Indianapolis Cabinet Company, a more particular description of said moneys, funds, and credits being to the grand jurors unknown, in a large amount, to wit, the sum of three hundred and seventy-five thousand dollars, by then and there cashing, discounting, and paying for the use and benefit of said Indianapolis Cabinet Company, out of the funds of said association, a large number of worthless and insolvent notes, drafts, and bills of exchange being drawn upon and by divers persons, firms, and companies, and corpora-

president knew that such person was cashier.⁴³ Where an indictment charged a person with aiding or abetting a bank officer in committing an offense by a misapplication of funds of the bank, and each count averred that the person whom the defendant was charged with abetting, misapplied the funds while an officer of the bank, and then averred that the defendant had unlawfully, wilfully, feloniously and knowingly, and with intent to defraud it and abet the said person "as aforesaid," without repeating the fact that the latter was then an officer of the bank; it was held to be sufficient.⁴⁴ Where an indictment charged "the defendants, Warner and Work, as aiders and abettors of Ferdinand Ward, in a wilful misapplication by Ward of the money of the Marine Bank, of which association Ward was at the time a director," and contained a statement, "that Ward intended that he and Warner and Work should convert to their own use the money in question," but no allegation that such a conversion by Ward was thereafter affected; a demurrer was sustained.⁴⁵

§ 507. Ordinance on Constitution as to juries in criminal prosecutions. The Sixth Amendment to the Federal Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial

tions, each and all of whom were then insolvent, as the said Theodore P. Houghy then and there well knew, whereby said sum was wholly lost to said association; with intent then and there and thereby to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association with the custody, control, and care of the funds, credits, and assets of said association, and the general superintendence of its affairs, and agent of said association in the transaction of all its business. And the grand jurors aforesaid do further say that Francis A. Coffin, Percival B. Coffin and Albert S. Reed, at the district and State of Indiana aforesaid, did unlawfully, knowing-

ly, and feloniously and with intent to injure and defraud said association, on, to wit, the first day of January, in the year of our Lord one thousand eight hundred and ninety-one, and on divers times between said date and the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-three, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association, to wit, the sum of three hundred and seventy-five thousand dollars aforesaid."

⁴³ U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664.

⁴⁴ Coffin v. U. S., 156 U. S. 432, 449, 39 L. ed. 481, 489.

⁴⁵ U. S. v. Warner, 26 Fed. 616.

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

This does not give him the right to be tried by a jury composed of persons representing every locality in the district, but only by a jury, every member of which is a resident of the territory which comprised the district at the time the offense is charged to have been committed.¹ It has been held that a direction that grand jury shall be summoned from a certain part of the district, in accordance with the Revised Statutes,² is not in conflict with this Amendment.³ Where a district is divided into several divisions, a grand jury selected from the inhabitants of a single division is not forbidden by the Constitution.⁴ An indictment was not quashed because the court excluded, from the grand jury, residents of counties where the acts charged were committed.⁵

When, between the time of the commission of an offense and that of the indictment and trial for the same, the place where it was committed is made a part of a new or different district or division, the court of the district or division where it is situated at the time of the indictment and trial has jurisdiction.⁶

§ 508. Qualifications of grand and petit jurors. The Judicial Code provides: "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions as jurors of the highest court of law in such State may have and be entitled to, at the time when such jurors for service in the courts of the United States are summoned."¹ This relieves talesmen from any

§ 507. 1 U. S. v. Peuschel, 116 Fed. 642. See Post v. U. S., 161 U. S. 583, 40 L. ed. 816.

² U. S. R. S., § 802.

³ U. S. v. Ayres, 46 Fed. 651.

⁴ U. S. v. Dixon, 44 Fed. 401.

⁵ U. S. v. Green, 113 Fed. 683; aff'd. C. C. A., 154 Fed. 601; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357.

⁶ *Ex parte* Moran, C. C. A., 144 Fed. 594.

§ 508. 1 Jud. Code, § 275, 36 Stat. at L. 1087, re-enacting U. S. R. S., § 800. It has been said: that the Federal Courts have no discretion concerning the qualifications and exemptions of jurors. The law is that they shall have the like qualifications and shall be entitled to like exemptions that jurors of the higher courts of the State had at the time of the enactment of the statute, or shall hereafter have in such State.

disability imposed by the Fourteenth Amendment.² No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, on account of race, color, or previous condition of servitude.³

In considering objections to grand jurors, the Federal courts are not restricted to such as are specifically designated by the State laws, but they may give effect to any objection which goes to the fitness of the men to serve.⁴ The court may, of its own motion, discharge grand jurors, when those substituted are not disqualified;⁵ and the court may, of its own motion, enforce other objections to grand jurors than those prescribed by the State statutes.⁶ It has been said that the word qualifications,

U. S. v. Wilson, 6 McLean, 604, Fed. Cas. No. 16,737; U. S. v. Gardner, 5 Chicago Leg. News, 501, Fed. Cas. No. 15,187; U. S. v. Coit, 1 Car. L. Rep. 346, Fed. Cas. No. 14,829. *Contra*, U. S. v. Price, 3 Hall, L. J. 121, Fed. Cas. No. 16,088. It is not necessary that any court rules should specify the qualifications. Without any court rule, jurors not having them may be challenged. U. S. v. Collins, 1 Woods, 499, Fed. Cas. No. 14,837. A State law relating to the challenges of jurors as to the favor or to the array pertains to their qualifications and exemptions, and is in force, and is followed by the Federal Courts; U. S. v. Douglass, 2 Blatchf. 207, Fed. Cas. No. 14,989; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134; U. S. v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16,429; U. S. v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550. But the right to a peremptory challenge, which sets aside a jurymen without regard to his qualification or exemption, is not affected by this section. U. S. v. Shackelford, 18 How. 588, 15 L. ed. 495; U. S. v. Douglass, 2 Blatchf. 207, Fed. Cas. No. 14,989; U. S. v. Devlin, 6 Blatchf. 71, Fed. Cas. No.

14,953. Other sections of the Revised Statutes regulate peremptory challenges. U. S. R. S., §§ 819, 1031, 1063. See *infra*, § 482. Those who are exempt from serving on juries are not disqualified, unless there is some statutory regulation to that effect. U. S. v. Gardner, 5 Chicago Leg. News, 501, Fed. Cas. No. 15,187. It was held not to be a ground of challenge to a grand juror, under the statutes of California, that his name was not on the last preceding assessment roll of the county from which he was summoned. U. S. v. Benson, 31 Fed. 896. It has been said that, where the State laws provide that jurors shall be selected from the book of the receiver of tax returns in each county, the fact that a man's name there appears implies that he is qualified, but does not establish the fact. U. S. v. Collins, 1 Woods, 499, Fed. Cas. No. 14,837.

² *Re Carnes*, 31 Fed. 397.

³ Jud. Code, § 278, 36 St. at L. 1087, re-enacting in part Act of March 1, 1875, ch. 114, § 4, 18 St. at L. 336.

⁴ U. S. v. Benson, 31 Fed. 896.

⁵ U. S. v. Jones, 69 Fed. 973.

⁶ U. S. v. Jones, 69 Fed. 973. It

has respect to the juror personally and may relate to his age, property, citizenship, or anything else belonging to his personal standing;⁷ but does not refer to special reasons, which do not exclude the juror from the panel, but only preclude him from acting in the particular case;⁸ and that, consequently, the prosecuting witness may serve upon the grand jury, although he was disqualified under the State laws to act in the case, where he is a witness.⁹ The fact that a man is a member of a political party, and a strong partisan, does not disqualify him as a grand juror in election cases.¹⁰

§ 509. Selection of grand and petit jurors. "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alter-

was held that the fact that a grand juror had said, when he heard that strikers were destroying private property, that they ought to be shot, did not disqualify him from taking part in the finding of an indictment against a striker for obstructing mails and commerce. *U. S. v. Clune*, 62 Fed. 798. And that an officer who had issued a warrant of arrest for the accused, and had expressed his opinion as to his guilt, was not disqualified from serving upon a grand jury, which returned an indictment against him. *U. S. v. Belvin*, 46 Fed. 381. But a plea in

abatement was sustained and an indictment dismissed, when it appeared that one of the grand jurors had served on a jury which had, on a former trial, found the accused guilty of the same offense. *U. S. v. Jones*, 31 Fed. 725.

⁷ *U. S. v. Collins*, 1 Woods, 499, Fed. Cas. No. 14,837.

⁸ *U. S. v. Williams*, 1 Dillon, 485, Fed. Cas. No. 16,716.

⁹ *U. S. v. Williams*, 1 Dillon, 485, 495; Fed. Cas. No. 16,716. *Contra*, *U. S. v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134.

¹⁰ *U. S. v. Eagan*, 30 Fed. 608.

nately, without reference to party affiliations until the whole number required shall be placed therein.”¹

§ 509. ¹Jud. Code, § 276, 36 St. at L. 1087, re-enacting in substance Act of June 30, 1879, ch. 52, § 2, 21 St. at L. 43. See *U. S. v. Miller*, 187 Fed. 369. When the name of one of the grand jurors who found an indictment was not put into the box by any competent authority, nor drawn from the box, it was held that the indictment was not vitiated when there was no imputation that the name appeared in the *venire* through bad faith. *U. S. v. Ambrose*, 3 Fed. 283. Where jurors were lawfully chosen by jury commissioners of opposing political faiths, it was held to be of no moment that their names were placed in the jury box by handfuls, instead of alternately by the clerk and by the commissioner. *U. S. v. Greene*, 113 Fed. 683. *Aff'd*, *Greene v. U. S.*, C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357. Where the clerk is present and supervises the transaction, the manual act of placing the tickets in the box may be performed by a deputy clerk. *Ibid.* Where the boxes for the juries of the District and Circuit Courts contained more than three hundred names, and the court directed the jury to be drawn “from the jury boxes,” the indictment was not quashed because the grand jury was in fact drawn from one of the boxes, which contained less than three hundred names. *Ibid.* It was held that an indictment should not be quashed on the ground that the jury box was not kept continuously in the clerk’s custody; where, in pursuance of the usual practice, a jury for another division of the same district was drawn at the official

residence of the judge and then transmitted to the clerk’s office in the other division by a reliable express company. *Ibid.* Where a new jury commissioner is appointed, he and the clerk may use the box in which names were placed by the clerk and his predecessor; and, in the absence of testimony, it will be presumed that the names which he there finds were duly placed therein. *May v. U. S.*, C. C. A., 199 Fed. 53. The jury commissioner may be appointed by a judge of another district, who is authorized to hold court there. *Ibid.* It has been held that the legality of the panel is not affected by a direction of the court that additional grand jurors be summoned, after a sufficient number have been impanelled and sworn to constitute a legal Grand Jury, *U. S. v. Nevin*, 199 Fed. 831, and that the summons by the marshal of some of the members of a Grand Jury, by the order of the court, from the body of the district, without drawing their names, will not affect the validity of an indictment where the persons thus summoned are duly qualified. *Ibid.* An indictment was quashed where the court ordered that thirty-six names be drawn for the formation of a grand jury and that the marshal summon therefrom twenty-three persons whom he should select. *U. S. v. Lewis*, 192 Fed. 633. Under the former statute it was held, that a judge from another district, duly designated to act, might make the necessary order for the selection of a grand jury. *May v. U. S.*, C. C. A., 199 Fed. 53. No notice of the drawing of the grand

"Jurors shall be returned from such parts of the district from time to time as the court shall direct, so as not to incur any unnecessary expense or unduly to burden the citizens of any part

jurors need be given to anyone. U. S. v. Lewis, 192 Fed. 633.

Under the Revised Statutes, it was held that the Federal courts had a large discretion as to the extent to which they might follow the details of State practice and avail themselves of the services of State officers, and that they might exercise this either by a general standing rule or by a special order. *Silsbury v. Foote*, 14 How 218, 14 L. ed. 394, U. S. v. *Shackleford*, 18 How. 588, 15 L. ed. 495; U. S. v. *Richardson*, 28 Fed. 61, 69; U. S. v. *Gardiner*, 5 Chicago Leg. News, 501; U. S. v. *Wilson*, 6 McLean, 604. Substantial conformity was all that was required. U. S. v. *Douglass*, 2 Blatchf. 207; U. S. v. *Reed*, 2 Blatchf. 435; U. S. v. *Tallman*, 10 Blatchf. 21; U. S. v. *Collins*, 1 Woods, 499; U. S. v. *Woodruff*, 4 McLean, 105 *Silsbury v. Foote*, 14 How. 218, 14 L. ed. 394; U. S. v. *Shackleford*, 18 How. 588, 15 L. ed. 495; U. S. v. *Rondeau*, 16 Fed. 109; *Kie v. U. S.*, 27 Fed. 351; U. S. v. *Richardson*, 28 Fed. 61; U. S. v. *Benson*, 31 Fed. 896; U. S. v. *Dow*, Taney, 34. It was held that a change in the practice of the State courts in the mode of summoning jurors, although based upon a statute, is not binding upon the Federal courts, until they have adopted it by rule, or otherwise. *Alston v. Manning*, Chase, 460; that an indictment was not rendered invalid because the notice of the town meeting for drawing the grand jurors was posted only three days, instead of four, as was required by the *venire facias*, issued to the constable, and the State statutes; U. S.

v. *Richardson*, 28 Fed. 61, 69, 74; that the drawing of the jurors within thirty days after each term, and not, as in the State court, on the last day of the term, was an immaterial variance; U. S. v. *Collins*, 1 Woods, 499; that it was not necessary that the officers who attended to drawing the jurors should be the same, either in rank or in number, nor that the jury boxes should be the same in material or shape, nor that they should be kept in the same shape and manner, nor that the same number of names should be placed in the box as in the State courts. U. S. v. *Collins*, 1 Woods, 499; U. S. v. *Wilson*, 6 McLean, 604; that the marshal of the United States was the proper person to attend to the matter. U. S. v. *Collins* 1 Woods, 499; that the jurors need not be taken from the lists made by the State authorities; U. S. v. *Collins*, 1 Woods, 499; but that this might be done; U. S. v. *Richardson*, 28 Fed. 61, 69; that a State law requiring that jurors be taken from the books of a certain officer, the receiver of tax returns, was not binding upon the Federal courts; U. S. v. *Collins*, 1 Woods, 499; but that, where the State law in Illinois required that the jurors should be selected by an officer, a rule requiring the clerk to issue a *venire facias* to the marshal, authorizing the latter to select the jurors at his convenience, instead of requiring their selection before the issue of the writ, did not conform to the State statute. U. S. v. *Woodruff*, 4 McLean, 105; construing Illinois act of 1845. But, it was held, that the provisions

of the district with such services.”² This statute applies to grand, as well as to petit juries.³

“When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.”⁴

“When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states.”⁵

“Every grand jury empaneled before any District or Circuit Court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately

of the Missouri statute, concerning the manner of drawing grand juries, were directory and need not be followed. *U. S. v. Eagan*, 30 Fed. 608. It is no objection to a grand jury that, when they were drawn, there were in the jury box the names of only three hundred and three persons, of whom three were ineligible and three dead. *U. S. v. Rondeau*, 16 Fed. 109.

² *Jud. Code*, § 277, 36 St. at L. 1087, re-enacting *U. S. R. S.*, § 802. Where two-thirds of the population of the district resided in a city where the defendant resided and the case involved large questions concerning interstate commerce, the panel of jurors, composed principally of farmers and drawn almost entirely from outside the city, was set aside. *U. S. v. Standard Oil Co.*, 170 Fed. 988. It has been held that the court has power to direct the clerk and commissioner to place in the box the names of a specified

number of persons residing in the division of the district where the court is held, divided in a certain proportion among the different counties therein without regard to the population of such counties. *Merchants' & Miners' Transp. Co. v. U. S.*, *C. C. A.*, 199 Fed. 902; affirming *U. S. v. Merchants' & Miners' Transp. Co.*, 187 Fed. 355. It was held to be no objection to the legality of a Grand Jury that it was drawn from a district larger in area, but including the district as constituted at the time the offense was committed. *McKinney v. U. S.*, *C. C. A.*, 199 Fed. 25. As to grand juries in Illinois, see § 66, *supra*.

³ *Agnew v. U. S.*, 165 U. S. 36, 44, 41 L. ed. 624, 627; *U. S. v. Stowell*, 2 Curtis, 153.

⁴ *Ibid.*, § 280, re-enacting *U. S. R. S.*, § 804.

⁵ *Ibid.*, § 281, re-enacting *U. S. R. S.*, § 805.

or for a day fixed, from the body of the district, and not from the by-standers, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.”⁶

“No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a *venire* to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discretion, also order a *venire* to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused must be held under recognizance before indictment found.”⁷

“The district courts, the district courts of the Territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.”⁸ Objections to irregularities in the summons, the panel and the organization of a grand jury, must be made by a plea in abatement or motion to quash and are waived by a plea of “not guilty,” unless the proceedings are absolutely void.⁹

⁶ *Ibid.*, § 282, re-enacting U. S. R. S., § 808. See U. S. v. London, 176 Fed. 976.

⁷ Jur. Code, § 284, 36 St. at L. 1087, re-enacting in substance U. S. R. S., § 810. See U. S. v. Louisville & N. R. Co., 177 Fed. 780. An order for the Grand Jury need not

state for what time it is to serve. U. S. v. Lewis, 192 Fed. 633.

⁸ Jud. Code, § 285, 36 St. at L. 1087, re-enacting in substance U. S. R. S., § 811.

⁹ Burchett v. U. S., C. C. A., 194 Fed. 821. See Harlan v. McGourin, 218 U. S. 442; *infra*, §§ 515, 516.

§ 510. **Writ of venire facias.** It has been held that a writ of *venire facias*, or a process in the nature of that writ, is an indispensable prerequisite to the summons of a grand jury.¹

§ 510. 1 U. S. v. Antz, 16 Fed. 119, 122, 123; citing Act of 1846, 9 St. at L., p. 72, § 3, Rev. St. § 810; U. S. v. Reed, 2 Blatchf. 435, 451, per Nelson, J.; Peter Cook's Case, 13 How. St. Tr. 311, per Treby, L. C. J., Talcot, arguendo; People v. McKay, 18 Johns. 212. "Although the writ which was to be used by the courts of the United States for summoning the juries was denominated in the statute a *venire facias*, and in its general features was that writ, it was not precisely that. The writ of *venire facias* was the process used to summon in a jury after issue joined, and when a trial was to be had in a particular cause, and was confined to that cause. Hence it was that the challenge to the array was limited to the interest or favor of the officer who summoned. The writ used throughout all the States of the Union for the summoning of petit juries, though known as the *venire facias* was more precisely the 'general previous precept, by virtue of which the sheriff returned into the courts of jail delivery divers several panels, and returned and delivered in one or more of those panels from time to time as the court needed and called for any.' Since at the common law the writ in the nature of *venire facias* was used for no other purpose than to convene grand and petit juries, it is manifest that the Congress by authorizing its issuance meant to include it as the writ of juries, under the grant to the courts of 'power to issue all writs necessary for the exercise of their respective ju-

risdictions.' If the Congress had stopped here the question would have been, whether, there being a grant of power to issue all writs necessary for the exercise of their jurisdictions which were agreeable to the usages and principles of law, as well as a jurisdiction which for its exercise rendered grand juries necessary, namely, a jurisdiction in criminal causes, and the ancient and invariable writ according to the usages and principles of law being the *venire*, the courts of the United States must not employ that writ, or a process in the nature of that writ, in the exercise of their criminal jurisdiction. I say if Congress had stopped here, the question would have been how far the acts of Congress had made the usage of the common law the exclusive guide or rule for convening grand juries. But Congress has not yet stopped here. Congress enacted 'That no grand jury shall be summoned to attend any Circuit or District Court unless one of the judges of such Circuit Court, or the judge of said district, in his own discretion, or upon a notification by the District Attorney that such jury will be needed, orders a *venire* to issue therefor, and either of said courts may in term order a grand jury to be summoned at such time and to serve such time as it may direct, whenever in its judgment it may be proper to do so.' I am aware that the immediate purpose of this last provision was to do away with the invariable presence of a grand jury at every term of a Circuit or District Court, and to

Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the post-office addressed to such person at his usual post-office address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts."² The writ may be ordered by the judge of another district duly designated to act within the same.³ It seems that the *venire facias* may be issued by the deputy clerk in the absence of his principal.⁴ A *venire* is not illegal because the names of the jurors are attached to the same, instead of being inserted in the body thereof.⁵ The objection to the omission to issue a *venire facias* is waived unless seasonably taken.⁶

leave it discretionary with the judges whether and when such a body should be convened; but I think the fair meaning of the enactment is that Congress either makes it, or recognizes it as already being, a rigid, unyielding requirement of the law that no grand jury shall be summoned unless a *venire facias* has therefore issued, if in the vacation, by order of one of the judges, or, if in term time, by order of the court." U. S. v. Antz, 16 Fed. 119, 125.

² Jud. Code, § 279, 36 St. at L. 1087.

³ May v. U. S., C. C. A., 199 Fed. 53.

⁴ U. S. v. Greene, 113 Fed. 683.

⁵ May v. U. S., C. C. A., 199 Fed. 53. It has been held that a *venire* is irregular when addressed to "the marshal of the District of Louisiana," there being no such officer and the title of the executive officer of the court being "the marshal of the Eastern District of Louisiana."

⁶ U. S. v. Antz, 16 Fed. 119. Powers v. U. S., 223 U. S. 303, 56 L. ed. 448.

§ 511. Proceedings of grand jury. The grand jury must consist of not less than sixteen, nor more than twenty-three, persons.¹ "From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury."² "No indictments shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors."³ The organization is not vitiated because the jurors are sworn and impanelled the day before that fixed by the court for their appearance.⁴ The jurors must be duly sworn, except those who have conscientious scruples against taking an oath, and they must take an affirmation to do their duty.⁵ The record must show this fact.⁶

An objection upon the ground that the grand jury was illegally constituted, when not merely technical, may be taken at any time before the arraignment.⁷

§ 511. ¹Jud. Code, § 282, 36 St. at L. 1087 reenacting U. S. R. S., § 808. See *U. S. v. London*, 176 Fed. 976.

²*Ibid.*, § 283, re-enacting U. S. R. S., § 809.

³U. S. R. S., § 1021.

⁴*U. S. v. Lewis*, 192 Fed. 633.

⁵*Burchett v. U. S., C. C. A.*, 194 Fed. 821. The usual oath requires a grand juror diligently to inquire and true presentment make of all such matters and things as are given him in charge; to present no one for envy, hatred or malice; to leave no one unrepresented for fear, favor, or affection, reward, or hope of reward; to keep secret the counsel of the United States, his fellows and his own. *Atwell v. U. S., C. C. A.*, 17 L.R.A.(N.S.) 1049, 162 Fed. 97, 99. "It may well be said that the first three obligations of this oath relate to the positive duty required of the grand juror, while the latter relates to and defines the rule of conduct to be followed by him in the discharge of these positive duties. The first

three are demanded by direct mandate of the law; the latter only by its policy, and solely in order that the first three may be the more thoroughly and effectively performed. The first three obligations are absolutely required by the law, to be laid by oath upon the conscience of the juror; the latter may be omitted, as in some courts is done, and supplied by instructions given by the court." *Ibid.*

⁶*Burchett v. U. S., C. C. A.*, 194 Fed. 821. A recital in the indictment that the grand jury was duly selected and sworn is sufficient. *Powers v. U. S.* 223 U. S. 303, 56 L. ed. 448; *Burchett v. U. S., C. C. A.*, 194 Fed. 821. Where the record showed that all the grand jurors were duly sworn, except one, "who was duly affirmed;" it was held, that the indictment should not be quashed, although it did not affirmatively appear that such grand juror possessed conscientious scruples against taking oath. *Bram v. U. S.*, 168 U. S. 532, 42 L. ed. 568.

⁷*U. S. v. Haskell*, 169 Fed. 449.

The indictment should be endorsed "a true bill" by the foreman,⁸ and must be publicly presented in open court, the proper practice being for the grand jury to be present and answer to their names, whereupon the indictment is delivered by the foreman to the clerk and the fact entered of record;⁹ but an indictment is not void because the grand jury do not accompany the foreman to the court-room when they are in session in an adjoining room with the door opening into the same opened so that they can see the actions of their representative.¹⁰ Where an indictment has been regularly returned into open court, it will be presumed that the grand jury and the officials therewith connected discharged their respective duties with reference to the same.¹¹ The grand jury can meet and adjourn of its own motion, in the absence of an order of the court, until its discharge and may lawfully proceed in the performance of its duties whether the court is in session or not.¹² The final adjournment of the court for the term for which the jury is impanelled discharges the grand jury.¹³ The absence of one or more grand jurors, by reason of a failure to notify them of a meeting at which an indictment was found, was held not to be sufficient to invalidate the same, when there were present a sufficient number.¹⁴ It was further held that the improper discharge of a grand jury would not vitiate an indictment if the necessary number remained.¹⁵ "A court shows no punctilious respect for the Constitution in regulating their conduct. We took the institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance, not he who by a verbal pedantry tries *a priori* to formulate its limitations and its extent."¹⁶ A prelimi-

⁸ See *U. S. v. Breese*, 172 Fed. 765.

⁹ *Renigar v. U. S.*, C. C. A., 26 L.R.A.(N.S.) 683, 172 Fed. 646. A paper which purports to be an indictment, endorsed as "a true bill" by the foreman of a Grand Jury and delivered by him alone to the clerk when the court is not in session, was held not to be an indictment and to confer no jurisdiction upon the court to try the accused. *Ibid.*

¹⁰ *Breese v. U. S.*, 226 U. S. 1, 57 L. ed. —; affirming 172 Fed. 765.

¹¹ *Carlisle v. U. S.*, C. C. A., 194 Fed. 827.

¹² *Jones v. U. S.*, C. C. A., 162 Fed. 417.

¹³ *Jones v. U. S.*, C. C. A., 162 Fed. 417.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Re Kittle*, 180 Fed. 946, per Hand, J.

nary complaint is not essential to the validity of an indictment.¹⁷ A grand jury, in a court of the United States, has the right to make investigations and to find indictments and presentments, of its own motion, as well as to consider the bills laid before it by the District Attorney.¹⁸ A presentment is an accusation made by grand jurors upon their personal knowledge or observation of the facts without the testimony of witnesses.¹⁹ The proceedings of the grand jury are secret; but it has been held not to be a contempt of court for a grand juror, after an indictment has been found and he has been discharged, to disclose the testimony upon which he acted.²⁰ The minutes of the grand jury will rarely, if ever, be inspected upon a motion to quash an indictment in a Federal Court.²¹ No one has the right to be present during an investigation by the grand jury;²² except the witness when under examination,²³ the District Attorney of the United States for the district,²⁴ one of his duly appointed assistants,²⁵ his clerk,²⁶ a stenographer,²⁷ the Attorney General,²⁸

¹⁷ U. S. v. Lewis, 192 Fed. 633.

¹⁸ Frisbie v. U. S., 157 U. S. 160, 163.

¹⁹ McKinney v. U. S., C. C. A., 199 Fed. 25.

²⁰ Atwell v. U. S., C. C. A., 17 L.R.A. (N.S.) 1049, 162 Fed. 97; reversing *Re* Atwell, 140 Fed. 368.

²¹ U. S. v. Price, C. C., S. D. N. Y., August, 1908, N. Y. L. J., Sept. 9, 1908; U. S. v. Violon, 173 Fed. 501; McKinney v. U. S., C. C. A., 199 Fed. 25.

²² U. S. v. Farrington, 5 Fed. 343; U. S. v. Kilpatrick, 16 Fed. 765, 774; U. S. v. Edgerton, 80 Fed. 374; U. S. v. Rosenthal, 121 Fed. 862; U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66.

²³ U. S. v. Farrington, 5 Fed. 343; U. S. v. Edgerton, 80 Fed. 374.

²⁴ U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134; U. S. v. Rosenthal, 121 Fed. 862.

²⁵ U. S. v. Reed, 2 Blatchf. 435, 455, Fed. Cas. No. 16,134.

²⁶ U. S. v. Reed, 2 Blatchf. 435, 455, Fed. Cas. No. 16,134.

²⁷ State v. Brewster, 70 Vermont, 341.

²⁸ Act of June 30, 1906, c. 3935, 34 St. at L. 816 (U. S. Comp. St. Supp. 1907, p. 44): "That the Attorney General or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which District Attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought." This authorizes two or more such attorneys, especially appointed and designated by the Attorney General, to be present together in a Grand

an officer of the Department of Justice,²⁹ or any attorney specially appointed by the Attorney General under any provision of law when thereunto specifically directed by the Attorney General;³⁰ and none of these has a right to be present during the deliberations of the grand jury, after the testimony is closed.³¹ But, in the latter case, it was held that the presence of the District Attorney at that time was an irregularity, which, when there was no proof of its injury or prejudice to the defendant, should be disregarded.³² It has been held that the presence, after their examination, of an expert witness,³³ or of an attorney for private prosecutors, who subsequently read documents and minutes of testimony previously taken and made comments upon the same,³⁴ are grounds for setting aside an indictment. A subpoena may direct the attendance of witnesses before the grand jury alone or before both the grand jury and the petit jury as well.³⁵ When it summons witnesses before the grand jury, it should disclose the name of the person against whom the inquiry is instituted or the subject of the investigation.³⁶ A witness properly subpoenaed cannot refuse to testify before a grand jury upon the ground that there is no cause or specific charge pending.³⁷ It has been said that the evidence which shall be received before a grand jury is not subject to judicial control,³⁸ and that the proceedings before a grand jury are no part of criminal proceedings against the ac-

Jury Room, although one of them acts as a stenographer. *U. S. v. Haskell*, 169 Fed. 449. But it does not permit the presence of an expert accountant. *U. S. v. Heinze*, 177 Fed. 770. It has been held, that this statute did not validate an indictment previously found, when a special assistant appointed by the Attorney General was present before the grand jury during the examination of the witnesses. *U. S. v. Virginia-Carolina Chemical Co.*, 163 Fed. 66. Before its enactment, it was held that the presence of a special assistant to the Attorney General; *U. S. v. Rosenthal*, 121 Fed. 862; *U. S. v. Virginia-*

Carolina Chemical Co., 163 Fed. 66; or an examiner of the Department of Justice, was improper. *U. S. v. Kilpatrick*, 16 Fed. 765, 774.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *U. S. v. Terry*, 39 Fed. 355.

³² *U. S. v. Terry*, 39 Fed. 355.

³³ *U. S. v. Edgerton*, 80 Fed. 374.

³⁴ *U. S. v. Farrington*, 5 Fed. 343.

³⁵ *Re Shaw*, 172 Fed. 520.

³⁶ *Ibid.*

³⁷ *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652; *Wilson v. U. S.*, 221 U. S. 361, 55 L. ed. 771.

³⁸ *Re Kittle*, 180 Fed. 946.

cused within the meaning of the Fifth Amendment to the Federal Constitution.³⁹ An indictment is void when found at a time when the grand jury is not authorized to hold its sessions.⁴⁰

§ 512. Challenges to grand jurors. A party under bail may challenge individuals upon the grand jury for prejudice or lack of qualification.¹ When his objection goes to the whole of the panel, he may challenge the array.² The same right is possessed by any individual who has notice that a complaint against him is to be brought before a grand jury.³ If he does not do so immediately after he has received notice of such investigation, and of any objections to the constitution of the grand jury or of the manner of its selection or of the proceedings before it, it may be held that they are waived by them, and that it is too late to raise them after an indictment has been found against him.⁴

§ 513. Manner of taking objections to an indictment. Objections to an indictment may be raised: by a motion to quash the same;¹ by a plea in abatement;² or by a demurrer.³ Objections which are purely technical and not based upon a constitutional right, must be raised at the first possible moment.⁴ The objection, that the indictment does not charge an offense under the laws of the United States may be raised at any time. An irregularity in the organization of a grand jury, which does not affect their authority to sit, is waived if the accused goes to trial without raising the same.⁵

§ 514. Arraignment. The arraignment is the call of the prisoner to the bar, from the court, to answer the matter charged upon him in the indictment.¹ This usually takes place upon the first day of the term. "When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or an-

³⁹ U. S. v. Price, 163 Fed. 904.

⁴⁰ *Ex parte* Harlan, 180 Fed. 119.

§ 512. ¹ U. S. v. Richardson, 28 Fed. 61.

² *Agnew v. U. S.*, 165 U. S. 36, 44, 41 L. ed. 624, 627.

³ *Agnew v. U. S.*, 165 U. S. 36, 44, 41 L. ed. 624, 627.

⁴ *Agnew v. U. S.*, 165 U. S. 36, 44, 41 L. ed. 624, 627.

§ 513. ¹ § 515, *infra*.

² § 517, *infra*.

³ § 516, *infra*.

⁴ *Breese v. U. S.*, 226 U. S. 1, 57 L. ed. —.

⁵ *Ex parte* Harlan, 180 Fed. 119.

§ 514. ¹ Blackstone, IV., 322.

swer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."² This section applies to offenses created by statutes subsequently enacted.³ It is the usual custom to grant the prisoner leave to withdraw his plea of not guilty and to file a demurrer or plea in abatement, within a limited time thereafter,⁴ but he has no right to obtain such permission.⁵ It has been held that this does not enable a party to present an objection which is purely technical.⁶ The better practice is to ask for leave at the time of the arraignment. The trial of a case without the entry of a plea of not guilty is erroneous.⁷ This statute applies to a prosecution by information.⁸ After a defendant has filed a plea of not guilty, it is not necessary to ask him how he will be tried, for the plea includes everything essential to put him on trial by jury.⁹

§ 515. Motion to quash an indictment. A motion to quash an indictment is usually addressed to the discretion of the court.¹ Ordinarily, it must be founded upon a legal objection to the proceedings, which appears upon the record, and must clearly be decided in favor of the defendant.² "On motions to quash, the court accepts only such propositions as raise clear points of law. Any involved question should be raised by demurrer or motion in arrest of judgment, where the court must meet the issues and dispose of them, holding them under consideration if necessary

² *Re Smith*, 13 Fed. 25; U. S. R. S., § 1032.

³ U. S. v. Hare, 2 Wheeler, Crim. Cas. 283, Fed. Cas. No. 15,304.

⁴ *Post v. U. S.*, 161 U. S. 583, 40 L. ed. 816.

⁵ *Holt v. U. S.*, 218 U. S. 245, 247, 54 L. ed. 1021, 1028; *Waller v. U. S.*, C. C. A., 179 Fed. 810; *U. S. v. London*, 176 Fed. 976; *U. S. v. Lewis*, 192 Fed. 633.

⁶ *Breese v. U. S.*, 226 U. S. 1, 57 L. ed. —. Leave to withdraw plea of "not guilty" and move to quash

the indictment may also be granted. *U. S. v. Lewis*, 192 Fed. 633.

⁷ *Palmer v. U. S.*, Washington, Ty. 5.

⁸ *U. S. v. Borger*, 7 Fed. 193 (19 Blatchf. 249).

⁹ *U. S. v. Gibert*, 2 Sumner, 19, Fed. Cas. No. 15,204.

§ 515. ¹ *U. S. v. O'Sullivan*, Fed. Cas. No. 15,974; *U. S. v. Stowell*, 2 Curtis, 153, Fed. Cas. No. 16,409; *U. S. v. Grunberg*, 131 Fed. 137.

² *U. S. v. Grunberg*, 131 Fed. 137.

for that purpose; but a motion to quash, being addressed to the discretion of the court, and interposing avoidable delays, unless clearly justified, should be decided on the spot, and therefore our practice as to such motions is as stated."³

Objections to the qualifications, the summons, or the selection of the grand jurors,⁴ or to irregularities in their proceedings and deliberations,⁵ or, it has been held, to the illegality of the proof, upon which they have acted,⁶ may be raised by such a motion. Where an improper person was present before the grand jury during their proceedings, the indictment may be quashed upon motion.⁷ Defendant cannot ordinarily thus object to such irregularities in the selection,⁸ or summons,⁹ of the grand jury, as have not prejudiced him. The courts have refused to quash indictments, where one or more of the grand jurors were not qualified,¹⁰ but an indictment was quashed when the marshal was allowed to select the grand jury from a larger number of names than were drawn.¹¹ Objections to the selection or qualification of a grand jury, or the proceedings before it, must be taken at the earliest possible moment.¹² Where there is a disputed question of fact concerning these matters, the

³ U. S. v. Grunberg, 131 Fed. 137, 138, per Putnam, J.

⁴ *Re Nicholls*, 5 N. J. L. 539; *Rex v. Belanger*, 6 Canada Crim. Cas. 295; *State v. Lawrence*, 12 Oregon, 297, 22 Cyc. 419. But see *People v. Petrea*, 92 N. Y. 128; *U. S. v. Tallman*, 10 Blatchf. 21 Fed. Cas. No. 16,429. The illegal registry of one of the grand jurors is not a ground for quashing an indictment, although the State law requires that the grand jurors should be registered electors. *U. S. v. Ewan*, 40 Fed. 451.

⁵ *U. S. v. Terry*, 39 Fed. 355; *Commonwealth v. Bradney*, 126 Pa. St. 199, 17 Atl. 600; *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270.

⁶ *U. S. v. Farrington*, 5 Fed. 343; *McGregor v. U. S.*, 134 Fed. 187. But see *U. S. v. Price*, C. C., S. D.

N. Y. August, 1908, N. Y. L. J. Sept. 9, 1908.

⁷ *U. S. v. Edgerton*, 80 Fed. 374; *U. S. v. Rosenthal*, 121 Fed. 862; *U. S. v. Virginia-Carolina Chemical Co.*, 163 Fed. 66. *U. S. v. Heinze*, 177 Fed. 770. *Cf. U. S. v. Merchants' & Miners' Transp. Co.*, 187 Fed. 355. But see *supra*, § 482.

⁸ *Agnew v. U. S.*, 165 U. S. 36, 44, 41 L. ed. 624, 627.

⁹ *U. S. v. Tuska*, 14 Blatchf. 5, Fed. Cas. No. 16,550.

¹⁰ *U. S. v. Benson*, 31 Fed. 896, 12 Sawyer, 477; *U. S. v. Ewan*, 40 Fed. 451.

¹¹ *U. S. v. Lewis*, 192 Fed. 633.

¹² *U. S. v. Agnew*, 165 U. S. 36, 44, 41 L. ed. 624, 627. See *infra*, § 517. Where the accused was ready to file a motion to quash on the return day after the indictment, but the presiding judge,

proper remedy is a plea in abatement;¹³ not a motion to quash.¹⁴ It seems that objections, not apparent upon the face of the indictment, will not be considered unless they are specified as the grounds for the motion to quash the same.¹⁵ A motion to quash an indictment is addressed to the discretion of the court, and its denial will not be reviewed unless there has been such an abuse of discretion as to cause actual injustice.¹⁶ It cannot be reviewed in the absence of exception made to the ruling when it is made.¹⁷

§ 516. **Demurrer to indictment.** It has been said that a demurrer in the regular order precedes arraignment.¹ The court has discretionary power to permit a plea to be withdrawn and a demurrer subsequently filed.² Oral demurrers were permitted at common law;³ but it is the safer practice to file a demurrer in writing. Special demurrers are not usually recognized in the Federal courts;⁴ but a paper filed as a special demurrer was sustained as an assignment of causes under the general demurrer.⁵ Objections to the form of the indictment, or to parts of the same, must be specifically stated in the demurrer.⁶ It seems

considering himself disqualified, would not permit the motion to be filed or accepted, nor accept a plea, and it was agreed that the motion might be filed without leave, to be subsequently obtained when another judge should preside; the motion was deemed to have been filed in time when leave was granted when the other judge next presided. U. S. v. Lewis, 192 Fed. 633.

¹³ *Infra*, § 517.

¹⁴ *Agnew v. U. S.*, 165 U. S. 36, 44, 41 L. ed. 624, 627.

¹⁵ *Kitt v. State*, 117 Ala. 213, 23 So. 485; *People v. Colby*, 54 Cal. 37; *People v. Hunter*, 54 Cal. 65; *State v. Phillips*, 119 Iowa, 652, 89 N. W. 1092, 94 N. W. 229, 67 L.R.A. 292; *State v. Fitzgerald*, 63 Iowa, 268, 19 N. W. 202; *State v. Simas*, 25 Nev. 432, 62 Pac. 242; *Shivers v. Territory*, 13 Okla. 466, 74 Pac. 899; *Stanley v. U. S.*, 1 Okla. 336, 33 Pac. 1025, 22 Cyc. 420.

¹⁶ *Carlisle v. U. S.*, C. C. A., 194 Fed. 827.

¹⁷ *Ibid.*

§ 516. ¹ *Commonwealth v. Ramsey*, 1 Brewster (Pa.) 422; 22 Cyc. 427. *Contra*, *Ellis v. Commonwealth*, 78 Ky. 130; *Stroud v. Commonwealth*, 19 S. W. 976, 14 Ky. L. Rep. 179.

² *Post v. U. S.*, 161 U. S. 583, 40 L. ed. 816.

³ *Swan's Case*, *Foster Cr. C.*, 104.

⁴ *U. S. v. French*, 57 Fed. 382.

⁵ *U. S. v. French*, 57 Fed. 382; *U. S. v. Patterson*, 59 Fed. 280, 281.

⁶ *U. S. v. Patterson*, 59 Fed. 280. An objection to an indictment charging a conspiracy, because it does not properly charge overt acts to effect the objects of the same, does not challenge its sufficiency so far as it alleges the conspiracy. *Hedderly v. U. S.*, C. C. A., 193 Fed. 561.

that surplus allegations in an indictment cannot be attacked by a demurrer.⁷ No objections which do not appear upon the face of the indictment can be raised by demurrer.⁸ When the statute of limitations contains exceptions, advantage of the same cannot be taken by demurrer, unless the indictment shows on its face that the case does not fall within any of the exceptions.⁹ Where, however, it appeared on the face of the indictment that the statute of limitations barred the prosecution, it was held that the objection might be raised by a general demurrer.¹⁰ Where an indictment charged "John Doe, a Chinese person, whose true name is to the grand jurors aforesaid unknown," and showed on its face that the name John Doe was fictitious, and that the grand jurors could not identify the person whom they were indicting, a demurrer was sustained.¹¹ "In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster*; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require."¹²

§ 517. **Pleas in abatement.** A plea in abatement is the proper remedy for objections to the indictment, which do not appear upon the face of the same. Certain objections, which may be raised by a plea in abatement, can also be interposed by a motion to quash the indictment.¹ Where there is a disputed question of fact in such cases, the proper remedy is a plea in abatement.² It seems that a misnomer of the defendant in an indictment is the subject of a plea in abatement,³ and that it can

⁷ U. S. v. Patterson, 59 Fed. 280.

⁸ U. S. v. Peuschel, 116 Fed. 642.

⁹ U. S. v. Cook, 17 Wall. 168, 21 L. ed. 538.

¹⁰ U. S. v. Watkins, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649; U. S. v. White, 5 Cranch, C. C. 368, Fed. Cas. 16,678.

¹¹ U. S. v. Doe, 127 Fed. 982.

¹² U. S. R. S., § 1026.

§ 517. ¹ Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624; *supra*, § 516.

² U. S. v. Gale, 109 U. S. 65, 3

S. Ct. 1, 27 L. ed. 857; Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624.

³ Rex v. Shakespeare, 10 East, 83, 2 Hale, P. C. 237; Washington v. State, 68 Ala. 85; Daniels v. State, 60 Ala. 56; Lawrence v. State, 59 Ala. 61; Miller v. State, 54 Ala. 155; Gabe v. State, 6 Ark. 519; Davids v. People, 192 Ill. 176, 61 N. E. 537; Gardner v. State, 4 Ind. 632; State v. Knowlton, 70

only be raised in that manner.⁴ Such a plea must state the true name of the accused, and also that he was not commonly known and called by the name under which he was indicted.⁵

An objection to the organization of a grand jury, the incompetency or disqualification of its members, and any irregularity in summoning them, may be raised by a plea in abatement.⁶ In case the irregularities have not prejudiced the defendant, the plea will be overruled.⁷ Such a plea must point out specifically the particular objection or defect, on which the defendant relies,⁸ and must negative every conclusion in favor of the

Me. 200; *Commonwealth v. Fredericks*, 119 Mass. 199; *Commonwealth v. Dedham*, 16 Mass. 141; *State v. Narcarm*, 69 N. H. 237, 45 Atl. 744; *Commonwealth v. Demain*, *Brightly*, 441, 3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29; *State v. Lorey* (South Carolina), 2 Brev. 395; *State v. Brunell*, 29 Wis. 435; 12 Cyc. 359.

⁴ *Ex parte Corrigan*, 2 Can. Cr. Cas. 591; *Dutton v. State*, 92 Ga. 14, 18 S. E. 545; *Dauids v. People*, 192 Ill. 176, 61 N. E. 537; *State v. Winstrand*, 37 Iowa, 110; *State v. Burns*, 8 Nev. 251; *People v. Smith* (New York), 1 Park. Cr. 329; *State v. Farr* (South Carolina), 12 Rich. 24; *State v. Montague* (South Carolina), 2 McCord, 257; 12 Cyc. 359, 360.

⁵ *U. S. v. Janes*, 74 Fed. 543; *Ruffin v. State*, 124 Ala. 91, 27 So. 307; *Bright v. State*, 76 Ala. 96; *Wren v. State*, 70 Ala. 1; *Waldron v. State*, 41 Fla. 265, 26 So. 701; *Henderson v. State*, 95 Ga. 326; 22 S. E. 537; *Washington v. State*, 113 Ga. 698, 39 S. E. 294; *Amann v. People*, 76 Ill. 188; *State v. Cooper*, 96 Ind. 331; *Commonwealth v. Demain*, *Brightly*, 441,

3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29; *State v. Hughes* (Tennessee), 1 Swan, 261, 12 Cyc. 360.

⁶ *Agnew v. U. S.*, 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; *U. S. v. Hammond*, 2 Woods, 197, Fed. Cas. No. 15,294; *U. S. v. Greene*, 113 Fed. 683.

⁷ *Agnew v. U. S.*, 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624.

⁸ *U. S. v. Greene*, 113 Fed. 683; *aff'd*, *Greene v. U. S.*, C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357. It was held to be insufficient to aver that instructions by those in charge, without naming them, were given to the officer serving the summons for the grand jury, to keep secret the names of the persons drawn and to enjoin upon those summoned the necessity of keeping their summons secret, when no such instructions were issued by the court. *Ibid*. An allegation that a grand jury was not publicly drawn was disregarded, when the court had knowledge of the fact that it was drawn in the presence of all the officers, who were required by law to be present. *Ibid*.

legality of the drawing and impaneling,⁹ and must show that the accused was thereby injured.¹⁰

Pleas in abatement are not favored by the courts,¹¹ and the allegations therein must be pleaded with strict exactness.¹²

A plea in abatement should be pleaded on or before the arraignment and before pleading not guilty or filing any special plea in bar.¹³ The right to plead in abatement is waived by filing a plea in bar,¹⁴ or by pleading not guilty and going to trial.¹⁵ It seems that the court may, in its discretion, allow a plea of not

⁹ State v. Brooks, 9 Ala. 9; Shiver v. State, 41 Fla. 630, 27 So. 36; Tervin v. State, 37 Fla. 396, 20 So. 551; Timberlake v. State, 100 Ga. 66, 27 S. E. 158; State v. Newer (Indiana), 7 Blatchf. 307; State v. Ward, 64 Me. 545; People v. Lauder, 82 Mich. 109, 46 N. W. 956; State v. Mead, 15 R. I. 416, 6 Atl. 867; State v. Duggan, 15 R. I. 412, 6 Atl. 597; State v. Rife, 18 R. I. 596, 30 Atl. 467; Sayle v. State, 8 Tex. 120; Commonwealth v. Thompson (Virginia), 4 Leigh, 667, 26 Am. Dec. 339; State v. Carter, 49 W. Va. 709, 39 S. E. 611; 12 Cyc. 359.

¹⁰ Agnew v. U. S., 165 U. S. 36, 45, 17 S. Ct. 235, 41 L. ed. 624; U. S. v. Merchants' & Miners' Transp. Co., 187 Fed. 355; U. S. v. Nevin, 199 Fed. 831. It is insufficient to allege that the irregularities, of which complaint is made, "tended to his injury or prejudice," without assigning any ground for such conclusion, when prejudice does not appear from the record or is not a necessary inference from what occurred. Agnew v. U. S., 165 U. S. 36, 45, 17 S. Ct. 235, 41 L. ed. 624. U. S. v. Greene, 113 Fed. 683, 694; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357.

¹¹ U. S. v. Hammond, 2 Woods,

197, Fed. Cas. No. 15,294; U. S. v. Williams, 1 Dillon, 485, Fed. Cas. No. 16,716; U. S. v. Greene, 113 Fed. 683, 689; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357.

¹² Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624; U. S. v. Hammond, 2 Woods, 197, Fed. Cas. No. 15,294; U. S. v. Williams, 1 Dillon, 485, Fed. Cas. No. 16,716; U. S. v. Greene, 113 Fed. 683, 689; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357. The plea that the private books and papers of the accused were wrongfully produced before the Grand Jury is insufficient when it fails to show that no other evidence was offered upon which the indictment was found. Hillman v. U. S., C. C. A., 192 Fed. 264.

¹³ U. S. v. Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857; Agnew v. U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624.

¹⁴ U. S. v. Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

¹⁵ Eperson v. State, 5 Lea (Tenn.) 291; State v. Deason, 6 Baxt. (Tenn.) 511; Thompson v. State (Tex. Cr. App. 1901), 62 S. W. 919; 12 Cyc. 357.

guilty to be withdrawn and a plea in abatement to be filed.¹⁶ When the plea in abatement is founded upon objections to the selection or qualification of a grand jury or the proceedings before it, the plea must be filed at the earliest possible moment.¹⁷ If the defendant has had the right to raise the objection by challenging the array of the grand jury, after he had notice that a complaint against him was under consideration, it might be held that he could not raise the objection by a plea in abatement.¹⁸

One Federal case holds that a plea in abatement alleging a disqualification of a grand juror need not be verified;¹⁹ but, according to the preponderance of authority, every plea in abatement should be verified.²⁰

The proper manner of objecting to a plea in abatement is by a demurrer.²¹ Upon such a demurrer, judgment is rendered

¹⁶ *Post v. U. S.*, 161 U. S. 583, 40 L. ed. 816.

¹⁷ *Agnew v. U. S.*, 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624. "The defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency; for, if he lies by until a bill is found, exception may be too late. But, where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by a motion to quash or by a plea in abatement; the latter in all cases of contested fact being the proper remedy." *Ibid.* *Waller v. U. S.*, C. C. A., 179 Fed. 810. A delay of five days after the return of an indictment was held to be a waiver of such an objection, when there was no excuse alleged for the delay. *Agnew v. U. S.*, 165 U. S. 36, 45, 17 S. Ct. 235, 41 L. ed. 624. So was a delay of nineteen days after the filing of the indictment and seventeen days after the return of the defendants to the State. *Lowdon v. U. S.*, C. C. A.,

149 Fed. 673; *U. S. v. Am. Tobacco Co.*, 177 Fed. 774. A delay of two months after the indictment was also held to be too late. *U. S. v. Greene*, 113 Fed. 683, 697; *aff'd*, *Greene v. U. S.*, C. C. A., 154 Fed. 401; *certiorari denied*, 207 U. S. 956, 52 L. ed. 357. Absence from the district is no excuse for the delay, when the defendants resisted attempts of the government to bring them there. *Ibid.* The pendency of a demurrer is no excuse for the delay when the defendant has failed to urge the same for a speedy hearing. *Hyde v. U. S.*, 225 U. S. 347, 373, 56 L. ed. 1114, 1128. The court may take the objection upon its own motion. *Ibid.*

¹⁸ *Agnew v. U. S.*, 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624.

¹⁹ *U. S. v. Hammond*, 2 Woods, 197, Fed. Cas. No. 15,294. See *State v. Welch*, 33 Mo. 33.

²⁰ *Rex v. Grainger*, 3 Burrows, 1617; *State v. Allen*, 91 Me. 258, 39 Atl. 994; *Findley v. People*, 1 Mich. 234; *Commonwealth v. Sayers*, 8 Leigh (Va.) 722; 12 Cyc. 356.

²¹ *Rex v. Cooke*, 2 B. & C. 618,

against the party who committed the first fault in pleading.²²

An issue of fact upon a plea in abatement is raised by replication.²³ If the defendant demurs to such a replication, the court may grant judgment against him, if his plea in abatement was originally demurrable.²⁴ Otherwise, it has been held that any defects in the plea are waived by the replication.²⁵ It has been held that a claim of immunity, because of testimony upon the subject by the defendant before a grand jury, may be raised by a plea in abatement;²⁶ but, as a general rule, the competency or relevancy²⁷ of the evidence upon which an indictment was found will not be examined by the court, either upon a plea in abatement or otherwise;²⁸ except, perhaps, where the State statute permits such a practice.²⁹ A grand jury is presumed to have acted on legal evidence in returning the indictment, until the accused shows the contrary.³⁰ It is no ground for a plea in abatement that the grand jury secrets have been disclosed.³¹ A defect which appears on the face of the indictment cannot be raised by a plea in abatement.³²

4 D. & R. 618, 9 E. C. L. 271; *Rex v. Clark*, 1 D. & R. 43, 16 E. C. L. 17; *Agnew v. U. S.*, 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; *Lowdon v. U. S.*, C. C. A., 149 Fed. 673; *McLeroy v. State*, 120 Ala. 274, 25 So. 247; *State v. Barrett*, 54 Ind. 434; *Commonwealth v. Lannon* (Massachusetts), 13 Allen, 563; *State v. Emery*, 59 Vt. 84, 7 Atl. 129; *Commonwealth v. Jackson*, 2 Va. Cas. 501; *Newman v. State*, 14 Wis. 393; 12 Cyc. 360.

²² *U. S. v. Lawrence*, 13 Blatchf. 295, Fed. Cas. No. 15,573; *People v. Krummer*, 4 Parker's Cr. Cas. (N. Y.) 217.

²³ *State v. Malia*, 79 Me. 540, 11 Atl. 602; *Commonwealth v. Dockham*, Thach. Cr. Cas. (Mass.) 238; *Lewis v. State*, 1 Head (Tenn.) 329; *Baker v. State*, 80 Wis. 416, 50 N. W. 518; *Martin v. State*, 79 Wis. 165, 48 N. W. 119; 12 Cyc. 360.

²⁴ *Reeves v. State*, 29 Fla. 527, 10 So. 901; *Commonwealth v. Hazlett*, 16 Pa. Superior Ct. 534; *State v. Wills*, 11 Humphries (Tenn.) 222; 12 Cyc. 360.

²⁵ *State v. Ligon*, 7 Porter (Ala.) 167; 12 Cyc. 360.

²⁶ *U. S. v. Swift*, 186 Fed. 1002.

²⁷ *McKinney v. U. S.*, C. C. A., 199 Fed. 25.

²⁸ *U. S. v. Rosenberg*, 7 Wall. 580, 19 L. ed. 263; *Holt v. U. S.*, 218 U. S. 245, 247, 54 L. ed. 1021, 1028; *Hillman v. U. S.*, C. C. A., 192 Fed. 264; *McKinney v. U. S.*, 199 Fed. 25; *U. S. v. Nevin*, 199 Fed. 831.

²⁹ *U. S. v. Swift*, 186 Fed. 1002, 1018.

³⁰ *Ex parte Harlan*, 180 Fed. 119.

³¹ *Atwell v. U. S.*, C. C. A., 17 L.R.A. (N.S.) 1049, 162 Fed. 97; *U. S. v. Am. Tobacco Co.*, 177 Fed. 774.

³² *U. S. v. J. L. Hopkins & Co.*, 199 Fed. 649.

§ 518. **Plea of Nolo Contendere.** A plea of *nolo contendere* is one by which a defendant forgoes his right to make a defense without acknowledging his guilt.¹ It has been said that it is not a plea in the strict sense of that term as used in the criminal law,² but that it is in effect a plea of guilty to every essential element of the offense pleaded and warrants the accused's conviction thereof without evidence, although the conviction cannot be used against him in any other case.³ It can be accepted only by permission of the court.⁴ It has been said that it applies only to offenses punishable by a fine alone.⁵ Such pleas have been accepted in the Seventh⁶ and the Eighth Circuit.⁷ In the Second Circuit, it was never the custom to accept the same before the year 1911. In the Circuit Court for the Southern District of New York, in the Steel Wire Pool Cases, a judge from another circuit, who had been assigned to try the same, accepted the plea against the protest of the district attorney. A judge of the District Court for that district, shortly thereafter, said that he felt bound to follow this ruling by accepting the plea from another defendant indicted for acts connected with the same transactions, but that this action should not be regarded as a precedent.⁸

§ 518. ¹Tucker v. U. S., C. C. A., 196 Fed. 260. See note 41 L.R.A.(N.S.) 70.

² Ibid.

³ U. S. v. Lair, C. C. A., 195 Fed. 47, 52. See U. S. v. Hartwell, 3 Cliff, 221, 26 Fed. Cas. No. 15,318.

⁴ Tucker v. U. S., C. C. A., 196 Fed. 260.

⁵ Tucker v. U. S., C. C. A., 196 Fed. 260, 266, where the court below, after a plea of *nolo contendere* was filed, took evidence and sentenced the defendant to fine and imprisonment; whereupon the judgment was reversed and the cause remanded, with direction to accept or refuse acceptance of the plea and proceed thereupon in conformity with law. *Contra*, U. S. v. Lair, C. C. A., 195 Fed. 47.

⁶ Tucker v. U. S., C. C. A., 196 Fed. 260.

⁷ U. S. v. Lair, C. C. A., 195 Fed. 47.

⁸ N. Y. Sun, Sept. 21, 1911. Hough, J.: "During my time there have been quite a number of applications made for the plea of non vult in this district. So far as I know after inquiry of the comparatively few persons who have been acquainted with these courts longer than I have, it is not within the memory of living man that the plea of non vult has been accepted in New York. The reason for that is, I think, quite obvious on an examination of two or three of our State statutes. It is now many years since pleading on the criminal side has been regulated by statute in New York, and therefore the common law plea of non vult has not been accepted in the State court. It is of such common occurrence that on the substantive matter contained

§ 519. Plea of pardon. A pardon to be available as a defense should be specially pleaded.¹ A Territorial case holds that the defense of pardon may be set up by a motion to dismiss the indictment, after a plea of not guilty.²

§ 520. Plea of former jeopardy, acquittal or conviction. A plea of former jeopardy, whether a former acquittal, or a former conviction, or otherwise, should be set up by a special plea in bar.¹ Such a plea should set forth the record of the former acquittal, or conviction, or proceedings, which put the defendant previously in jeopardy.² Where the evidence in support of a plea of former jeopardy is wholly documentary, uncon-

in any indictment a charge might be brought in the Federal court or in the State courts that it would be most unjust to have a kind of plea acceptable in the Federal court which was unlawful in the State court, especially when that particular style of plea is always and has always been from time immemorial within the discretion of the trial court.

Therefore I wish it to be understood, so far as I am concerned, that the acceptance of the plea of non vult in this case is based upon its acceptance by the Judge who first heard it, for there is no reason here that I can see to change what has been done in this particular cause, but this action is not to be regarded as a precedent in my administration of the criminal law."

§ 519. ¹U. S. v. Wilson, 7 Peters, 150, 8 L. ed. 640; Fries' Case, 3 Dallas, 515, 1 L. ed. 701, Fed. Cas. No. 5,126; Wharton State Trials, 587; Michael v. State, 40 Ala. 361; State v. Keith, 63 N. C. 140; State v. Blalock, 61 N. C. 242; 12 Cyc. 363.

²Territory v. Richardson, 9 Okla. 579, 60 Pac. 244, 49 L.R.A. 440.

§ 520. ¹U. S. v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15,794.

²Vaux's Case, 4 Coke, 44a; Reg. v. Connell, 6 Cox, C. C. 178; Rex

v. Emden, 9 East, 437; Rex v. Vandercom, 2 East, P. C. 519, 2 Leach, C. C. 816; Rex v. Wildey, 1 M. & S. 183; 1 Chitty, Criminal Law, 459; 2 Hale, P. C. 241, 243, 255; 2 Hawkins, P. C., c. 25, § 2; Smith v. State, 52 Ala. 407; Foster v. State, 39 Ala. 229; Henry v. State, 33 Ala. 389; Harp v. State, 59 Ark. 113, 26 S. W. 714; Evans v. State, 54 Ark. 227, 15 S. W. 360; Bradley v. State, 32 Ark. 722; Territory v. King, 6 Dak. 131, 50 N. W. 623; Blair v. State, 81 Ga. 628, 7 S. E. 855; Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; Evans v. State, 68 Ga. 826; Crocker v. State, 47 Ga. 568; Hensley v. State, 107 Ind. 587, 8 N. E. 692; Davis v. State, 51 Neb. 301, 70 N. W. 984; State v. Ackerman, 64 N. J. L. 99, 45 Atl. 27; People v. Smith, 172 N. Y. 210, 64 N. E. 814; Zachary v. State, 7 Baxt. (Tenn.) 1; Ford v. State (Tex. Cr. App. 1900), 56 S. W. 918; Wheelock v. State (Tex. Cr. App. 1896), 38 S. W. 182; Washington v. State, 35 Tex. Cr. 156, 32 S. W. 694; Grisham v. State, 19 Tex. App. 504; Williams v. State, 13 Tex. App. 285, 46 Am. Rep. 237; State v. Cross, 44 W. Va. 315, 29 S. E. 527; 12 Cyc. 364, 365. See U. S. v. Olsen, 57 Fed. 579; Berkowitz v. U. S., C. C. A., 93 Fed. 452, 35 C. C. A. 379.

tradicted, and insufficient in law to sustain the same, the better practice is to instruct the jury to return a verdict thereupon.³

§ 521. **Proceedings upon pleas.** A plea of confession and avoidance removes the requirement of proof beyond a reasonable doubt.¹ Where the defendant's attorney, in his presence, claimed the opening and affirmative of an issue upon a plea in bar, it was held that the legal presumption of innocence did not apply.² A submission to a jury of the issue raised upon a plea cures a previous error by the court in overruling the same.³

§ 522. **Bills of particulars.** Where an indictment is sufficiently definite to be sustained upon demurrer, but does not give the defendant the information to which he is fairly entitled in order properly to prepare for trial, he should be given a bill of particulars of the facts therein charged.¹ These may be ordered when the indictment charges the mailing of indecent and obscene literature, without quoting the opposing language,² or an offense against the internal revenue laws, without specifying the alcoholic liquor to which it refers;³ or in order to show upon which statute the indictment is based.⁴ A bill of particulars cannot cure a defect in an indictment.⁵ A judgment will not be reversed for a refusal to direct the service of a bill of particulars, unless the substantial rights of the accused have been thereby prejudiced.⁶

§ 523. **Evidence in criminal cases.** The rules concerning the admission and exclusion of evidence in criminal cases, in the courts of the United States, are, ordinarily, the same as those in civil causes. The Constitution ordains, in the Fifth Amendment, that no person "shall be compelled in any Crimi-

³ *Storm v. Territory of Arizona*, 311; *Dunlop v. U. S.*, 165 U. S. 486, C. C. A., 170 Fed. 423.

§ 521. ¹ *U. S. v. Heike*, 175 Fed. 852.

² *Ibid.*

³ *Jones v. U. S.*, C. C. A., 179 Fed. 584.

§ 522. ¹ *U. S. v. Thompson*, 189 Fed. 838; *May v. U. S.*, C. C. A., 199 Fed. 53.

² *Rosen v. U. S.*, 161 U. S. 29, 40 L. ed. 606; *Price v. U. S.*, 165 U. S.

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311; *Dunlop v. U. S.*, 165 U. S. 486, 41 L. ed. 799.

³ *U. S. v. Thompson*, 189 Fed. 838.

⁴ *Morris v. U. S.*, C. C. A., 161 Fed. 672, 681, 88 C. C. A. 532, 541; *May v. U. S.*, C. C. A., 199 Fed. 53, 61.

⁵ *May v. U. S.*, C. C. A., 199 Fed. 53, 61.

⁶ *Hedderly v. U. S.*, C. C. A., 193 Fed. 561.

nal Case to be a witness against himself;" and in the Sixth Amendment that, in all criminal prosecutions, the accused shall have the right "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor." The right of the accused to be confronted with the witnesses against him does not exclude the admission of dying declarations, in cases where they would be admissible at common law;¹ nor does it exclude the admission of competent evidence concerning previous testimony, by a witness, upon a former trial of the accused under a different indictment, when it appears that the absence of the witness has been wrongfully procured by the defendant.² So much of a statute as declared that the judgment of conviction against the principal felons should be admissible in a criminal prosecution against the receiver of property of the United States, which had been embezzled, stolen or purloined, as evidence of such embezzlement, theft or purloinment,³ was

§ 523. ¹Kirby v. U. S., 174 U. S. 47, 61, 43 L. ed. 890, 896.

²Reynolds v. U. S., 98 U. S. 145, 158, 25 L. ed. 244, 247, per Chief Justice Waite: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. . . . "The testimony

shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offense under another indictment; that she had no home, except with the accused; that at some time before the trial a subpoena had been issued for her, but by mistake she was named as Mary Jane Schobold; that an officer who knew the witness personally went to the house of the accused to serve the subpoena, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, 'Will you tell me where she is?' that the reply was 'No, that will be for you to find out;' that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, 'Oh, no; she won't, till the subpoena is served upon her,' and then, after some further conversa-

held to be unconstitutional.⁴ It has been held that the right of a defendant to be confronted with the witnesses against him requires that his counsel be given an opportunity to be advised of all evidence submitted against him; and that it is error to permit the District Attorney to show to witnesses, for the purpose of refreshing their testimony, documents which have been identified, without first submitting them to the defendant's counsel on his demand for an inspection.⁵ The statute providing that the rules of decision as to the competency of witnesses shall be the same in the State and Federal courts,⁶ does not apply to criminal cases.⁷ It has been said that the law which there applies is that of the State as it was when the courts of the United States

tion, that 'She does not appear in this case.' It being discovered after the trial commenced that a wrong name had been inserted in the subpoena, a new subpoena was issued with the right name, at nine o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At ten o'clock that morning the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible. In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instru-

mental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own. Upon the testimony as it stood, it is clear to our minds that the judgment should not be reversed because secondary evidence was admitted." *Reynolds v. U. S.*, 98 U. S. 145, 159, 160, 25 L. ed. 244, 247, 248, per Chief Justice Waite.

³ Act of March 3, 1875, c. 144, 18 St. at L. 479.

⁴ *Kirby v. U. S.*, 174 U. S. 47, 61, 43 L. ed. 890, 896.

⁵ *Morris v. U. S.*, C. C. A., 149 Fed. 123.

⁶ U. S. R. S., § 858; *supra*, §§ 339, 359.

⁷ *U. S. v. Sims*, 161 Fed. 1008, holding that their competency must be determined by the common law; *U. S. v. Hughes*, 175 Fed. 238, holding that it must be determined by the law of the State as it existed when the Judiciary Act of 1789 was passed.

were established by the Judiciary Act of 1789.⁸ No person convicted of perjury or subornation of perjury under the laws of the United States is capable of giving testimony in the courts of the United States until the judgment is reversed.⁹ In the districts of Pennsylvania, the conviction and sentence for a capital or other infamous crime does not disqualify a witness from testifying.¹⁰ The conviction and sentence of a witness in a court of another State does not disqualify him.¹¹ A pardon restores the competency of a witness.¹² The defendant in a criminal case may testify on the trial at his own request, but not otherwise.¹³ The lawful husband or wife of an accused is a compe-

⁸ U. S. v. Reid, 12 How. 361, 363, 366, 13 L. ed. 1023, 1024, 1025; Logan v. U. S., 144 U. S. 263, 301, 36 L. ed. 429, 442.

⁹ U. S. R. S., §§ 5392, 5393; Logan v. U. S., 144 U. S. 263, 302, 36 L. ed. 429, 442. See § 339, *supra*.

¹⁰ U. S. v. Hughes, 175 Fed. 238.

¹¹ Logan v. U. S., 144 U. S. 263, 303, 36 L. ed. 429, 443.

¹² *Ibid*.

¹³ Act of Mar. 16, 1878, ch. 37, 20 St. at L. 30. It is not essential to the admissibility of his testimony that he be first warned that what he says may be used against him. Wilson v. U. S., 162 U. S. 613, 40 L. ed. 1090; Powers v. U. S., 223 U. S. 303, 56 L. ed. 448. When testifying voluntarily, he may be fully cross-examined as to the testimony which he gives. Powers v. U. S., 223 U. S. 303, 56 L. ed. 448. But it has been held: that his cross-examination may not extend beyond the subject of his direct examination; and that impeaching questions concerning an involuntary confession previously made by him, to which he has not referred, if admitted, violate his constitutional rights. Harrold v. Territory of Oklahoma, C. C. A., 169 Fed. 47. It has been said that it is the duty of the court

to determine whether or not a confession was voluntary or involuntary and that it is error to permit the introduction before the jury of the evidence upon that question. *Ibid*. It was held that, upon the second trial for a criminal offense, it was not error to permit the defendant, when testifying in his own behalf, to be asked upon cross-examination if he did not feign insanity upon his first trial; nor, if he denies this, to admit the testimony of other witnesses as to his demeanor on and during the first trial, both as affecting his credibility as a witness and tending to show his guilt of the offense charged. Waller v. U. S., C. C. A., 31 L.R.A. (N.S.) 113, 179 Fed. 810. A written statement, previously made by a witness, is not admissible in evidence to contradict and impeach his testimony, unless it was called to his attention when on the stand. Lemon v. U. S., C. C. A., 164 Fed. 953. It was held: that where, on cross-examination, a witness admitted having made a sworn statement, the entire statement was admissible in evidence; but that he could not be cross-examined as to whether certain statements suggested by counsel were contained therein. Jones v. U. S., C. C. A., 162

tent witness in a prosecution for bigamy, polygamy or unlawful cohabitation.¹⁴ In the Federal courts, there is no law forbidding a conviction upon the uncorroborated testimony of an accomplice.¹⁵ The testimony of a witness upon cross-examination may be restricted to the subject of his direct examination and to questions intended to impeach him or affect his competency or credibility.¹⁶ It was held that the fact that both parties permitted the introduction of incompetent evidence, without objection, did not preclude the court from subsequently excluding similar evidence upon objection duly made.¹⁷ It has been held that when books of account are in court and subject to the inspection and use of the defendant's counsel, it is not error to allow a summary of their contents to be put in evidence.¹⁸ An act of Congress provides: "That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness."¹⁹ It was held that a statute²⁰ was unconstitutional, which compelled the owner of property, in proceedings for its forfeiture, to produce, upon the trial, his books and papers for the inspection of the United States Attorney; and provided that, in case of his

Fed. 417. Upon defendant's cross-examination, it was held to be proper to show that his license as a detective had been revoked after a judicial investigation resulting from an article published in a newspaper owned by a person his animosity towards whom was a material fact. *Franklin v. U. S., C. C. A.*, 193 Fed. 334. It was held that, in a prosecution for receiving stolen stamps, a conviction cannot be sustained upon the admission or confession of the defendant or upon his acts or declarations, without proof that the stamps were in fact stolen. *Naftzger v. U. S., C. C. A.*, 200 Fed. 494.

¹⁴ Act of Mar. 3, 1887, ch. 397, 24

St. at L. 635. It seems that, in other cases, the wife of the accused is not competent as a witness. *Hendrix v. U. S.*, 219 U. S. 79, 55 L. ed. 102.

¹⁵ *Richardson v. U. S., C. C. A.*, 181 Fed. 1.

¹⁶ *Harrold v. Territory of Oklahoma, C. C. A.*, 169 Fed. 47; *supra*, § 473.

¹⁷ *Franklin v. U. S., C. C. A.*, 193 Fed. 334.

¹⁸ *Lemon v. U. S., C. C. A.*, 164 Fed. 953, 960.

¹⁹ Act of March 16, 1878, 20 St. at L. 30.

²⁰ Act of June 22, 1874, § 12, 18 St. at L. 186.

refusal, the allegations on the part of the government should be taken as confessed.²¹ It was held, at Circuit, that papers which had been unlawfully seized cannot be put in evidence against the person to whom they belong.²² An officer of a corporation cannot refuse to produce its books, which are in his possession or under his control, because they may tend to incriminate the corporation which owns them; ²³ nor when the records of the corporation disclose the complicity of the witness in a criminal act, is he relieved from producing them.²⁴ It has been held, that the proceedings before the grand jury are not a "criminal case," and that an indictment is not invalidated by the fact that the accused was subpoenaed before the grand jury, there sworn against his protest and asked questions concerning the offense charged, to which he refused to answer upon the ground that he might thus incriminate himself.²⁵ The Revised Statutes provide that: "Every person who is indicted of treason or other capital crime, shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution."²⁶ It has been held that the accused has the right to compulsory process, to compel the attendance of his witnesses, even before an indictment.²⁷ This section of the Revised Statutes does not give the defendant the right to compel the attendance, as witnesses, of ambassadors or consuls who are exempted from subpoenas by treaty.²⁸ "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient

²¹ *Boyd v. U. S.*, 116 U. S. 616, 29 L. ed. 746.

²² *U. S. v. Wong Quong Wong*, 94 Fed. 832. *Contra*, Opinion in *Adams v. N. Y.*, 192 U. S. 585, 48 L. ed. 575. See *supra*, § 339.

²³ *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652; *U. S. v. Armour & Co.*, 142 Fed. 808.

²⁴ *Wilson v. U. S.*, 226 U. S. 478; *supra*, §§ 339, 343.

²⁵ *U. S. v. Price*, 163 Fed. 904.

²⁶ *U. S. R. S.*, § 1034.

²⁷ *Burr's Trial*, vol. I, p. 77.

²⁸ *Re Dillon*, 7 Sawyer, 561.

means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States."²⁹ The statute makes the order rest in the discretion of the court, and a denial of the application will rarely, if ever, be the cause of a reversal upon writ of error.³⁰ Where the application was not made until the trial was nearly concluded, and it would have taken several days to bring the witnesses before the court;³¹ and where the court granted the application as to some, but not as to all, of the witnesses named;³² it was held that the rulings would not be reviewed. It has been held that the court may limit to four upon each point of the defendant's proof the number of witnesses that shall be subpoenaed for him at the expense of the government.³³

Subpoenas for witnesses, issued on behalf of the United States, in a criminal case may be served in any district of the United States, no matter how distant it may be from the place of trial.³⁴ The language of the statute³⁵ seems sufficiently broad to give the same right to the defendant in a criminal case. The Revised Statutes further provide: "Witnesses who are required

²⁹ U. S. R. S., § 878.

³⁰ *Crumpton v. U. S.*, 138 U. S. 361, 365, 34 L. ed. 958, 960; *Goldsby v. U. S.*, 160 U. S. 70, 73, 40 L. ed. 343, 344.

³¹ *Crumpton v. U. S.*, 138 U. S. 361, 364, 34 L. ed. 958, 959.

³² *Goldsby v. U. S.*, 160 U. S. 70, 40 L. ed. 343.

³³ *O'Hara v. U. S.*, C. C. A., 129 Fed. 551, 64 C. C. A. 81.

³⁴ U. S. R. S., § 876.

³⁵ Quoted *supra*, § 342. It has been held that, in the Southern District of New York, subpoenas issued by a United States Commissioner on behalf of a defendant cannot be served outside of the county where

he holds the hearing; unless a United States judge, upon an affidavit of the prosecutor or District Attorney, or of the defendant or his counsel, stating that the affiant believes that the evidence of the witness is material and his attendance at the trial is necessary, indorses, on the subpoena, an order for the attendance of such witness. *U. S. v. Beavers*, 125 Fed. 778; and, in the Eastern District of Pennsylvania, that such a subpoena cannot be served in another district, although within one hundred miles of the place where the hearing before him is appointed to be held. *U. S. v. Stern*, 177 Fed. 479.

to attend any term of a Circuit or District Court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the District Attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or District Attorney.”³⁶ It has been held that a Federal court should not, upon the application of the District Attorney of the United States, compel the production of a witness confined in the State penitentiary for assault with intent to murder, when the State authorities oppose the application.³⁷ The Revised Statutes further provide: “Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost.”³⁸ “Any judge of the United States, on the application of a District Attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement un-

³⁶ U. S. R. S., § 877.

³⁸ U. S. R. S., § 879.

³⁷ U. S. v. Barefield, 23 Fed. 136.

til he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.”³⁹ “In the District of Vermont, all recognizances of witnesses, taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the District or Circuit Court thereof, shall be to the Circuit Court next thereafter to be held in the said district.”⁴⁰ Upon the trial of an indictment against a person for embezzling public moneys, it is sufficient evidence, for the purpose of showing a balance against him, to produce a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the department; or, when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department.⁴¹

§ 524. List of jurors and witnesses. The Revised Statutes provide: “When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.”¹ “The provision is not directory only, but mandatory to the government, and its purpose is to inform the defendant of the testimony which he will have to meet and to enable him to prepare his defense.”² If he seasonably objects to a failure to furnish him with a copy and list, the trial cannot lawfully proceed until the statute has been obeyed;³ but such an objection may be waived.⁴ It must be raised before the jury is sworn.⁵ When a witness is called, whose name is not upon the list that has been

³⁹ U. S. R. S., § 881.

⁴⁰ U. S. R. S., § 880.

⁴¹ U. S. R. S., §§ 886, 887; 28 St. at L., 764, 809; quoted *supra*, § 333. § 524. ¹ U. S. R. S., § 1033.

² Logan v. U. S., 144 U. S. 263, 36 L. ed. 429.

³ Logan v. U. S., 144 U. S. 263, 36 L. ed. 429.

⁴ Hickory v. U. S., 151 U. S. 303, 38 L. ed. 170; U. S. v. Cornell, 2 Mason, 91.

⁵ U. S. v. Curtis, 4 Mason, 232.

delivered to the defendant, his counsel must immediately object.⁶ It is too late to raise the objection after the testimony in chief of such witness has been concluded.⁷ The two days' time must be exclusive of the day when the papers are delivered and of that when the trial begins.⁸ The arraignment is no part of the trial and the accused is not entitled to these papers before he is obliged to plead.⁹ The caption must be included in the copy of the indictment furnished.¹⁰ The places of abode of the jurors and witnesses should also be designated.¹¹ It is insufficient to state the names of the counties alone.¹² The townships should also be stated.¹³ Their occupations need not be.¹⁴ The names of witnesses, who are used for rebuttal, need not be stated in the list.¹⁵ In cases not capital, the prisoner is not entitled to a list of the witnesses,¹⁶ nor, to a list of the jurors;¹⁷ nor to a copy of the indictment at the expense of the government.¹⁸ But a copy of the indictment may, at his expense, be given him after his arrest¹⁹ and where there has been no preliminary examination the court may order that he be given a list of the witnesses sworn before the grand jury.²⁰ Inspection of the minutes of the grand jury is ordinarily denied him.²¹

§ 525. Place of trial. The Constitution ordains: "The Trial, of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed

⁶ *Hickory v. U. S.*, 151 U. S. 303, 38 L. ed. 170.

⁷ *Ibid.*

⁸ *U. S. v. Dow*, Taney, 34.

⁹ *U. S. v. Curtis*, 4 Mason, 232; *U. S. v. Neverson*, 1 Mackey, D. C. 152. *Contra*, *U. S. v. Dow*, Taney, 34.

¹⁰ *U. S. v. Insurgents*, 2 Dallas, 335, 1 L. ed. 404.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Goldsby v. U. S.*, 160 U. S. 70, 40 L. ed. 343.

¹⁶ *U. S. v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399; *U. S. v. Wil-*

liams, 1 Cranch, C. C. 178; *U. S. v. Wood*, 3 Wash. C. C. 440; *Balliet v. U. S.*, C. C. A., 129 Fed. 689, 64 C. C. A. 201.

¹⁷ *Ibid.*

¹⁸ *U. S. v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399; *Shelp v. U. S.*, C. C. A., 81 Fed. 694.

¹⁹ *U. S. v. Williams*, 7 Cranch, C. C. 178; *U. S. v. Curtis*, 4 Mason, 232.

²⁰ *U. S. v. Southmayd*, 6 Bissell, 321.

²¹ *U. S. v. Southmayd*, 6 Bissell, 321; *U. S. v. Price*, C. C. S. D. N. Y., August 1908, N. Y. L. J., September 9, 1908.

within any State, the trial shall be at such Place or Places as the Congress may by law have directed.”¹

The Sixth Amendment ordains: “In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”² The Judicial Code provides: “The trial of offenses, punishable with death shall be had in the county where the offense was committed when that can be done without inconvenience.”³

It has been said, that, since it is no longer necessary to draw the jury from the county, this rule is of less importance than formerly;⁴ and that the place of trial is to be determined by the discretion of court upon considerations of inconvenience.⁵ It has been doubted whether this section applies to a crime committed in a place within the exclusive jurisdiction of the United States.⁶ If a party goes to trial without demanding that he be tried in the county where the offense was committed, he waives his rights under this statute.⁷ It is not necessary that an indictment which charges a capital offense shall allege the county where a crime was committed, provided that the judicial district of its commission is averred.⁸ “When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.”⁹ In a case where the crime consisted of the offer of a bribe, it may be punished in the place where the letter was delivered, although the briber was never there.¹⁰ The same rule applies where the

§ 525. ¹ Article III, § 2.

² See § 507, *supra*. This ordinance does not apply where the crime is not committed in any State. U. S. v. Dawson, 15 How. 467, 487.

³ Jud. Code, § 40, 36 St. at L. 1087; re-enacting U. S. R. S., § 729.

⁴ U. S. v. Cornell, 2 Mason, 91; U. S. v. Wilson, Baldwin, 78.

⁵ U. S. v. Cornell, 2 Mason, 91.

⁶ U. S. v. Cornell, 2 Mason, 91.

⁷ U. S. v. Cornell, 2 Mason, 91.

⁸ U. S. v. Wilson, Baldwin, 79.

⁹ Jud. Code, § 42, 36 St. at L. 1087, re-enacting U. S. R. S., § 731.

¹⁰ *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, in which the writer was counsel; *Benson v. Henkel*, 198 U. S. 1, 15, 49 L. ed. 919, 924.

crime consisted in an agreement which was consummated by the acceptance of the other party to the same.¹¹ In the case of a conspiracy, where the overt acts are committed in different districts, the accused may be punished in either; even in one where they have never been.¹² Under the Pure Food and Drugs Law,¹³ jurisdiction exists in the court of the district from which the goods were shipped, although the defendant does not there reside.¹⁴ The provision in the statute for the seizure of the adulterated or misbranded goods in any district where they may be found relates to civil proceedings only and does not affect the jurisdiction of a criminal prosecution.¹⁵

"The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."¹⁶ The words "out of the jurisdiction of any particular State" mean "out of the jurisdiction of any particular State of the United States."¹⁷ It has been held, that the statute does not apply to a crime committed in a continental Territory of the United States.¹⁸ It has been said that the statute contemplates two classes of cases: one in which the offender is apprehended without the limits of the United States and brought in custody into some judicial dis-

¹¹ *Burton v. U. S.*, 202 U. S. 344, 50 L. ed. 1057.

¹² *Hyde v. U. S.*, 225 U. S. 347, 56 L. ed. 1114; *U. S. v. Wells*, C. C. A., 192 Fed. 870, *certiorari* refused, 225 U. S. 714, 56 L. ed. 1269, where, at a time when the author was counsel for the accused, after an argument by him before the district attorney, the grand jury of the district of his residence refused to indict the accused; but they were subsequently ordered to be removed upon an indictment for the same charge obtained in the district of Wyoming, where they had never been; *U. S. v. Campbell*, 179 Fed. 762; *U. S. v. Reddin*, 193 Fed. 798.

¹³ Act of June 30, 1906, ch. 3915, § 2, 34 St. at L. 768, Comp. St. Supp. 1911, p. 1354.

¹⁴ *U. S. v. J. L. Hopkins & Co.*, 199 Fed. 649.

¹⁵ *Ibid.*

¹⁶ Jud. Code, § 41, re-enacting 36 St. at L. 1087.

¹⁷ *U. S. v. Furlong*, 5 Wheaton, 184. In case of murder on Navassa Island, it was held that the Circuit Court of the United States for the District of Maryland had jurisdiction to try the charge; but where the offense was committed upon the New Hebrides Islands, the Attorney General advised that no Federal Court could have jurisdiction to try the case. 20 Op. A. G. 590.

¹⁸ *U. S. v. Alberty*, 1 Hempstead, 44.

trict; the other in which he is first taken in legal custody after his arrival within some district of the United States; and that it does not give the District Attorney of the United States the election in which of two districts to proceed to trial.¹⁹ The offender may be tried in the district where he is first arrested, although he landed in another district.²⁰

If a vessel on which the offense was committed was bound to a port in the district and the accused is there in custody, this is *prima facie* evidence that he was there first arrested.²¹ It is not usual to offer evidence to prove that the accused was first arrested in the district where he was tried.²² An averment that an offense was committed on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, is sufficient without any other particular designation of the place of the offense.²³

§ 526. Challenges to petit jurors. "When the offense charged is treason, or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to six peremptory challenges, and in all other cases, civil and criminal, each

¹⁹ U. S. v. Bird, 1 Sprague, 299. Where the offense had been committed on a vessel, which afterwards anchored for quarantine in New York harbor, within the Eastern District of that State, and he was there delivered to the marshal for the Southern District, and in that district a warrant for his arrest was first issued, another statute giving both courts concurrent jurisdiction over those waters, it was held that the Federal Court of the latter the Second District had jurisdiction.

²⁰ U. S. v. Thompson, 1 Sumner, 168; U. S. v. Carrie, 23 Law. Rep. 145; U. S. v. Baker, 5 Blatch. 6.

²¹ U. S. v. Mingo, 2 Curtis, 1. See U. S. v. McGill, 4 Dallas, 425, 428, note, 1 L. ed. 894, 895, note, s. c., 1 Wash. C. C. 463.

²² U. S. v. Mingo, 2 Curtis, 1.

When no objection upon this ground had been taken upon the trial, it was held that a motion in arrest of judgment, on the ground that no proof had been adduced in support of the averment that the place of trial was the District and Circuit in which the defendants were first brought and apprehended, must be denied, U. S. v. Crawford, 1 N. Y. Leg. Obs. 288, 2 Fed. Cas. No. 14,890; but where there was a special verdict finding that the offense was committed at a certain place described and designated, but not finding whether that place was within the jurisdiction of a State, or within a district of the United States, or upon the high seas; it was held to be insufficient, U. S. v. Jackalow, 1 Black, 484, 17 L. ed. 225.

²³ U. S. v. Gibert, 2 Sumner, 19.

party shall be entitled to three peremptory challenges, and in all cases where there are several defendants and several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the court without the aid of triers."¹

"If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made."² "At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers."³

When a criminal prosecution is removed from a State Court, the number of challenges is regulated by the statutes of the United States and not by the State law.⁴ The phrase "any other felony" in the statute first cited designates other offenses than treason or capital offenses.⁵ In cases where the punishment is not capital, the defendant is entitled to ten challenges: when the offense is declared by statute, either expressly or by implication, to be a felony. A crime is a felony where Congress does not define an offense, but merely punishes it by its common law name, and at common law it is a felony; and where Congress adopts a State law as to an offense, and under such State law it is a felony.⁶ The charges of counterfeiting coin of the United States,⁷ of breaking into a postoffice,⁸ and of embezzling

§ 526. ¹Jud. Code, § 272, 36 St. at L. 1087, re-enacting U. S. R. S., § 819. Where three defendants were tried together for a misdemeanor, they are entitled to but three challenges, and it has been held that the challenge of any one of them is counted against all. *Wilcox v. U. S., C. C. A., 161 Fed. 109.* Where the defendant made no complaint that any of the jury were unfair or partial, or that any one of them was objectionable to him, or would have been peremptorily challenged if he had the opportuni-

ty, it was held that no error could be assigned to a preliminary ruling restricting the number of his peremptory challenges. *Pearce v. U. S., C. C. A., 192 Fed. 561.*

² U. S. R. S., § 1031.

³ U. S. R. S., § 4303.

⁴ *Georgia v. O'Grady*, 3 Woods, 496, Fed. Cas. No. 5,352.

⁵ *U. S. v. Coppersmith*, 4 Fed. 198.

⁶ *U. S. v. Coppersmith*, 4 Fed. 198.

⁷ *U. S. v. Coppersmith*, 4 Fed. 198.

⁸ *Considine v. U. S., C. C. A., 112 Fed. 342, 50 C. C. A. 272.*

the funds of a bank,⁹ are misdemeanors, and a party charged with one of these offenses is entitled to but three challenges, not to ten, as is the case with a defendant charged with a felony.¹⁰ Challenges for cause and to the favor are regulated by the rules of the common law.¹¹ By the common law, a man is not a competent juror who is master, servant, steward or counsellor of either party, and this rule still prevails in the courts of the United States.¹² It is a good ground for a challenge for principal cause, that a juror has formed a positive, decided, substantial, deliberate and well-settled opinion as to the issue to be tried.¹³ If the opinion is only hypothetical, a challenge for cause will not necessarily be sustained.¹⁴ Expression of the

⁹ *Tyler v. U. S.*, C. C. A., 106 Fed. 137, 45 C. C. A. 247.

¹⁰ U. S. R. S., § 819.

¹¹ *Reynolds v. U. S.*, 98 U. S. 145, 25 L. ed. 244. Where the record does not show that the defendants have exhausted their peremptory challenges, an error in overruling a challenge by him for cause, *Richards v. U. S.*, C. C. A., 175 Fed. 911, or in sustaining the Government's challenge for cause, *Simpson v. U. S.*, C. C. A., 184 Fed. 817, will ordinarily be disregarded.

¹² *Crawford v. U. S.*, 212 U. S. 183, 53 L. ed. 465, where a challenge upon the ground that the talesman was a salaried official of the United States was held sufficient to sustain an exception when it was overruled, the juror receiving a salary from the United States, but not being technically an official thereof.

¹³ *Reynolds v. U. S.*, 98 U. S. 145, 155, 25 L. ed. 244, 246.

¹⁴ *Reynolds v. U. S.*, 98 U. S. 145, 155, 25 L. ed. 244, 246. Chief Justice Marshall, in *Burr's* trial, stated the rule to be: that "light impressions which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the

testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." *Burr's Trial*, vol. I, p. 416. "The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus pre-

opinion by the juror is immaterial.¹⁵ Upon the trial of an indictment for murder in the first degree, the District Attorney

sented is one of mixed law and fact, and to be tried, so far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." *Reynolds v. U. S.*, 98 U. S. 145, 155, 156, 25 L. ed. 244, 246, 247, per Chief Justice Waite. "In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the ac-

tual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so." *Reynolds v. U. S.*, 98 U. S. 145, 156, 157, 25 L. ed. 244, 246, 247, per Chief Justice Waite. It was held that, under the Alaska Criminal Code, it was no ground of challenge to the favor of a juror had expressed an opinion, as to the guilt of the defendant, that it would require evidence to remove, when the juror testified that he would decide the case impartially on the evidence, uninfluenced by such opinions; *Dolan v. U. S.*, C. C. A., 116 Fed. 578, 54 C. C. A. 34; nor that the defendant was indicted with two others for robbery, one of whom had been previously tried and convicted, that the juror had read all the public accounts for the former trial, heard the matters discussed by persons then present, formed a fixed opinion as to the guilt or innocence of the one then tried, and had formed an opinion as to the guilt or innocence of the defendant, when he testified that he had no such opinion at the time, and if selected as a juror would try the case impartially from the law and evidence produced on the trial. *Hawkins v. U. S.*, C. C. A., 116 Fed. 569, 53 C. C. A. 663; *Dolan v. U. S.*, C. C. A., 116 Fed. 578, 54 C. C. A. 34.

¹⁵ *Reynolds v. U. S.*, 98 U. S. 145, 157, 25 L. ed. 244, 247. "The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a posi-

may ask a juror whether he has any conscientious scruples which would preclude him from rendering a verdict of guilty on circumstantial evidence, "in a case where the penalty prescribed by law is death."¹⁶

"In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juror or talesman, First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either sections one or three of an Act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled 'An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah,' or, Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman. Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any

tive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." *Reynolds v. U. S.*, 98

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U. S. 145, 157, 25 L. ed. 244, 247, per Chief Waite, C. J.

¹⁶ *Hardy v. U. S.*, 186 *U. S.* 224, 22 Sup. Ct. 889, 46 L. ed. 1137.

offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent.”¹⁷ Upon the trial of an indictment for polygamy, it is not error to exclude jurors who are living in polygamy.¹⁸ No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.¹⁹ Under the Alaska Criminal Code the court may require a defendant to exhaust all grounds of challenge, both for cause and peremptorily to each juror, as he is called, before the prosecution is called upon to challenge, and before another juror is called into the box;²⁰ and a subsequent peremptory challenge by him may be denied.²¹ After a juror has been accepted by both sides and has taken his seat in the box, but has not been sworn, he may, upon announcing himself as feeling disqualified to act impartially, be directed by the court to stand aside.²² It has been held that the right to a peremptory challenge, on the part of the prosecution at least, is open until the jury is sworn to try the case;²³ and that, where the defendant had fourteen peremptory challenges left, he could not complain of permission being given the District Attorney, before the jury had been sworn, to challenge peremptorily a juror who had been passed and accepted by both parties.²⁴ It was held to be too late for the defendant to challenge a juror after the juror had been sworn and the District Attorney had made his opening, although the defendant did not learn until then that the juror had expressed an opinion unfavorable to the defendant.²⁵

¹⁷ Jud. Code, § 288, 36 St. at L. 1087, re-enacting 22 St. at L. 31, § 5. See *Clawson v. U. S.*, 114 U. S. 477, 29 L. ed. 179.

¹⁸ *Reynolds v. U. S.*, 98 U. S. 145, 157, 25 L. ed. 244, 247.

¹⁹ Jud. Code, § 286, 36 St. at L. 1087, re-enacting U. S. R. S., § 286.

²⁰ *Dolan v. U. S.*, C. C. A., 116 Fed. 578, 54 C. C. A. 34. But see *Lewis v. U. S.*, 146 U. S. 370, 36 L. ed. 1011.

²¹ *Hawkins v. U. S.*, C. C. A., 116 Fed. 569, 53 C. C. A. 663; *Dolan v. U. S.*, C. C. A., 116 Fed. 578, 54 C. C. A. 34.

²² *U. S. v. Davis*, 103 Fed. 437.

²³ *U. S. v. Davis*, 103 Fed. 457.

²⁴ *U. S. v. Davis*, 103 Fed. 457.

²⁵ *Hawkins v. U. S.*, C. C. A., 116 Fed. 569, 53 C. C. A. 663.

The accused has the right to see the jurors when he exercises his right of challenge²⁶ and to be present when the challenges are tried.²⁷ When the court prescribed an erroneous method of procedure in this respect, it was held that a general exception to its direction was sufficient and that the defendant was not required specifically to demand his right and then except to such denial.²⁸

"A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside."²⁹

The Supreme Court of the United States has said: "There is no statute of the United States which prescribes the method of procedure in empanelling jurors in criminal cases, and it is customary for the United States courts in such cases to conform to the methods prescribed by the statutes of the United States."³⁰ "While the court in the present instance did not exceed its jurisdiction in directing the empanelling of the jury by a method different from that prescribed by the state statute, and while we do not feel called upon to make suggestions as to the proper practice to be adopted by the Circuit Courts in empanelling juries in criminal cases, yet obviously all rules of practice must necessarily be adopted to secure the rights of the accused; that is, where there is no statute, the practice must not conflict with or abridge the right as it exists at common law."³¹

§ 527. Trials in criminal cases. The Constitution ordains: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."¹ It has been said: that a judgment after a trial without a jury would be a nullity;² and that where the trial is conducted by a judge without a jury, by consent of the parties, he acts as an arbitrator, and his conclusions of fact cannot be reviewed upon a writ of error.³ A jury may be waived

²⁶ Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

²⁷ Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262.

²⁸ Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

²⁹ Reynolds v. U. S., 98 U. S. 145, 157, per Chief Justice Waite.

³⁰ Lewis v. U. S., 146 U. S. 370, 377, 13 S. Ct. 136, 36 L. ed. 1011.

³¹ Ibid.

§ 527. ¹ Article III, § 2.

² Frank v. U. S., C. C. A., 192 Fed. 864.

³ Low v. U. S., C. C. A., 169 Fed. 86.

in prosecutions for petty offenses only.⁴ In case of a felony, the trial cannot take place in the absence of the defendant⁵ and the record must show his presence.⁶ Upon the trial of a prosecution for a misdemeanor, the defendant has the right to be present at the trial; but he may waive the same by his voluntary absence.⁷

"No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or District Attorney, for which no fees shall be charged by the clerk or marshal."⁸ It has been held that this may be done without a special order of the court when the prisoner is in jail under an ordinary *mittimus* issued by a State magistrate to the sheriff,⁹ that the jailor may insist upon a written order from the judge or district attorney,¹⁰ that no other officer can make such an order¹¹ and that the statute has no application to proceedings before commissioners.¹²

The defendant has the right to be represented by counsel.¹³

⁴ *Schick v. U. S.*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99. It has been held that a jury cannot be waived where the offense is punishable by imprisonment for more than one year (*Low v. U. S.*, C. C. A., 169 Fed. 86); that the trial judge may be considered as an arbitrator; that his conclusions of fact cannot be reviewed by a writ of error, and that the court of review cannot consider the sufficiency of the evidence to support the judgment or any rulings upon the admission or rejection of evidence. *Low v. U. S.*, C. C. A., 169 Fed. 86.

⁵ *Hopt v. Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262; *Lewis v. U. S.*, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

⁶ *Lewis v. U. S.*, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

⁷ *U. S. v. Leckie*, 1 Sprague, 227, Fed. Cas. No. 15,583; *U. S. v. Mayo*, 1 Curtis, 433, Fed. Cas. No. 15,754; *U. S. v. Shepherd*, 1 Hughes, 520,

Fed. Cas. No. 16,274. See 12 Cyc. 529.

⁸ U. S. R. S., § 1030.

⁹ *U. S. v. Harden*, 10 Fed. 802, 4 Hughes, 455.

¹⁰ *U. S. v. Martin*, 17 Fed. 150, 9 Sawyer, 90.

¹¹ *U. S. v. Harden*, 10 Fed. 802, 4 Hughes, 455.

¹² *U. S. v. Martin*, 17 Fed. 150, 9 Sawyer, 90.

¹³ U. S. R. S., § 747. Where the objection was not raised upon the trial, it was held to be too late, upon an application for the writ of *habeas corpus*, to object that the prisoner charged with a capital offense had been represented by a counsellor who had been assigned by the court, and had been not allowed to consult with an attorney whom he had selected. *Andersen v. Treat*, 172 U. S. 24, 43 L. ed. 351. Counsel assigned by the court have no right to recover compensation

The Revised Statutes provide: "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours." When, after a trial has been begun, it is discovered that a juror is disqualified, the court may, under proper circumstances, discharge the jury and order a new trial, against the defendant's objections.¹⁴

The court may permit the jurors to separate during adjournments and recesses of the trial,¹⁵ and it is not error to refuse to exclude the jurors from the court-room during the argument and decision of motions and questions of law.¹⁶ The objection that there is no evidence to prove that the defendant committed the crime charged may be considered upon writ of error; although no motion to direct a verdict in his favor upon that ground was made, and no exception in the case raises the point.¹⁷ The judge has no power to direct a verdict in favor of the prosecution, although the evidence is uncontradicted,¹⁸ and he cannot even charge as matter of law that any allegation has been proved.¹⁹ He may express to the jury his opinion upon the facts;²⁰ but it is the better practice for him not to do so until after the counsel have summed up;²¹ and never, it has been held, after the jury have reported their inability to

from the United States. *Knabb v. U. S.*, 1 Court Claims, 173.

¹⁴ *Thompson v. U. S.*, 155 U. S. 271, 39 L. ed. 146. It was said not to be an abuse of discretion to refuse to discharge a jury which had read newspaper articles calculated to prejudice the defendant, where they stated, when being interrogated, that this would not influence them in arriving at a verdict. *Marrin v. U. S.*, C. C. A., 167 Fed. 951, where the objection had been waived. See *supra*, § 478.

¹⁵ *U. S. v. Holt*, 168 Fed. 141.

¹⁶ *Ibid.*

¹⁷ *Clyatt v. U. S.*, 197 U. S. 207, 49 L. ed. 726. But see *Simpson v. U. S.*, C. C. A., 184 Fed. 817, holding that such a motion is essential and that the introduction of evidence by the accused in his own behalf is a waiver of such a motion previously made.

¹⁸ *Konda v. U. S.*, C. C. A., 22 L.R.A.(N.S.) 304, 166 Fed. 91.

¹⁹ *Ibid.*

²⁰ *Keller v. U. S.*, C. C. A., 168 Fed. 697.

²¹ *U. S. v. Foster*, 183 Fed. 626; reversed upon another point, C. C. A., 188 Fed. 305.

agree.²² He must, however, instruct the jury that the facts are to be decided by them,²³ and a judgment may be reversed when his language was so positive and emphatic as to tend to intimidate the jury.²⁴ "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: Provided, That such attempt be itself a separate offense."²⁵ A verdict for man-slaughter will be sustained under an indictment charging murder which contains all the allegations essential to aver the lesser crime.²⁶

"In an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury."²⁷ Where an indictment charges the defendants with conspiracy together and with no one else, an acquittal of one is an acquittal of both.²⁸ But it has been held: that where they are also charged with conspiracy with others unknown to the grand jury, one may be acquitted and the other convicted.²⁹ A verdict of "guilty as charged in the indictment" is tantamount to a conviction on each of the counts therein charged.³⁰ Where there are several counts in an indictment, one of which is good and the other bad, and the jury find a general verdict of guilty, the verdict will be sustained upon the presumption of law that it was based upon the good count;³¹

²² *Foster v. U. S.*, C. C. A., 183 Fed. 305; reversing 183 Fed. 626.

²³ *Keller v. U. S.*, C. C. A., 168 Fed. 697.

²⁴ *Rudd v. U. S.*, C. C. A., 173 Fed. 912. See *Richardson v. U. S.*, C. C. A., 181 Fed. 1; *Foster v. U. S.*, C. C. A., 188 Fed. 305.

²⁵ U. S. R. S. § 1035.

²⁶ *U. S. v. Leonard*, 2 Fed. 669, 18 Blatch. 187.

²⁷ U. S. R. S., § 1036.

²⁸ *U. S. v. Hamilton*, 8 Chicago Legal News, 211, Fed. Cas. No. 15,288.

²⁹ *Ibid.*

³⁰ *Schraubstadter v. U. S.*, C. C. A., 199 Fed. 568.

³¹ *Tubbs v. U. S.*, C. C. A., 105 Fed. 59, 44 C. C. A., 357; *Holloway v. Reg.*, 17 Q. B. 317; 2 Den. C. C. 287, 17 Jur. 825, 79 E. C. L. 317; *Reg v. Bullock*, Dears. C. C. 653, 25 L. J. M. C. 92; *Cribb v. State*, 9 Fla. 409; *Josslyn v. Commonwealth*, 6 Metc. (Mass.) 236; *Boose v. State*, 10 Ohio St. 575.

but the sentence imposed cannot exceed that which might properly be imposed on the good count.³²

§ 528. Summary trials of offenses against navigation laws. The Revised Statutes enact: "Whenever a complaint shall be made against any master, officer or seaman of any vessel belonging, in whole or in part, to any citizen of the United States, of the commission of any offense, not capital or otherwise infamous, against any law of the United States made for the protection of persons or property engaged in commerce or navigation, it shall be the duty of the district attorney to investigate the same, and the general nature thereof, and, if in his opinion, the case is such as should be summarily tried, he shall report the same to the district judge, and the judge shall forthwith, or as soon as the ordinary business of the court will permit, proceed to try the cause, and for that purpose may, if necessary, hold a special session of the court, either in term-time or vacation."¹ "At the summary trial of offenses against the laws for the protection of persons or property engaged in commerce or navigation, it shall not be necessary that the accused shall have been previously indicted, but a statement of complaint, verified by oath in writing, shall be presented to the court, setting out the offense in such manner as clearly to apprise the accused of the character of the offense complained of, and to enable him to answer the complaint. The complaint or statement shall be read to the accused, who may plead to or answer the same, or make a counter-statement. The trial shall thereupon be proceeded with in a summary manner, and the case shall be decided by the court; unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty."² "It shall be lawful for the court to allow the district attorney to amend his statement of complaint at any stage of the proceedings, before verdict, if, in the opinion of the court, such amendment will work no injustice to the accused; and if it appears to the court that the accused is unprepared to meet the charge as amended, and that an adjournment of the cause

³² *Tubbs v. U. S.*, C. C. A., 105 Fed. 59, 44 C. C. A. 357. See §§ 532, 536, *infra*.

§ 528. ¹ U. S. R. S., § 4300. See *U. S. v. Harriman*, 1 Hughes, 525. ² U. S. R. S., § 4301.

will promote the ends of justice, such adjournment shall be made, until a further day, to be fixed by the court.”³ “At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers.”⁴ “It shall not be lawful for the court to sentence any person convicted in such trial to any greater punishment than imprisonment in jail for one year, or to a fine exceeding five hundred dollars, or both, in its discretion, in those cases where the laws of the United States authorize such imprisonment and fine.”⁵ “All the penalties and forfeitures which may be incurred for offenses against this Title may be sued for, prosecuted, and recovered in such court, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties, except when otherwise expressly prescribed.”⁶ A later statute applies the provisions of these sections to the trial of offenses for failure to observe signals made in laying and repairing submarine cables and for failing to keep fishing implements or nets out the way of such operations.⁷ “The law which dispenses with an indictment for petty offenses on high seas has been found very useful both to the government and to the accused. The district judges who have sat here since this law was first passed in June, 1864, have had very grave doubts of the constitutionality of that part of Section 4301 which provides for a trial by the court; and it has been usual to try all contested cases by jury.”⁸ It has been said that these summary proceedings are put by the statute substantially on the footing of civil cases, and that the want of a due verification of complaint is waived by voluntary appearance of accused.⁹ It has been held, that such an error can be cured by amendment and cannot be urged for the first time upon a motion in arrest of judgment.¹⁰

§ 529. Practice in prosecutions under the civil rights laws. “The jurisdiction in civil and criminal matters con-

³ U. S. R. S., § 4302.

⁴ U. S. R. S., § 4303.

⁵ U. S. R. S., § 4304.

⁶ U. S. R. S., § 4305.

⁷ Act of Feb. 29, 1888, c. 17, § 11, 25 St. at L. 42.

⁸ *Re Smith*, 13 Fed. 25. D. Mass.

⁹ *U. S. v. Smith*, 17 Fed. 510.

¹⁰ *Ibid.*

ferred on the District Courts by the provisions of this title," that on the "Judiciary" "and of title 'Civil Rights,' and of title 'Crimes' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."¹ This section is not repealed or affected by the Judiciary Act of March 3, 1887.² It relates to the forms of process and remedy and not to the extent or scope of the jurisdiction, nor to the rules of decision.³ It has been said: that, as there are no acts of Congress regulating challenges to grand jurors, the Federal court should follow the state practice as to objections to indictments because of irregularity in the selection of the members of the grand jury.⁴

§ 530. New trials. The rules regulating motions for new trials in criminal cases are substantially the same as those in civil actions at common law.¹ In the absence of a State statute, at least, the motion must be made at the term at which judgment is entered;² but when no judgment had been entered it

§ 529. ¹ U. S. R. S., § 722.

² 24 St. at L. 552, § 5.

³ *Re Stupp*, 12 Blatch. 509.

⁴ U. S. v. Egan, 30 Fed. 608.

§ 530. ¹ *Supra*, § 478.

² U. S. v. Rogers, 164 Fed. 520; *supra*, § 478. Where, after the affirmation of a criminal conviction and the expiration of the trial term, the defendant applied to the Circuit Court of Appeals for leave to file a motion for a new trial in the Dis-

trict Court, relying upon a local statute, which authorized such a motion at any time within one year after sentence, whether before or after the expiration of the term; the court, without intimating any opinion upon the subject, directed that the motion be made in the District Court. *Trafton v. U. S.*, C. C. A., 147 Fed. 513, 514; quoted *supra*, § 478

was held that the motion might be made after the trial term.³ As a general rule, a motion for a new trial cannot be granted because of improper remarks by the prosecuting attorney, unless the defendant's counsel at once called the attention of the court to objectionable language and requested the court to interfere, and upon the court's refusal, noted an exception.⁴ If the court then interferes and directs the District Attorney to desist using such language, and he obeys, it is usually held that the mischief is cured;⁵ but where the District Attorney commented upon the failure of the accused to testify, and the court failed to prohibit any further reference to the matter, and to instruct the jury to ignore it, it was held that a new trial should be granted.⁶ The district attorney has the right to state that the Government has made out a *prima facie* case which has not been contradicted.⁷ An order denying a motion for a new trial should not be reviewed upon writ of error,⁸ but a refusal to consider affidavits offered in support of a motion for a new trial may be a ground for reversal when an exception was duly taken to such exclusion.⁹ Where uncontradicted affidavits, which the court of original jurisdiction refused to consider, prove that a new trial must be granted, the court of review granted the same.¹⁰

§ 531. Motion in arrest of judgment. A motion in arrest of judgment must be based upon an omission, in the record, of a fact essential to show the jurisdiction of the court, or upon some error in the proceedings, which appears upon the record.¹ A motion in arrest of judgment will be granted where an ob-

³ U. S. v. Rogers, 164 Fed. 520.

⁴ Crumpton v. U. S., 138 U. S. 361, 364, 34 L. ed. 958, 959; Dunlop v. U. S., 165 U. S. 486, 498, 41 L. ed. 799, 803; Sawyer v. U. S., 202 U. S. 150, 50 L. ed. 972. See Cudahy Packing Co. v. Skoumal, C. C. A., 125 Fed. 470; Thompson v. U. S., C. C. A., 144 Fed. 14; Johnston v. U. S., C. C. A., 154 Fed. 445.

⁵ Ibid.

⁶ Wilson v. U. S., 149 U. S. 60, 13 S. Ct. 765, 37 L. ed. 650.

⁷ Carlisle v. U. S., C. C. A., 194 Fed. 827.

⁸ Whitworth v. U. S., C. C. A., 114 Fed. 302, *supra*, § 478.

⁹ Clyde Mattox v. U. S., 146 U. S. 140, 147, 36 L. ed. 917, 920. See Hendrix v. U. S., 219 U. S. 79, 91, 55 L. ed. 102, 106.

¹⁰ Ogden v. U. S., C. C. A., 112 Fed. 523.

§ 531. ¹ U. S. v. Kilpatrick, 16 Fed. 765; U. S. v. Barnhart, 17 Fed. 579 (9 Sawyer, 159); U. S. v. McKnight, 112 Fed. 982.

jection to the legality of the organization of a grand jury arises on the record,² or the indictment, conviction and sentence, were made by a court sitting at an unauthorized time,³ or where the record fails to show that a plea of not guilty was entered by the defendant, or by order of the court on his behalf and in his presence;⁴ or where it appears from the indictment that it is based upon a statute that had been repealed;⁵ or where the indictment fails to charge any offense under a statute of the United States.⁶ Ordinarily, the affidavits of jurors will not be considered in support of a motion for a new trial. The failure of the defendant to demand a bill of particulars does not deprive him of the right to move in arrest of judgment because of a defect in the indictment.⁸ A motion in arrest of judgment will not be granted because of mere technical defects in the indictment, which do not tend to prejudice the defendant;⁹ nor because of defects or uncertainties in the same, which might be fatal upon a motion to quash, when it contains allegations of all the essential elements of the crime charged;¹⁰ nor, it seems, for misjoinder or duplicity.¹¹ Where there is a general verdict of guilty, and the indictment contains several counts, of which only one is good, the judgment will not be arrested, if the evidence is sufficient to support the good count;¹² nor, at least when no exception to them was taken at the time, for errors and irregularities in the conduct of the trial,¹³ such

² U. S. v. London, 176 Fed. 976.

³ See *Ex parte Harlan*, 180 Fed. 119.

⁴ *Dansby v. U. S.*, 2 Indian Territory, 456, 51 S. W. 1083.

⁵ U. S. v. Goodwin, 20 Fed. 237.

⁶ U. S. v. Bartow, 10 Fed. 874 (20 Blatchf. 349); *Morris v. U. S.*, C. C. A., 168 Fed. 682.

⁷ *Hendrix v. U. S.*, 219 U. S. 79, 55 L. ed. 102, where the court refused to consider the affidavits of some of the jurors that they agreed to the verdict upon an understanding that the punishment should be less than that which was finally imposed; *Walsh v. U. S.*, C. C. A., 174 Fed. 615. But see cases cited § 478, *supra*.

⁸ U. S. v. Tubbs, 94 Fed. 356.

⁹ U. S. v. Chase, 27 Fed. 807. *Schraubstadter v. U. S.*, C. C. A., 199 Fed. 568.

¹⁰ U. S. v. Kilpatrick, 16 Fed. 765.

¹¹ U. S. v. Bayaud, 16 Fed. 376 (21 Blatchf. 287); *Chitty's Criminal Law*, I, p. 253; 12 Cyc. 762. But see *U. S. v. Peterson*, 1 W. & M. 305, Fed. Cas. No. 16,037; *U. S. v. Dickinson*, 2 McLean, 325, Fed. Cas. No. 14,958; *U. S. v. Sharp*, Peters C. C. 131, Fed. Cas. No. 16,265.

¹² U. S. v. Potter, 6 McLean, 186 Fed. Cas. No. 16,078.

¹³ *Chitty's Criminal Law*, I, p. 661; 12 Cyc. 759.

as the fact that the indictment was not sent to the jury room, when it was in court during the trial and was read to the jury;¹⁴ or a failure to read the indictment to the jury, when the accused did not demand that it be read.¹⁵ A motion in arrest of judgment will be granted when, in the case of a felony at least, a verdict was rendered in the absence of the defendant,¹⁶ provided that a prompt objection upon this ground was made.⁷¹ Upon a motion in arrest of judgment, the court will not look beyond the record, not even into a stipulation admitting certain facts.¹⁸ Where, after a motion in arrest of judgment, the defendant forfeited his bail and absconded, the court refused to decide the motion in his absence.¹⁹

§ 532. Judgment in criminal cases. Ordinarily, the sentence is pronounced by the judges who presided at the trial; but, in an extraordinary case, where the jurisdiction is not lost, it seems that the judge sitting at a regular term of the court may pass sentence, although the conviction was had at another term and before him and another judge.¹ The judgment in a criminal case, in which two defendants are jointly tried and jointly convicted, must be several and not joint;² except so far as the costs are concerned, for which, perhaps, a joint judgment might be entered.³ Where two indictments for offenses under the same statute have been consolidated, the court may sentence each defendant to the whole statutory fine.⁴ Where there is a general verdict of "guilty" upon several counts, some of which are bad, a sentence of imprisonment based upon a good count will be affirmed, although a separate sentence for the same term was imposed upon a bad count, with a provision that the term should run concurrently.⁵ Where there is a general verdict of

¹⁴ U. S. v. Angell, 11 Fed., 34.

¹⁵ U. S. v. Bickford, 4 Blatchf. 337, Fed. Cas. No. 14,591.

¹⁶ U. S. v. McClure, 107 Fed. 268.

¹⁷ U. S. v. Shepherd, 1 Hughes, 520, Fed. Cas. No. 16,274.

¹⁸ U. S. v. Barnhart, 17 Fed. 579 (9 Sawyer, 159). See U. S. v. Holt, 168 Fed. 141.

¹⁹ U. S. v. Erskine, 4 Cranch C. C. 299, Fed. Cas. No. 15,057.

§ 532. ¹U. S. v. Gordon, 5

Blatchf. 18, Fed. Cas. No. 15,231;

U. S. v. May, 2 McArthur, 512.

² U. S. v. Ismenard, 1 Cranch C. C. 150, Fed. Cas. No. 15,450.

³ Calico v. State, 4 Ark. 430.

⁴ Turner v. U. S., C. C. A., 66 Fed. 280, 13 C. C. A., 436.

⁵ Wisconsin Cent. Ry. Co. v. U. S., C. C. A., 169 Fed. 76; *Ex parte* Gouyet, 175 Fed. 230; Bartholomew v. U. S., C. C. A., 177 Fed. 902. See U. S. v. Lair, C. C. A., 195 Fed. 47.

guilty under an indictment, with two or more counts charging different crimes of the same character and growing out of the same transaction, but differing in degree, the sentence must impose a single penalty.⁶ But, where there is a general verdict, upon two or more counts charging crimes of the same character arising out of distinct and separate transactions, a separate penalty may be imposed for each count.⁷ It seems that the court has the power to sentence the defendant upon a single count and to suspend sentence upon the others.⁸ Where sentence is imposed for a specified term of imprisonment, upon different counts, a separate term for each count must be specifically stated by the court in the sentence;⁹ and if it is the intention of the court that the term shall be consecutive or concurrent, that must be stated in the judgment.¹⁰ Otherwise, it has been held that it will be presumed that the terms are concurrent.¹¹ In such a case, it is error to impose the sentence for a certain period in gross, which is in excess of the statutory penalty for a single crime.¹² Another court cannot cure the defect by apportioning the term upon the different counts; and, after serving the lawful part of the term, the prisoner may be discharged upon *habeas corpus*;¹³ unless the term of the court, at which the judgment was entered, has not yet expired, in which case, be-

But see *Dwyer v. U. S., C. C. A.*, 170 Fed. 160, where the judge charged the jury that the testimony concerning the counts that were insufficient was material to the issues upon those which were good.

⁶ *Ex parte Joyce*, Fed. Cas. No. 7,556.

⁷ *U. S. v. Bennett*, 17 Blatchf. 357, Fed. Cas. No. 14,572; *Re Greenwald*, 77 Fed. 590; *U. S. v. Carpenter*, C. C. A., 9 L.R.A.(N.S.) 1043, 151 Fed. 214; *U. S. v. Peeke*, C. C. A., 153 Fed. 166. Where a prisoner convicted for two offenses was sentenced to a term of imprisonment for each offense, the terms to run concurrently, and the statute required that the terms of the imprisonment should be cumulative; it was held that, since the error did

not prejudice the convict, he should not be discharged by *habeas corpus*. *Connella v. Haskell*, C. C. A., 158 Fed. 285.

⁸ *U. S. v. Blaisdell*, 3 Benedict, 132, Fed. Cas. No. 14,608.

⁹ *U. S. v. Bennett*, 17 Blatchf. 357, Fed. Cas. No. 14,572; *Re Greenwald*, 77 Fed. 590.

¹⁰ *Kirkman v. McClaughry*, 152 Fed. 255.

¹¹ *Kirkman v. McClaughry*, 152 Fed. 255.

¹² *U. S. v. Bennett*, 17 Blatchf. 357, Fed. Cas. No. 14,572; *Re Greenwald*, 77 Fed. 590; *U. S. v. Peeke*, C. C. A., 12 L.R.A.(N.S.) 314, 153 Fed. 166.

¹³ *U. S. v. Peeke*, C. C. A., 153 Fed. 166.

fore the discharge of the prisoner, an opportunity to correct the sentence might be afforded.¹⁴ Where the prisoner was sentenced to three successive terms of imprisonment upon different counts, and the sentence for the second or middle term was void, it was held that the third term began at once upon the expiration of the first.¹⁵ The plaintiff in error cannot complain because the statute directed that he be punished by fine and imprisonment and no fine was imposed upon him,¹⁶ nor because different punishment is imposed upon him than that prayed in the information;¹⁷ but where the statute directed that the imprisonment be at hard labor, it was held that it was error to omit the direction for hard labor.¹⁸ The judgment was consequently reversed and remanded in order that the proper punishment might be imposed. Where the statute does not authorize imprisonment at hard labor upon *habeas corpus*, the trial court can amend the sentence *nunc pro tunc* by striking out that part of the sentence.¹⁹ "In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary, with its discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law."²⁰

The Revised Statutes provide: "If any person having devised or intending to devise any scheme or artifice to defraud, or to be effected by either opening or intending to open correspond-

¹⁴ U. S. v. Carpenter, C. C. A., 12 L.R.A. (N.S.) 314, 151 Fed. 214; *supra*, § 481.

¹⁵ U. S. v. Carpenter, C. C. A., 151 Fed. 214.

¹⁶ Bartholomew v. U. S., C. C. A., 177 Fed. 902.

¹⁷ Standard Oil Co. v. Missouri,

224 U. S. 270, 285, 56 L. ed. 760, 769.

¹⁸ Sorenson v. U. S., C. C. A., 168 Fed. 785.

¹⁹ *Ex parte* Harlan, 180 Fed. 119.

²⁰ *Ex parte* Karstendick, 93 U. S. 396, 399, 23 L. ed. 889, 890, per Waite, C. J.

ence or communication with any other person, whether resident within or outside of the United States, by means of the Post-office Establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the Post-office Establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-office Establishment enters as an instrument into such fraudulent scheme and device.”²¹

This does not constitute all the offenses committed during the same six months a single continuing offense, and upon a conviction under several consolidated indictments for separate offenses committed within that time, the sentence may impose separate and cumulative terms of imprisonment for each offense.²² It has been held that, when more than three offenses, committed within the six calendar months, are joined, the court may impose a separate and cumulative penalty for the offenses for those in excess of three.²³

Except, perhaps, in a capital case, it is unnecessary for the court to ask the prisoner if he has anything to say before the sentence is pronounced.²⁴

In a recent case, after verdict of guilty, the court took testimony, for the purpose of information, as to the amount of the fine that should be imposed upon the corporation, which was the defendant.²⁵

²¹ U. S. R. S., § 5480. See *supra*, § 503.

²² *Re De Bara*, 179 U. S. 316, 21 S. Ct. 110, 25 L. ed. 207.

²³ *Re Henry*, 123 U. S. 372, 31 L. ed. 174. See *supra*, § 503.

²⁴ *Turner v. U. S.*, C. C. A., 66 Fed. 287, 289, 13 C. C. A. 443, 445.

²⁵ *U. S. v. Standard Oil Co. of Indiana*, 155 Fed. 305, 317, citing *Bishop's New Criminal Law*, I, §§ 948 and 950. The court imposed a fine of \$29,240,000, which was more than the capital stock of the defendant, and which had a capital of only \$1,000,000. The reason as-

It seems that the signature of the judge is unnecessary to the validity of a judgment in a criminal case, when it is correctly recited in the record duly authenticated by the clerk.²⁶

§ 533. **Suspension of judgment in criminal cases.** It has been held that the Territorial courts have no power to suspend sentence indefinitely.¹ "There can be no doubt of the right of a court to temporarily suspend its judgment and continue to do so from time to time in a criminal cause, for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may properly be considered before judgment, or for other good cause. In this cause, however, the record does not show that the suspension was for any such reason, or for a certain or short time, but on the contrary, it appears it was for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them. Instead of this being a mere suspension of sentence, it operated as a condonation of the offense, and an exercise of a pardoning power, which was never conferred upon the court. In this I think the court clearly transcended its authority."² Indefinite suspensions of the execution of a sentence that has been imposed are occasionally granted by the courts of the United States.³

§ 534. **Execution of judgment.** "Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for the execution

signed was that the owner of the defendant's capital stock, the Standard Oil Company of New Jersey, whose capital was \$100,000,000, was the real defendant. This case was reversed by the Circuit Court of Appeals, 104 Fed. 376.

²⁶ *Connella v. Haskell*, C. C. A., 158 Fed. 285.

§ 533. ¹ *U. S. v. Wilson*, 46 Fed. 748.

² *U. S. v. Wilson*, 46 Fed. 748, 749, per Beatty, J. See *U. S. v. Blaisdell*, 30 Benedict, 132, Fed. Cas. No. 14,608.

³ *U. S. v. Curtis*, C. C., S. D. N. Y., November, 1908, per Hough, J. cited in *U. S. v. Morse*, C. C. A., 174 Fed. 539, 541.

thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct.”¹

“Whenever any criminal convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.”²

“Where a judicial district has been or may hereafter be divided, the Circuit and District Courts of the United States shall have power to sentence any one convicted of an offense punishable by imprisonment at hard labor to the penitentiary within the State, though it be out of the judicial district in which the conviction is had.”³

“In every case where any person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.”⁴

“In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.”⁵

“All prisoners who have been, or may be convicted of any offense against the laws of the United States, and confined in any State jail or penitentiary in execution of the judgment upon such conviction, who so conduct themselves that no charge for misconduct is sustained against them, shall have a deduction of one month in each year made from the term of such sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such

§ 534. ¹ U. S. R. S., § 1040.

⁴ U. S. R. S., § 5541.

² U. S. R. S., § 5539.

⁵ U. S. R. S., § 5542.

³ U. S. R. S., § 5540.

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jail or penitentiary, with the approval of the Attorney-General.”⁶ “The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any State for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary.”⁷

“All prisoners who have been or shall hereafter be convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any State or Territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted and a certificate of the warden or keeper of such prison [or] penitentiary of such deduction shall be entered on the warrant of commitment: *Provided*, that if during the term of imprisonment the prisoner shall commit any offense for which he shall be convicted by a jury, all remissions theretofore made shall be thereby annulled.

“Sec. 2. That on the discharge from any prison of any person convicted under the laws of the United States on indictment, he or she shall be provided by the warden or keeper of said prison with one plain suit of clothes and five dollars in money, for which charge shall be made and allowed in the accounts of said prison with the United States; *Provided*, That this section shall not apply to persons sentenced for a term of imprisonment of less than six months.”⁸ “All persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a District or Territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined for the term for which

⁶ U. S. R. S., § 5543. See U. S. v. Schroeder, 14 Blatchf. 344.

⁸ Act of March 3, 1875, 18 Stat. at L. 479.

⁷ U. S. R. S., § 5544.

they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia, the transportation and the delivery shall be by the warden of the jail of that District; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only to be paid by the Attorney-General, out of the judiciary fund. But if in the opinion of the Attorney-General, the expense of transportation from any State, Territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case, when, in the opinion of the Attorney-General, it is necessary for the preservation of the health of the prisoner or when in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment; *Provided however*, That no change shall be made in the case of any prisoner on the ground of unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf.”⁹ “The Attorney-General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment subsistence and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined.”¹⁰

“Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or by either, the court by which the sentence is passed

⁹ U. S. R. S., § 5546, as amended
by Act of July 12, 1876, 19 Stat.
at L. 88.

¹⁰ U. S. R. S., § 5547.

may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the State or district where such court is held, the use of which is authorized by the legislature of the State for such purpose.”¹¹ “Juvenile offenders against the laws of the United States, being under the age of sixteen years, and who may hereafter be convicted of crime, the punishment whereof is imprisonment, shall be confined during the term of sentence in some house of refuge to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal of the district where such conviction has occurred; or if such conviction be had in the District of Columbia, then the transportation and delivery shall be by the warden of the jail of that district, and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshal or warden, only shall be paid by the Attorney-General, out of the judiciary fund.”¹² “The Attorney-General shall contract with the managers or persons having control of such houses of refuge for the imprisonment, subsistence and proper employment of all such juvenile offenders and shall give the several courts of the United States and of the District of Columbia notice of the places so provided for the confinement of such offenders; and they shall be sentenced to confinement in the house of refuge nearest the place of conviction so designated by the Attorney-General.”¹³ “In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided*, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.”¹⁴ After the expiration of the specific term of imprisonment, the convict may serve the remainder of his term in the penitentiary in

¹¹ U. S. R. S., § 5548.

¹³ U. S. R. S., § 5550.

¹² U. S. R. S., § 5549.

¹⁴ U. S. R. S., § 1041.

which he was previously confined.¹⁵ "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States Court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the District Attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailor or keeper of the jail a certificate setting forth the facts."¹⁶ After the expiration of the term at which a judgment fining a defendant is rendered, the court has no power by an order to declare such judgment abated because of his subsequent death,¹⁷ unless the judgment is reversed.¹⁸ It has been held that a judgment without a fine, imposed in a civil contempt proceeding, does not abate by the death of the defendant.¹⁹

§ 535. Bills of exceptions. Whenever the plaintiff in error wishes to have the court of review examine the proceedings upon the trial, it is necessary for him to prepare and serve a bill of exceptions. The same rules regulate bills of exceptions in civil actions and criminal proceedings.¹

¹⁵ *Haddox v. Richardson*, C. C. A., 168 Fed. 635.

¹⁶ U. S. R. S., § 1042.

¹⁷ *U. S. v. N. Y. Cent. & H. R. R. Co.*, C. C. A., 164 Fed. 324; reversing *U. S. v. Pomeroy*, 152 Fed. 279.

¹⁸ *Dyar v. U. S.*, C. C. A., 186 Fed. 614.

¹⁹ *Wasserman v. U. S.*, C. C. A., 161 Fed. 722.

§ 535. ¹ *Supra*, § 534.

§ 536. Writs of error in criminal cases. A judgment in criminal cases is reviewed by writ of error and not by appeal.¹ A defendant, who has been convicted of any crime which is not capital, may bring the judgment for review before the Circuit Court of Appeals for the appropriate district by a writ of error.² His writ must be sued out within six months after the entry of the judgment sought to be reviewed.³ In case of a conviction of a capital crime, the defendant may bring the judgment immediately before the Supreme Court of the United States for review.⁴ It might be held that such a writ must be sued out at the term in which the trial was had, or within such time, not exceeding sixty days after the expiration of such term as the court may for cause allow by an order duly entered.⁵ Until recently, the Government of the United States had no right to obtain a review of a judgment or order of acquittal, except possibly when a constitutional, jurisdictional or treaty question was involved.⁶ A recent act of Congress provides: "That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be

§ 536. ¹ See *infra*, § 687.
² 26 St. at L. 829, § 5; 29 St. at L. 492.

³ 27 St. at L. 824, § 11.

⁴ 26 St. at L. 827, § 5.

⁵ 26 St. at L. 827, § 11; 25 St. at L. 656, § 6. See Parker, Petitioner, 131 U. S. 221.

⁶ U. S. v. Sanges, 144 U. S. 310, 36 L. ed. 445.

admitted to bail on his own recognizance: *Provided*, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."⁷ This statute is constitutional.⁸ An error in an instruction relating to a single count does not justify a reversal of the judgment where there was a general verdict of guilty and there are other counts unaffected by the same.⁹ Where there is a general verdict of guilty upon an indictment containing several counts, some of which are bad, the conviction will not be reversed if there is one good count warranting the judgment.¹⁰ "In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction."¹¹ But where a case, such as a contempt proceeding, is tried before a single judge, who finds the defendant guilty of separate acts and imposes a single sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance; there is no room for such a presumption, and the judgment will be reversed if it appears that the defendants have been sentenced upon any charge which in law or in fact did not constitute a contempt.¹²

⁷ Act of March 2, 1907, c 2564, 34 St. at L. 1246.

⁸ *Morse v. U. S., C. C. A.*, 174 Fed. 539. As to the erroneous admission of testimony in such a case, see *Dwyer v. U. S., C. C. A.*, 170 Fed. 160, cited *supra*, § 532.

⁹ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 440, 55 L. ed. 797, 805, 34 L.R.A.(N.S.) 874.

¹⁰ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 440, 55 L. ed. 797, 805, 34 L.R.A.(N.S.) 874.

¹¹ *Ibid.*

¹² *U. S. v. Bitty*, 208 U. S. 393, 52 L. ed. 543. "Congress was not required by the Constitution to grant to an accused the privilege of bringing her upon the overruling of a demurrer to the indictment and before the final determination of the case

against him; the question of the sufficiency of the indictment simply because, in the interest of the prompt administration of the criminal law, it allowed the United States to prosecute a writ of error directly to this court for the review of a final judgment which stopped the prosecution by quashing or dismissing the indictment upon the ground of the unconstitutionality or construction of the statute." *U. S. v. Bitty*, 208 U. S. 393, 399, 400, 52 L. ed. 543, 545, 546. Under this statute, an order or judgment quashing an indictment or sustaining a plea in bar may be reviewed in a proper case. *U. S. v. Heinze*, No. 2, 218 U. S. 547, 54 L. ed. 1145; *U. S. v. Kissel*, 218 U. S. 601, 54 L. ed. 1168; *U. S. v. Barber*, 219 U. S. 72, 55 L. ed. 99. The court has no jurisdiction to re-

The practice in obtaining and prosecuting writs of error is described in the last chapter of this work.¹³ Stays of proceedings and bail pending writs of error are previously discussed.¹⁴ An order in the discretion of the court below, such as the denial of a motion to quash an indictment,¹⁵ the denial of a motion for a continuance¹⁶ or of a motion for a new trial,¹⁷ will rarely, if ever, be reviewed. The overruling of a demurrer will not be reviewed when the defendant was subsequently allowed to plead "not guilty."¹⁸ A question not raised in the trial court will not be reviewed upon a writ of error, unless the proceedings are clearly void or the court's refusal so to do would shock the judicial conscience.¹⁹ Objections to irregularities in the summons, the panel, or the organization of a grand jury, cannot be raised for the first time by writ of error.²⁰ The erroneous admission of evidence is ordinarily a ground for reversal, unless it appears that it could not have prejudiced the defendant.²¹ A general exception to a refusal to direct a verdict is insufficient to entitle the accused to claim in the court of review that there was a variance.²² The submission of a case upon an agreed statement of facts leaves the question of law thereupon arising open for review.²³ In an extraordinary case,

view the interpretation of the indictment, but in signing the writ of error will assume that the construction of the counts given by the court below is correct. *U. S. v. Patten*, 226 U. S. 525, 57 L. ed. —, *U. S. v. Winslow*, 227 U. S. 202, 57 L. ed. —. It is doubtful whether the Attorney General can ask that the indictment be sustained under other statutes than those upon which they relied in the court below. *U. S. v. George*, 228 U. S. 14, 57 L. ed. —. Where the indictment was dismissed because not sustained by the statute and also as bad on principles of general law, the Supreme Court can only review the decision so far as it is based upon the invalidity or construction of the statute. *U. S. v. Stevenson*, 215 U. S. 190, 54 L. ed. 153.

¹³ *Infra*, Chapter XXXV.

¹⁴ *Supra*, § 493.

¹⁵ *Hillegass v. U. S.*, C. C. A., 183 Fed. 199. See § 515, *supra*.

¹⁶ *Callahan v. U. S.*, C. C. A., 195 Fed. 924.

¹⁷ *Mitchell v. U. S.*, C. C. A., 196 Fed. 874. See §§ 478, 530, *supra*.

¹⁸ *Hillegass v. U. S.*, C. C. A., 183 Fed. 199.

¹⁹ *Keliher v. U. S.*, C. C. A., 193 Fed. 8.

²⁰ *Burchett v. U. S.*, C. C. A., 194 Fed. 821.

²¹ *Keliher v. U. S.*, C. C. A., 193 Fed. 8, 20, and cases cited.

²² *Richardson v. U. S.*, C. C. A., 181 Fed. 1.

²³ *Frank v. U. S.*, C. C. A., 192 Fed. 864.

where personal liberty is involved, the court of review may consider an error not contained in the assignment, although no sufficient exception to the same was taken.²⁴ It is not essential to an affirmance of a conviction that the judges should be satisfied of the defendant's guilt beyond a reasonable doubt when there is no substantial evidence of the same.²⁵ A reversal for error in imposing an excessive sentence does not entitle the defendant to a discharge, but the case will be remanded with directions to enter the appropriate judgment.²⁶ It has been held that, upon an affirmance, the Circuit Court of Appeals may, with the consent of the district attorney, authorize the trial judge to modify the sentence imposed.²⁷

²⁴ *Humes v. U. S., C. C. A.*, 182 Fed. 485.

²⁵ *Matthews v. U. S., C. C. A.*, 192 Fed. 490.

²⁶ *Mitchell v. U. S., C. C. A.*, 196 Fed. 874. See § 532, *supra*.

²⁷ *Scott v. U. S., C. C. A.*, 165 Fed. 172. In *Rosenstein v. U. S., C. C. A.*, 193 Fed. 1022, the counsel

for the plaintiff in error having called the attention of the court of review that the punishment should have been less in view of extenuating circumstances which his client excusably failed to bring before the District Court, the judgment was vacated and the case remanded for a resentence.

CHAPTER XXXII.

REMOVAL OF CAUSES.

§ 537. Removal of cases from the State courts to the District Courts of the United States. In general. The right of removal from the State to the Federal courts was first granted by the Judiciary Act of September 24th, 1789.¹ It was continuously extended: by the act of March 2nd, 1833, passed during the attempt at nullification by South Carolina;² and by the acts of March 3rd, 1863,³ April 9th, 1866,⁴ May 11th, 1866,⁵ July 13th, 1866,⁶ July 27th, 1866,⁷ February 5th, 1867,⁸ March 2nd, 1867,⁹ July 27th, 1868,¹⁰ May 31st, 1870,¹¹ February 28th, 1871,¹² and March 30th, 1872.¹³ All of these were incorporated in the Revised Statutes of 1873.¹⁴ The right was further extended by the first act of March 3rd, 1875, an appropriation bill, which included a clause upon the subject;¹⁵ and by the second act, known as the Judiciary Act, of March 3rd, 1875, which was intended to extend the same to the full extent authorized by the Constitution of the United States.¹⁶ The right of removal was restricted by the act of March 3rd, 1887.¹⁷

The enrollment of this last act contained a few clerical er-

§ 537. ¹ Ch. 20, § 12, 1 St. at L. 79.

² Ch. 57, § 3, 4 St. at L. 633.

³ Ch. 81, § 5, 12 St. at L. 756.

⁴ Ch. 31, § 3, 14 St. at L. 27.

⁵ Ch. 80, §§ 3, 5, 14 St. at L. 46.

⁶ Ch. 184, § 67, 14 St. at L. 171.

⁷ Ch. 288, 14 St. at L. 306.

⁸ Ch. 27, 14 St. at L. 385.

⁹ Ch. 196, 14 St. at L. 558.

¹⁰ Ch. 255, § 2, 15 St. at L. 227.

¹¹ Ch. 114, §§ 16, 18, 16 St. at L. 144.

¹² Ch. 99, § 16, 16 St. at L. 438.

¹³ Ch. 72, 17 St. at L. 44.

¹⁴ §§ 639, 640, 641, 642, 643, 644, 645, 646 and 647.

¹⁵ Ch. 130, § 8, 18 St. at L. 371.

¹⁶ Ch. 137, 18 St. at L. 471.

Senator George F. Edmunds, who took part in the enactment of that law, told the writer that that was the intention.

¹⁷ Ch. 373, 24 St. at L. 552. For the report and debate in Congress see *Foulk v. Gray*, 120 Fed. 156, 160, 18 Cong. Rec. 2724.

rors, which were corrected by a statute re-enacting the same, approved August 13th, 1888.¹⁸ The act of February 8th, 1894,¹⁹ repealed so much of the former statutes as gave a right of removal to an officer of the United States, engaged in the enforcement of the act to regulate Congressional elections.²⁰

The Act of April 5, 1910, provided that cases arising under the Employers' Liability Act should not be removed.²¹ This forbids the right of removal in any case based upon the Employers' Liability Act, although there is also a diversity of citizenship²² and the removal is sought because of prejudice or local influence;²³ and even, it has been held, when there is not only a diversity of citizenship, but allegations in the complaint which would justify a recovery under the State statute or the common law.²⁴ The Judicial Code of March 3, 1911, repealed the former statutes except the Employers' Liability Act, directed that the removals be made to the District Courts, instead of as formerly to the Circuit Courts which it abolished, increased the value of matter in dispute from two thousand dollars to three thousand dollars, made certain changes in the practice and then re-enacted the law substantially as it previously stood."²⁵

¹⁸ *Symonds v. St. Louis & S. E. Ry. Co.*, 192 Fed. 353; *Strauser v. Chicago, B. & Q. R. Co.*, 193 Fed. 293; *Saiek v. Pennsylvania R. Co.*, 193 Fed. 303; *Lee v. Toledo, St. L. & W. Ry. Co.*, 193 Fed. 685; *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768; *Hulac v. Chicago & N. W. Ry. Co.*, 194 Fed. 747; *McChesney v. Illinois Cent. R. Co.*, 197 Fed. 85. *Contra*, *Van Brimmer v. Texas & P. Ry. Co.*, (E. D. Texas) 190 Fed. 394.

¹⁹ *Strauser v. Chicago, B. & Q. R. Co.*, 193 Fed. 293.

²⁰ *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.

²¹ Ch. 866, 25 St. at L. 433.

²² Ch. 25, 28 St. at L. 36.

²³ 28 Stat. L. 36.

²⁴ 36 St. at L. 291, ch. 143, p. 291, § 1.

²⁵ Jud. Code, §§ 297, 28-39, 36 St. at L. 1087; *Ibid*.

Sec. 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court or in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made,

to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

Sec. 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory, prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new

district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

Sec. 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with

or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district.”²⁶ “No case arising under an Act entitled “an act relating to the liability of common carriers by railroad to their employees in certain cases,” approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”²⁷ It has been held that there can be no removal for this cause when neither party is a resident of the district.²⁹ The matter in dispute must exceed in value the jurisdictional amount \$3,000, exclusive of interest and costs.³⁰

Where the plaintiff's pleading does not show that his cause of action arises under the Constitution or laws of the United States, the defendant cannot remove the case because his defense depends upon a provision of such laws or Constitution.³¹ An omission in this respect in the plaintiff's pleading is not

the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future Act, but also in all cases.

²⁶ *Ibid.*, § 28, re-enacting 24 St. at L. ch. 373, p. 552. See §§ 24-39, *supra*. It was held that a suit arising under the postal laws, the institution of which in a State court was authorized by the Revised Statutes, might be removed into a Federal court upon the ground that it arose under a law of the United States. *New Orleans Nat. Bank v. Merchant*, 18 Fed. 841.

²⁷ *Ibid.*

²⁹ *Clark v. Southern Pac. Co.* (W. D. Texas) 175 Fed. 122; *Bottoms v. St. Louis & S. F. R. Co.*, 179 Fed. 318. See §§ 61, 62, *supra*.

³⁰ See § 6, *supra*: It has been held that a case arising under the revenue laws cannot be removed unless the value of the matter in dispute, exceeds the jurisdictional amount, although the Federal court might have had original jurisdiction over the same. *Johnson v. Wells, Fargo & Co.*, 91 Fed. 1.

³¹ *Oregon S. L. & U. N. Ry. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048; *Tennessee v. Union & P. Bank of Com.*, 152 U. S. 454, 38 L. ed. 511; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85; *Postal Tel. C. Co. v. Alabama*, 155 U. S. 482, 39 L. ed. 231; *East L. L. Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233; 180 U. S. 535; *Gableman v. Peoria*,

cured by the petition of removal,³² or by an amendment filed subsequent to the removal.³³ Where a removal is sought because the suit arises under the Constitution or laws of the United States, all the defendants must join in the petition; although the sole ground is that one of them is a corporation chartered by Congress.³⁴

Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States have original jurisdiction under the Judicial Code, namely, in which there is a controversy between citizens of different States or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$3,000, or in which there is a controversy between citizens of the same State claiming lands under grants of different States, can be removed into the District Court of the United States for the proper district by the defendant or defendants therein alone,³⁵ and not by them, unless they are non-residents of that State,³⁶ or when they claim land under grants of different States;³⁷ nor when there is no separable controversy³⁸ nor proof of prejudice or local influ-

D. & E. R. Co., 179 U. S. 335, 45 L. ed. 220; *Miller v. Le Mars Nat. Bank*, 116 Fed. 551. *Supra*, § 17. The fact that the plaintiff's pleading shows that his suit cannot be maintained, because it is inconsistent with the Constitution or laws of the United States, does not justify a removal. *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 46 L. ed. 144.

³² *W. G. Coyle & Co. v. Stern, C. C. A.*, 193 Fed. 582.

³³ *Caples v. Texas & P. Ry. Co.*, 67 Fed. 9.

³⁴ *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055; *infra*, § 542.

³⁵ Ind. Code § 28, 36 St. at L. 1087, re-enacting 24 St. at L. 552; *Fletcher v. Hamlet*, 116 U. S. 408, 29 L. ed. 679; *Houston & T. C. R.*

Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; *Mills v. Newell*, 41 Fed. 529; *supra*, §§ 40-49, 18-24; *infra*, § 542. But see *Mutual Life Ins. Co. v. Champlin*, 21 Fed. 85; *Foster's Federal Judiciary Acts*, 26-29.

³⁶ *Martin v. Snyder*, 148 U. S. 663, 37 L. ed. 602; *Wichita Nat. Bank v. Smith, C. C. A.*, 72 Fed. 568; *infra*, § 542. It has been held that a suit is not removable when pending within a district in which the plaintiff does not reside, although he is a citizen and resident of the State, and the defendant, a citizen and resident of another State, and he sued in such district for the purpose of preventing a removal. *Shawnee Nat. Bank v. Missouri, K. & T. Ry.*, 175 Fed. 456.

³⁷ *Infra*, § 550.

³⁸ *Infra*, § 541.

ence,³⁹ unless all on the side of the controversy opposite to that of the plaintiff unite in the application for a removal.⁴⁰

An assignment of a cause of action to a citizen of the same State as the defendant, although made for that purpose, will prevent the removal of a suit thereupon to the Federal court, unless a Federal question is involved or the parties claim the same lands under grants from different States.^{40a}

"Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section."⁴¹ Removals in other suits to which aliens are parties present several doubtful questions which are previously considered.⁴² In determining between whom the controversy exists the court is not bound by the title of the cause nor by the form of the pleadings, but will examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the controversy between citizens of a State and foreign States, citizens, or defendants may be.⁴³ The citizenship of

³⁹ *Infra*, § 549.

⁴⁰ *Fletcher v. Hamlet*, 116 U. S. 408, 29 L. ed. 679; *Houston & T. C. R. Co. v. Shirley*, 111 U. S. 358, 28 L. ed. 455; *Chicago, R. I. & Pac. Ry. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055; *Huntington v. Pinney*, 126 Fed. 237; *Arkansas V. Sm. Co. v. Cowenhoven*, 41 Fed. 450; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. 773; *Yarnell v. Felton*, 102 Fed. 369; *infra*, § 542.

^{40a} *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. ed. 261; *Oakley v. Goodnow*, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. ed. 61; *Leather Manu-*

facturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 Sup. Ct. 777, 30 L. ed. 816; *Vimont v. Chicago & N. W. Ry. Co.*, 64 Iowa, 513, 17 N. W. 31, 21 N. W. 9; *Goodnow v. Litchfield*, 67 Iowa, 691, 25 N. W. 882; *Goodnow v. Oakley*, 68 Iowa, 25, 25 N. W. 912; *Vimont v. Chicago & N. W. Ry. Co.*, 69 Iowa, 296, 22 N. W. 906, 28 N. W. 612; *Hawley v. Chicago, B. & Q. Ry. Co.*, 71 Iowa, 717, 29 N. W. 787; *Contra*, *Goodnow v. Litchfield*, 47 Fed. 753.

⁴¹ *Jud. Code*, § 34, 36 St. at L. 1087.

⁴² *Supra*, § 45.

⁴³ *Removal Cases*, 100 U. S. 457,

formal parties,⁴⁴ of improper parties,⁴⁵ or, perhaps, of unnecessary parties,⁴⁶ is immaterial. It has been said that, where there is a difference of citizenship and a cause of action, it is immaterial whether a controversy exists.⁴⁷ "Where a suit is now pending or may be hereafter brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence; to remove said cause provided that if it further appears that said suit can be fully and justly determined as to the other defendants in the State court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."⁴⁸ "When any civil suit or criminal prosecution is com-

468, 25 L. ed. 593, 597; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Carson v. Hyatt*, 118 U. S. 279, 286, 30 L. ed. 167, 169; *Judah v. Iowa B. W. Co.*, 32 Fed. 561; *Wilson v. Oswego Tp.*, 151 U. S. 56; 38 L. ed. 70; *Bacon v. Rives*, 106 U. S. 99, 27 L. ed. 69; *Wolcott v. Sprague*, 55 Fed. 545; *Scoutt v. Keck*, C. C. A., 73 Fed. 900; *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 9, 14; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 186, 31 L. ed. 650, 652; *Horn Silver Mining Co. v. New York State*, 143 U. S. 305, 317, 36 L. ed. 164, 169; *Carver v. Jarvis-Conklin Tr. Co.*, 73 Fed. 9; *Missouri v. Alt.* 37 Fed. 302; *Hunter v. Conrad*, 85

Fed. 803. See *Garrard v. Silver Peak Mines*, 76 Fed. 1. But see *Seddon v. Virginia, T. & C. S. R. Co.*, 1 L.R.A. 108, 36 Fed. 6; *Putnam v. Ingraham*, 114 U. S. 57, 29 L. ed. 65; *Sloane v. Anderson*, 117 U. S. 275, 278, 29 L. ed. 899, 900; *Missouri v. New Madrid County*, 73 Fed. 304, §§ 40, 41.

⁴⁴ *Supra*, § 43.

⁴⁵ *Infra*, §§ 539, 540.

⁴⁶ *Supra*, § 42.

⁴⁷ *Memphis Sav. Bank v. Houchens*, C. C. A., 115 Fed. 96. See *Re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403.

⁴⁸ *Jud. Code*, § 28, 36 St. at L. 1087, re-enacting 24 St. at L., ch. 373, p. 552. For the practice in such a case see *infra*, § 386.

menced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer; and affects the validity of any such revenue law, or when any suit is commenced against any person for or on account of anything done by him while an officer of either House of Congress, in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed from trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court.”⁴⁹ This statute is constitutional;⁵⁰ It covers a criminal prosecution for an assault by a posse-man appointed by a deputy marshal;⁵¹ It has been held that it gives the right of removal to a corporation constructing a building under the authority of the Secretary of the Treasury;⁵² and that a proceeding to punish a collector of internal revenue for contempt in refusing to permit a sheriff to enter a bonded warehouse may be removed.⁵³

“When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other per-

⁴⁹ Ibid., § 33, re-enacting U. S. R. S., § 643, as amended by 28 St. at L., p. 36; 18 St. at L., ch. 130, § 8, p. 401 (1 Supp. R. S. U. S., 2d ed. p. 77). This act was passed on account of the case of *Kilbourn v. Thompson*, 103 U. S. 168; 26 L. ed. 377; s. c., *McA. & M.* 401. For practice see *infra*, § 551.

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⁵⁰ *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648.

⁵¹ *Virginia v. De Hart*, 119 Fed. 626.

⁵² *Ward v. Congress Const. Co.*, C. C. A., 99 Fed. 598.

⁵³ *McCullough v. Large*, 20 Fed. 309.

son, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in such State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending.”⁵⁴ This statute gives no relief to prevent or cure wrongs committed by judicial tribunals in the administration of a constitutional law.⁵⁵

The purpose of the creation of the right to remove a case from a State to a Federal court was to enable a defendant to have claims against him under the Federal Constitution or Federal statutes, adjudicated in the first instance by a Federal tribunal; and to enable him to obtain freedom from local prejudice or influence, when sued in the courts of a State, of which he is not a citizen. This right is unknown to the common law and is the creature of statute.⁵⁶ Statutes, which provide for such removals, are authorized by the Constitution of the United States.⁵⁷ The right of removal is not a vested right of property, which may not be taken away after it has once accrued; and such a right, which has come into existence, but has not

⁵⁴ Jud. Code, § 31, 36 St. at L. 1087, re-enacting U. S. R. S., § 641; *infra*, §§ 551, 555.

⁵⁵ *Virginia v. Rives*, 100 U. S. 313, 320, 25 L. ed. 667, 670; *California v. Chue Fau*, 42 Fed. 865; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633.

⁵⁶ *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Hubbard v. Northern R. Co.*, Fed. Cas. No. 6,818 (3 Blatchf. 84; 25 Vt. 715); *Manley v. Olney*, 32 Fed. 708.

⁵⁷ *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. (80 U. S.) 270, 20 L. ed. 571; *Home Life Ins. Co. v. Dunn*, 19 Wall. (86 U. S.) 214, 22 L. ed. 68; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *Strau-*

der v. West Virginia, 100 U. S. 303, 25 L. ed. 664; *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,827 (6 Blatchf. 362); *Johnson v. Monell*, Fed. Cas. No. 7,399 (Woolw. 390); *Murray v. Patrie*, Fed. Cas. No. 9,967; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. 145; *Wheeler v. New York, L. E. & W. R. Co.*, 35 Fed. 849, 1 L.R.A. 65; *McCormick v. Humphrey*, 27 Ind. 144; *Burson v. National Park Bank*, 40 Ind. 173, 13 Am. Rep. 285; *Meadow Val. Min. Co. v. Dodds*, 7 Nev. 143, 8 Am. Rep. 709; *State v. Fairfield County Court of Common Pleas*, 15 Ohio St. 377; *Hodgson v. Millward* (Pennsylvania), 3 Grant Cas. 412; *Kulp v. Ricketts* (Pennsylvania), 3

been exercised before the repeal of the statute under which it arose, is lost upon such repeal.⁵⁸ The States have no power to restrict or to impair the right of removal.⁵⁹ A State may revoke the authority of a foreign corporation, such as an insurance company, not engaged in Interstate Commerce, to transact business within its jurisdiction, because of the removal by such corporation of a suit which has been brought against it.⁶⁰ An agreement by a corporation not to remove, into a court of the United States, any suit brought against it within a State, is void.⁶¹ A stipulation not to remove a specified suit is valid.⁶² The right to remove a particular case may also be waived by the conduct of the defendant.⁶³

Grant Cas. 420; Goodman v. City of Oshkosh, 45 Wis. 355.

⁵⁸ Manley v. Olney, 32 Fed. 708; Birdseye v. Schaeffer, 37 Fed. 821; Kaufman v. McNutt (Super. Ct. Cin., Ohio), 1 Wkly. Law Bul. 94.

⁵⁹ Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Hulbert v. Russo, 64 Fed. 8 (holding that a statutory stay for nonpayment of motion costs did not prevent a removal); Ashe v. Union Cent. Life Ins. Co., 115 Fed. 234; Jones v. Amazon Ins. Co. (Pennsylvania), 8 Leg. Gaz. 59; Brown v. Crippin (Virginia), 4 Hen. & M. 173. A State court cannot enjoin the removal of a case. Blydenstein v. N. Y. S. & Tr. Co., 59 Fed. 12. A State statute creating a cause of action, and providing that the same shall only be enforced in the State courts, or in a specified State court, will not prevent the removal of such a suit to a court of the United States. Railway Co. v. Whitton, 13 Wall. (80 U. S.) 270, 20 L. ed. 571; Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. ed. 927; Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. ed. 88; affirming 31 Fed. 670; Warren v. Wisconsin Valley R. Co., Fed. Cas. No.

17,204 (6 Biss. 425); Kirby v. Chicago & N. W. R. Co., 106 Fed. 551.

⁶⁰ Doyle v. Continental Ins. Co., 94 U. S. 535; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246.

⁶¹ Barron v. Burnside, 121 U. S. 186; Insurance Co. v. Morse, 20 Wall. 445; Rowland v. Empire State Life Ins. Co., Fed. Cas. No. 12,097; Ashe v. Union Cent. L. I. Co., 115 Fed. 234; Commonwealth v. East Tennessee Coal Co., 97 Ky. 238, 30 S. W. 608; Railway Passenger Assur. Co. v. Pierce, 27 Ohio St. 155; Baltimore & O. R. Co. v. Cary, 28 Ohio St. 208; Erie Ry. Co. v. Stringer, 32 Ohio St. 468; Rice v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. 212, 3 L.R.A. 572. *Contra*, see New York Life Ins. Co. v. Best, 23 Ohio St. 105.

⁶² Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035 (13 Blatchf. 224). A defendant may waive his right to insist upon a removal to a Federal court by his stipulation to try it in the State court in consideration of being permitted to file an answer after default, there being no question of jurisdiction. Smithsonian v. Chicago G. W. Ry. Co. (Minnesota), 73 N. W. 853.

⁶³ Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399;

§ 538. Cases which are the subject of removal. The Judicial Code authorizes the removal of those cases of which

Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035 (13 Blatchf. 224); Gaffney v. Gillette, Fed. Cas. No. 5,168 (4 Dill. 264); Hudson River R. R. & Term. Co. v. Day, 54 Fed. 545; State of West Virginia v. King, 112 Fed. 369; Schneider v. Eldredge, 125 Fed. 638; Amy v. Manning, 144 Mass. 153, 10 N. E. 737; Dart v. Arnis (New York), 19 How. Pr. 429; Pollock v. Cohen, 32 Ohio St. 514; Wadleigh v. Standard Life & Acc. Ins. Co., 76 Wis. 439, 45 N. W. 109. *Held*, that a landowner who has appealed from an award in condemnation proceedings waives his right of removal by having the record and prior proceedings sent up on *certiorari* to the State Supreme Court; Hudson River R. & Term. Co. v. Day, 54 Fed. 545. *Held*, that an heir of a decedent, who contests a claim against the estate in the probate court in Illinois, which is a court of record, and there goes to trial on the merits, cannot thereafter remove the cause from the District Court, to which he has taken it on appeal. Schneider v. Eldredge, 125 Fed. 638. On the last day of the return term, defendant filed a petition for the removal of the case on the ground of citizenship, another motion filed at the same time stating that this was done without prejudice to a motion to dismiss and a plea in abatement already filed. He also filed a general answer to the merits, in which he expressly declared that he did not waive either his plea or his motion to dismiss. At the next term, to which the case had been continued *nisi*, both the plea and the motion to dis-

miss were overruled, but defendant took no further action in reference to the removal until at the fourth term thereafter, when, the case being called for trial, he objected thereto, and requested the court to remove it. *Held*, that he had waived his right to such removal. Amy v. Manning, 144 Mass. 153, 10 N. E. 737. The right is not waived by a previous objection to the jurisdiction of the State court and proceedings founded upon such objection, Remington v. Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274; Baumgardner v. Bono, Fertilizer Co., 58 Fed. 1; Donahue v. Calumet Fire Clay Co., 94 Fed. 23; such as the trial of a plea in abatement, Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274; nor by an appeal from an order denying a motion to set aside the service of the summons and a motion to stay proceedings pending such appeal, Remington v. Central Pac. Ry. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; nor by opposition to an application for any interlocutory remedy, or a proceeding to dissolve such a remedy, Cella, Adler & Tilles v. Brown, 136 Fed. 439, 440; but see Dart v. Arnis, (New York), 19 How. Prac. 429; as an attachment, Cella, Adler & Tilles v. Brown, 136 Fed. 439; Calderhead v. Downing, 103 Fed. 27; nor by the filing and procurement of the approval of a bond to dissolve an attachment is not a waiver of the right of removal. Purdy v. Wallace Muller & Co., 81 Fed. 513; Whiteley Malleable Castings Co. v. Sterlingworth

Railway Supply Co., 83 Fed. 853; Southern Pac. Co. v. Stewart, 88 Ga. 13, 13 S. E. 824; or an injunction, Garrard v. Silver Peake Mines, 76 Fed. 1; Champlain Const. Co. v. O'Brien, 104 Fed. 930; Cella, Adler & Tilles v. Brown, 136 Fed. 439; Franklin v. Wolf, 78 Ga. 446, 3 S. E. 696; but, it has been held, that where a temporary injunction is allowed upon petition and affidavit, an appeal therefrom to the State Supreme Court, taken previous to the filing of a petition for removal, bars the right of the defendant to remove the cause, Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co., 29 Fed. 337; or a receiver, Freeman v. Butler, 39 Fed. 1; Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Franklin v. Wolf, 78 Ga. 446, 3 S. E. 696; nor by a voluntary appearance in the State court, Healy v. Prevost, Fed. Cas. No. 6,297; Stevens v. Richardson, 9 Fed. 191 (20 Blatchf. 53); Connor v. Skagit Cumberland Coal Co., 45 Fed. 802; Groton Bridge & Manufacturing Co. v. American Bridge Co., 137 Fed. 284; nor by the filing of a demurrer, Tennessee Coal, Lumber & Tan-bark Co. v. Waller, 37 Fed. 545; Connor v. Skagit Cumberland Coal Co., 45 Fed. 802; Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co., 83 Fed. 853; or an answer, Gavin v. Vance, 33 Fed. 84; Donahue v. Calumet Fire Clay Co., 94 Fed. 23; or a plea in abatement, Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274; nor by argument in opposition to a motion to strike out his pleading, at least when the same does not affect the merits of the controversy, Richards v. Incorporated Town of Rock Rapids, 31 Fed. 505; nor, it has been held, by his consent to the appointment of an auditor, Stone v.

Sargent, 129 Mass. 503. Before a suit was triable in court, or at issue, plaintiffs entered a rule of reference under the Pennsylvania compulsory arbitration act, and the cause was tried out of court before arbitrators, who made an award, which, under the act, was binding on the parties only by their mutual acquiescence. Plaintiffs appealed from the award, and, after the jurisdiction of the court had reattached, petitioned for the removal of the suit. *Held*, that the proceedings before the arbitrators were not such a trial as precluded the removal, and plaintiffs had not waived their right to remove by entering the rule of reference. Thorne v. Towanda Tanning Co., 15 Fed. 289. The Supreme Court of Colorado refused to hear a cause, which was pending therein at the time of the State's admission, unless both parties should invoke its action, which they accordingly did by written stipulation of submission. *Held*, that this was a waiver of any right to remove the cause after a reversal of the judgment and the return of the cause for a new trial, Gaffney v. Gillette, Fed. Cas. No. 5,168 (4 Dill. 264). It has been held that a consent to a reference of the issues is such a waiver. Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035 (13 Blatchf. 224); provided that the time to file the petition has not expired, *infra*, § 543; nor by any subsequent proceedings, such as a motion for a continuance, taken in the State court after the right of removal has been denied, Insurance Co. v. Dunn, 19 Wall. 214; Removal Cases, 100 U. S. 57; Richards v. Rock Rapids, 31 Fed. 505; Texarkana Telephone Co. v. Bridges (Arkansas), 86 S. W. 841; Pennsylvania Co. v. Leeman (Indiana), 66 N. E. 48. Where a

the District Courts of the United States are given original jurisdiction by the same.¹ It has been said that a judicial proceeding, which is of such a character, owing to its procedure, that it could not be commenced in the Federal courts, can be removed when the controversy presents every element mentioned in the first section of the statute, namely: that it is a suit of a civil nature, at common law or in equity, which involves three thousand dollars, exclusive of interest and costs, and arises only between citizens of different States, or

defendant in a suit in a State court, after his application for a removal to a Federal court had been denied, presented an amendment to his pleadings previously filed, which the court allowed, and thereafter prosecuted, in the State Court of Appeals, a writ of prohibition, the object of which was to compel the inferior court to proceed with the cause in a particular manner; it was held that such subsequent proceedings constituted a waiver of his right to a removal, and, the cause having been subsequently docketed by him in the Federal court, was subject to remand. *State of West Virginia v. King*, 112 Fed. 369; *Baltimore & O. R. Co. v. Ford*, 35 Fed. 170; where, in an action against a nonresident in a State court, its attorney was directed to appear solely for the purpose of removing the cause on the last day for answer he filed a petition for removal with a bond; applied to the judge for an order of removal, and when, over objection, the court postponed the hearing on the application for a removal to the following week, the attorney believing it necessary to sustain his right to removal, and, for that purpose only, orally asked for and obtained an extension of time to plead; held that such application for time should be construed as an application for an extension of time to

appear for the purpose of pleading to the jurisdiction or otherwise, and therefore did not constitute an appearance sufficient to confer jurisdiction. *Waters v. Central Trust Co.*, 126 Fed. 469; or it has been held, a stipulation to plead and try the case at the next term, *Waite v. Phoenix Ins. Co.*, 62 Fed. 769; or by defending upon a trial, *Insurance Co. v. Dunn*, 19 Wall. 214; *Removal Cases*, 100 U. S. 457; *Richards v. Incorporated Town of Rock Rapids*, 31 Fed. 505, 506; *State v. Sullivan*, 50 Fed. 593; *McMullen v. Northern Pac. R. Co.*, 57 Fed. 16; nor by argument in opposition to an appeal from the order of removal, *Mecke v. Valley T. M. Co.*, 89 Fed. 209, 211; nor by appealing to a higher State court from an order refusing the removal, *Richards v. Incorporated Town of Rock Rapids*, 31 Fed. 505, 506. After the transcript has been filed, the case cannot be remanded by consent, *Lawton v. Blitch*, 30 Fed. 641. It has been held by a State court, that a removal may be withdrawn and the right waived by a notice to that effect, after the petition and bond have been filed, but before the transcript has been sent to the Court of the United States, *Wadleigh v. Standard Life & Acc. Ins. Co.*, 76 Wis. 439, 45 N. W. 109.

§ 538. ¹ § 2; quoted *supra* § 537.

or between citizens of the same State claiming land under grants of different States.² A proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, is considered as purely administrative in its character, and not in any just sense a suit; but an appeal from the decision in such a proceeding may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and if there are parties litigant to contest the case on the one side and the other.³ The decision of a State court of last resort, that a special statutory proceeding is not a civil suit, does not control the Federal court on the question whether the same may be removed.⁴

It has been held: that a suit against an assignee for the benefit of creditors, brought under the Ohio statute for an adjudication upon a claim against the estate, may be removed;⁵ that a creditor's bill, brought under a State statute by one who is not a judgment creditor, to set aside a conveyance as fraudulent,⁶ or to reach and apply, in payment of a debt, property of a debtor, which cannot be attached or taken under execution in an action at law,⁷ and a suit against a partnership by the firm name, under a State statute which authorizes, in such case, judgment to be entered against the firm, enforceable against the partnership property and also that of such members as have appeared or have been served with notice, cannot be removed.⁸ It has been said that, before a suit is pending in a State court, for the purposes of the removal act, it must be a suit within the meaning of the State law, and the mere filing of a petition of intervention, without the issue or service of notice or process of any kind, does not constitute a suit

² *Re Stutsman County*, 88 Fed. 337, 342. See *Wilson v. Smith*, 66 Fed. 81. But see *Anderson v. Sharp*, 189 Fed. 247.

³ *Delaware C. Com'rs v. Diebold S. & L. Co.*, 133 U. S. 473, 33 L. ed. 674; *Upshur County v. Rich*, 135 U. S. 474, 477, 34 L. ed. 199, 200; per *Bradley, J.*

⁴ *Re Jarnecke Ditch*, 69 Fed. 161.

⁵ *Claffin v. Robbins*, Fed. Cas. No. 2,776 (1 Flip. 603).

⁶ *First Nat. Bank v. Prager*, C. C. A., 91 Fed. 689. See *supra*, §§ 82, 83.

⁷ *Mathews Slate Co. v. Mathews*, 148 Fed. 490. See *supra*, §§ 82, 83.

⁸ *Ralya Market Co. v. Armour & Co.*, 102 Fed. 530.

within the meaning of the law of Iowa.⁹ When the requisite difference of citizenship exists and the matter in controversy exceeds the jurisdictional amount, an action commenced by attachment in the State court can be removed although the writ could not have originally issued from the Federal court.¹⁰ So may an action pending before a Nebraska justice of the peace.¹¹ A suit which might have been removed from the court of first instance, cannot be removed when pending in an appellate court.¹² A suit brought in a Territorial court cannot be removed, when, after answer, it has passed into the jurisdiction of a State court upon the admission of the Territory as a State.¹³ It is no objection to the removal that the case involves claims and defenses in both law and equity, which cannot be united in a suit in the Federal court.¹⁴ Except in cases arising under the civil rights acts, or where there is a defense under the revenue laws, or the defendant is an officer of a House of Congress, no criminal proceeding,¹⁵ nor proceeding in its nature criminal,¹⁶ can be removed. An action by a State or by a public officer, to recover a penalty, is criminal, not civil, in its nature; and consequently cannot be removed; even, it has been held, where the State statute declares it to be a civil action, or where a count for the penalty is joined with an-

⁹ *Re Iowa & M. Const. Co.*, 6 Fed. 799.

¹⁰ *Crocker Nat. Bank v. Pengerstecher*, 44 Fed. 705; *Vermilya v. Brown*, 65 Fed. 149; *Long v. Long*, 73 Fed. 369. *Cf. Bentlif v. London & C. F. Corp. Ltd.*, 44 Fed. 667; *supra*, § 470.

¹¹ *Katz v. Herschel Mfg. Co.*, 150 Fed. 684.

¹² *Miller v. Finn*, 1 Neb. 254; *Williams v. Lowe*, 4 Neb. 382.

¹³ *Ames v. Colorado Cent. R. Co.*, Fed. Cas. No. 325 (4 Dill. 260).

¹⁴ *Ketchum v. Black River Lumber Co.*, 4 Fed. 139; *Tarver v. Ficklin*, 60 Ga. 373.

¹⁵ *New Hampshire v. The Grand Trunk Railway*, 3 Fed. 887.

¹⁶ *Chicago, M. & St. P. Ry. Co. v. Iowa*, 145 U. S. 632, 12 Sup. Ct.

978, 36 L. ed. 857; *Iowa v. Chicago, B. & Q. R. Co.*, 3 L.R.A. 554, 37 Fed. 497; appeal dismissed; *Ferguson v. Ross*, 3 L.R.A. 322, 38 Fed. 161; *Texas v. Day, L. & C. Co.*, 41 Fed. 228; *Dey et al., R. R. Com'rs v. Chicago, M. & St. P. R. Co.*, 45 Fed. 82. An early case holds that an action on a recognizance for good behavior is criminal in its nature and cannot be removed. *Respublica v. Cobbett*, 3 Dall. 467, 1 L. ed. 683; *Chicago, M. & St. P. Ry. Co. v. Iowa*, 145 U. S. 632, 12 Sup. Ct. 978, 36 L. ed. 857; *Iowa v. Chicago, B. & Q. R. Co.*, 3 L.R.A. 554, 37 Fed. 497; *Ferguson v. Ross*, 3 L.R.A. 322, 38 Fed. 161; *Texas v. Day, L. & C. Co.*, 41 Fed. 228; *Dey et al., R. R. Com'rs v. Chicago, M. & St. P. R. Co.*, 45 Fed. 82; *State*,

other count for damages;¹⁷ nor when any part of the penalty belongs to the State, although the suit is brought in the name of an informer, who receives the balance of the same;¹⁸ but where the penalty is imposed merely as punitive damages for the benefit of the individual plaintiff, the suit is removable.¹⁹ It has been held: that an information in equity by a State Attorney General, to enjoin the violation of an anti-trust law, is not removable;²⁰ and that a suit by State Commissioners, to enjoin a railroad company from violating a State statute and their order concerning rates, may be removed.²¹

The following cases have been held to be removable: a proceeding to punish a revenue collector for contempt of court;²² an action by the State to enjoin a Federal receiver from destroying a railroad;²³ a statutory summary proceeding by a landlord to eject a tenant;²⁴ an executory process in Louisiana to seize and sell a vessel under a mortgage;²⁵ a proceeding for the collection of delinquent taxes under a statute of North Dakota;²⁶ and an action by the personal representative of a decedent to recover damages for causing his death,²⁷ although the act also provides for a fine, payable to the personal representative, after conviction upon an indictment.²⁸

of *Indiana v. Alleghany Oil Co.*, 85 Fed. 870; *Southern Ry. Co. v. State (Indiana)*, 72 N. E. 174.

¹⁷ *Indiana v. Alleghany Oil Co.*, 85 Fed. 870.

¹⁸ *Texas v. D., L. & C. Co.*, 49 Fed. 593.

¹⁹ *Gruetter v. Cumberland Tel. & T. Co.*, 181 Fed. 248; *Younts v. Southwestern Tel. & T. Co.*, 192 Fed. 200.

²⁰ *Moloney v. Am. T. Co.*, 72 Fed. 801.

²¹ *Missouri, K. & T. Ry. Co. of Kansas v. Hickman*, 183 U. S. 53, 22 S. Ct. 18, 46 L. ed. 78; reversing judgment, *Hickman v. Missouri, K. & T. Ry. Co. of Kansas*, 52 S. W. 351, 151 Mo. 644; *Hickman v. Missouri, K. & T. Ry. Co.*, 97 Fed. 113.

²² *McCullough v. Large*, 20 Fed. 309.

²³ *State v. Frost*, 89 N. W. 915, 113 Wis. 623.

²⁴ *Gallatin v. Sherman*, 77 Fed. 337.

²⁵ *W. G. Coyle & Co. v. Stern, C. C. A.*, 193 Fed. 582.

²⁶ *Re Stutsman County*, 88 Fed. 337. It has been held that a proceeding in a court in Kentucky to cause the assessment of omitted property, for taxation, cannot be removed. *Chicago, St. L. & No. Ry. Co. v. Commonwealth*, 72 S. W. 1119, 24 Ky. Law Rep. 2124.

²⁷ *Brisenden v. Chamberlain*, 53 Fed. 307.

²⁸ *Boston & Maine R. Co. v. Hurd*, C. C. A., 56 L.R.A. 193, 108 Fed. 116; *Malloy v. American Hide & Leather Co.*, 148 Fed. 482. The latter case was decided after the Supreme Court of Massachusetts had

An application for the writ of mandamus is not removable, except, perhaps, when it is ancillary to proceedings previously pending in the Federal court.²⁹ It has been held that an action in the nature of a *quo warranto*, even if it is begun by information, may be removed, when it arises under the Constitution or laws of the United States.³⁰ It has been held that such an action, to determine the defendant's title to office in a corporation organized under the laws of the State in which the suit is brought, is not removable because of difference of citizenship, when the relator is a citizen of that State and the defendant a citizen of another State.³¹ A proceeding upon an application for the writ of *habeas corpus* could be removed under the Judiciary Act of 1887.³² A suit or proceeding in which the value of the matter in dispute cannot be estimated in money is not removable.³³

An application for the probate of a will is not removable,

said that the statute in question was penal.

²⁹ See *supra*, § 51.

³⁰ *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. ed. 482; *State of Illinois v. Illinois Cent. R. Co.*, 33 Fed. 721; *supra*, § 468.

It has been held that a proceeding in the nature of *quo warranto* to try respondent's title to the office of lieutenant governor, on the ground that he had not been a resident of the State for the time required by the Constitution, is not removable to the United States Circuit Court under the act of Congress called the "civil rights bill" and the *habeas corpus* acts of March 3, 1863, and May 11, 1866. *State v. Gleason*, 12 Fla. 190.

³¹ *Place v. Illinois ex rel. Wilkinson*, C. C. A., 69 Fed. 481, 16 C. C. A. 300. An action to annul the franchise of a corporation cannot be removed. *People v. Blecker St.*

& Fulton Ferry R. R. Co., 178 Fed. 156. A writ of *quo warranto* brought to enforce the provisions of the Pennsylvania Constitution, art. 16, sec. 12, and Act June 5, 1883, secs. 1, 2, prohibiting competing telegraph companies from consolidating, and providing that upon such consolidation the property shall be forfeited to the Commonwealth, is a criminal proceeding, and therefore cannot be removed from the State court to the United States Circuit Court. *Commonwealth v. Western Union Tel. Co.* (Pennsylvania Common Pleas, 1889), 1 Daugh. Co. 141.

³² *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458; *Re Burrus*, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514.

³³ *Whitney v. Am. Shipbuilding Co.*, 197 Fed. 777, a suit to compel a corporation to exhibit its books to its stockholders. See § 6, *supra*.

either originally,³⁴ or upon appeal.³⁵ It has been held that a suit in equity to establish a lost will may be removed.³⁶ A bill in equity brought to annul a will as a muniment of title, and to limit the operation of the decree admitting the same to probate, was held to be removable.³⁷ It has been held: that a statutory proceeding to set aside the probate of a will, in the same court, cannot be removed;³⁸ but that an appeal from such proceedings may be removed.³⁹

A District Court of the United States has no jurisdiction to undertake the general administration of a decedent's estate.⁴⁰ A proceeding for the general administration of a decedent's estate cannot be removed.⁴¹

³⁴ *Copeland v. Bruning*, 72 Fed. 5 (under Indiana statute); *Hargroves v. Redd*, 43 Ga. 142. In *McDonnell v. Jordan*, 178 U. S. 229, 44 L. ed. 1048, which arose under the Alabama statute, the Supreme Court, without passing upon the question whether a contest upon the admission of a will in a probate court could be removed, intimated that in such a case the proponent of the will was the plaintiff and could not obtain the removal.

³⁵ *Re Frazer*, Fed. Cas. No. 5,068 (C. C. under Michigan statute); *Re Cilley*, 58 Fed. 977 (under New Hampshire statute); *Re Aspinwall's Estate*, 83 Fed. 851 (under Pennsylvania statute); appeal dismissed in C. C. A., 90 Fed. 675; *Wahl v. Franz*, C. C. A., 49 L.R.A. 62, 100 Fed. 680 (under Arkansas statute); reversing 81 Fed. 9.

³⁶ *Southworth v. Adams*, 4 Fed. 1 (9 Biss. 521).

³⁷ *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524. See *Southworth v. Adams*, 11 Rep. 46.

³⁸ *Reed v. Reed*, 31 Fed. 49 (under Ohio statute). A Circuit Court of the United States has taken original jurisdiction of a proceeding under the Oregon statutes to contest

a will. *Richardson v. Green*, C. C. A., 61 Fed. 423. See *supra*, §§ 6, 7.

³⁹ *Brodhead v. Shoemaker*, 11 L.R.A. 567, 44 Fed. 518 (under Georgia statute). See *supra*, §§ 6, 7.

⁴⁰ *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867. See *supra*, § 54.

⁴¹ *Foley v. Hartley*, 72 Fed. 570; *Re Foley*, 76 Fed. 390; *Re Foley*, 80 Fed. 949; *Clark v. Guy*, 114 Fed. 783. It has been held that a proceeding in a Connecticut probate court for the settlement of the accounts of an executor, cannot be removed, *Clark v. Guy*, 114 Fed. 783. It has been held, in Georgia, that a proceeding in the court of ordinary of Georgia, for the final settlement of a guardian's account, may be removed. *Stafford v. Hightower*, 68 Ga. 394. It was previously said that proceedings in the State court, upon a petition of an administratrix for a final accounting, might be removed. *Craigie v. McArthur*, Fed. Cas. No. 3,341 (4 Dill. 474). A District Court of the United States has original jurisdiction of a bill in equity, which prays that the defendant be directed to pay a certain portion of the assets in his hands to the com-

It has been held that the following cases, affecting the estate of a decedent, are removable: a proceeding in a court of probate, against the administrator, to compel payment of a debt owed by the decedent during his life;⁴² an action to recover a legacy;⁴³ an application by an illegitimate child to be permitted to share in a decedent's estate, because of the alleged acknowledgment of the petitioner's paternity in accordance with the State statute;⁴⁴ a special proceeding by an administrator for leave to sell the land of his decedent for the payment of debts;⁴⁵ and a suit by one executor against another, who was also the surviving partner of the decedent, to compel an account of his administration of the partnership assets.⁴⁶ A suit for divorce cannot be removed, although the plaintiff demands alimony and counsel fees.⁴⁷ Proceedings for the condemnation

plainants, who are part of his next of kin; but in such case a decree cannot be entered directing that citizens of the same State as the defendant receive a similar share of such estate. *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867. It was held that a Circuit Court of the United States had original jurisdiction of a suit by a residuary legatee, who has been bequeathed an annuity, for an accounting and for the payment of such annuity and for the distribution of the residuary estate, when ascertained, between herself and the other residuary legatees; all of whom apparently, as well as the complainant, were citizens of different States from that of the defendant trustees and executors, *Comstock v. Herron*, C. C. A., 55 Fed. 803. A proceeding by a widow in a District Court of Nevada for a partial distribution of the estate of a decedent, and for a determination that part of the same was separate property and the rest community property, *Re Foley*, 80 Fed. 949. It has been said, an application by a widow for an heir's

support under the statute of Georgia, *McElmurray v. Loomis*, 31 Fed. 395; and a proceeding in Louisiana for the removal of an executor and the appointment of his successor, *Succession of Burnside*, 34 La. Ann. 728.

⁴² *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927; *Schneider v. Eldredge*, 125 Fed. 638. It was held that a claim against the insolvent estate of a deceased person, pending in the superior court on appeal from the decision of the probate commissioners, cannot be removed to the Circuit Court of the United States under Acts 1867, c. 196. *Du Vivier v. Hopkins*, 116 Mass. 125, 17 Am. Rep. 141.

⁴³ *Wilson v. Smith*, 66 Fed. 81.

⁴⁴ *Re Foley*, 76 Fed. 390.

⁴⁵ *Elliott v. Schuler*, 50 Fed. 454.

⁴⁶ *Filer v. Levy*, 17 Fed. 609 (although the liquidating partner gave a bond in the State probate court and is an officer thereof).

⁴⁷ *Johnson v. Johnson*, 13 Fed. 193; *Bowman v. Bowman*, 30 Fed. 849; *Chappell v. Chappell*, 86 Md. 532.

of land, when instituted by a State for its exclusive benefit, are not removable, if no Federal question is involved.⁴⁸ When instituted by or for the benefit of a corporation, public⁴⁹ or private,⁵⁰ between whom and the respondent the requisite difference of citizenship exists, or when the proceeding arises under the Constitution or laws of the United States,⁵¹ although instituted by a town or other subdivision of the state,⁵² they may be removed. Proceedings upon a petition filed with the State railroad commissioners, praying their consent to the taking of certain lands by condemnation proceedings to be subsequently instituted, cannot be removed.⁵³ The initial proceeding for the appraisal by commissioners, at least when the application for their appointment is made *ex parte*, is usually considered to be purely administrative in its nature and not to be a suit which can be removed.⁵⁴ In some cases, when such application is upon notice and may be opposed, it has been held that the proceedings are then removable.⁵⁵ After their appraisal, when

⁴⁸ *Madisonville Traction Co. v. St. Bernard Min. Co.*, 130 Fed. 789, 790.

⁴⁹ *Metropolitan Water Co. v. Kansas City*, 164 Fed. 738; s. c., 164 Fed. 728; *Fishblatt v. Atlantic City*, 174 Fed. 196.

⁵⁰ *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Searl v. School District*, 124 U. S. 197, 199, 31 L. ed. 415, 416; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 49 L. ed. 462; affirming 130 Fed. 789. It has been held, in West Virginia, that a foreign corporation cannot institute proceedings in the United States Courts to condemn the land of a citizen of the State for the use of the corporation, and proceedings of that nature instituted in the State courts cannot be removed to the Federal courts. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812.

⁵¹ *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, 29 L. ed. 319, 325; *Helena Power Transmission Co. v.*

Spratt, 46 Fed. 319 (under Montana statute).

⁵² *Metropolitan Water Co. v. Kansas City*, 164 Fed. 738; s. c., 164 Fed. 728.

⁵³ *New York, N. H. & H. R. Co. v. Cockcroft*, 46 Fed. 881.

⁵⁴ *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. ed. 206, 207; *Pacific Railroad Removal Cases*, 115 U. S. 1, 10, 18, 29 L. ed. 319, 322, 325; *Searl v. School District*, 124 U. S. 197, 199, 31 L. ed. 415, 416.

⁵⁵ *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. 339 (under Oregon statute); *Mineral Range R. Co. v. Detroit & Lake Superior Cotton Co.*, 25 Fed. 515 (under Michigan statute); *Colorado Midland Ry. Co. v. Jones*, 29 Fed. 193 (under Colorado statute); *Banigan v. Worcester*, 30 Fed. 392 (under Massachusetts statute); *Kansas City & Tr. R. Co. v. Interstate Lumber Co.*, 37 Fed. 3; *Sugar Creek, P. B. & P. C. R. Co. v. McKell*, 75 Fed. 34 (under West Virginia statute); *Postal*

process is issued by the court which appointed them, directing the owners to show cause why their report should not be confirmed, a removal may be had, even though there is a subsequent appeal, upon which all the matters decided can be retried.⁵⁶ When, after the appraisal by commissioners, a trial by jury can be had upon demand, the proceedings can be removed at or before the time when such demand is made.⁵⁷ When there is no such proceeding in the court of first instance, a removal may take place after an appeal to another court, where the question as to the amount of damages to be awarded can be retried.⁵⁸ The existence of a controversy as to the right to condemn the lands, which is distinct from that of the amount of damages to be awarded, does not prevent a removal.⁵⁹ A statutory appeal from an assessment of taxes to "a county court," which, in respect to such proceeding, acts not as a judicial body but as a board of commissioners without judicial power, and which is only authorized to determine questions of quantity, proportion and value; is not a suit which can be removed to a Federal court.⁶⁰ It has been held that proceed-

Tel. Cable Co. v. Southern Ry. Co., 88 Fed. 803 (under North Carolina statute); Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co., 119 Fed. 209 (under Missouri statute). But see *Searl v. School District*, 124 U. S. 197, 31 L. ed. 415 (under similar statute). But it has been held, that under a Connecticut statute, which requires the appointment of commissioners to be made upon notice, there can be no removal of the proceedings. *Hartford & C. W. R. Co. v. Montague*, 94 Fed. 337.

⁵⁶ *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 49 L. ed. 462 (under Kentucky statute); affirming 130 Fed. 789.

⁵⁷ *Minneapolis, St. P. & S. S. Ry. Co. v. Nestor*, 50 Fed. 1 (under North Dakota statute).

⁵⁸ *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Pacific Railroad Removal Cases*, 115 U. S. 1, 10, 18, 29 L. ed. 319, 322, 325;

Searl v. School District, 124 U. S. 197, 31 L. ed. 415, 416; *Warren v. Wisconsin V. Ry. Co.*, Fed. Cas. No. 17,204, 6 Biss. 425 (under Illinois statute); *Hudson River R. & T. Co. v. Day*, 54 Fed. 545 (under New Jersey statute); *Terre Haute v. Evansville & T. H. R. Co.*, 106 Fed. 545 (under Indiana statute); *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. 551 (under Iowa statute); *Myers v. Chicago, N. W. Ry. Co.*, 118 Iowa, 312, 91 N. W. 1076.

⁵⁹ *Searle v. School District*, 124 U. S. 197, 31 L. ed. 415; *Madison Tr. Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 49 L. ed. 462 (decided by a divided court of five to four); *Sugar Creek, P. B. & P. C. R. Co. v. McKell*, 75 Fed. 34; *Helena Power Transmission Co. v. Spratt*, 146 Fed. 310 (under Montana statute).

⁶⁰ *Upsher County v. Rich*, 135 U. S. 467, 34 L. ed. 196 (under West Virginia statute).

ings before the Oregon board of control by the users of water in a stream to determine the rights of the appropriators thereof,⁶¹ and in a court with full judicial powers under the Illinois statute to assess real estate for the cost of a sewer in proportion to the benefits derived from the same, are not removable;⁶² that proceedings under the Indiana⁶³ and Missouri⁶⁴ statutes for the establishment and, under the laws of North Dakota, to collect delinquent taxes,⁶⁵ may be removed.

Proceedings upon a claim presented to a board of county officers cannot be removed while they are pending before such board.⁶⁶ It has been held, however, that an appeal to a court of record from the decision of a county board upon such a claim may be removed.⁶⁷ In such a case, the claimant was considered to be the plaintiff, although the appeal had been taken by a taxpayer from a decision allowing the claim.⁶⁸

A creditor's bill, founded upon a judgment of a State or Federal court, may be removed, when the requisite difference of citizenship exists.⁶⁹ It has been held: that a creditor's bill, when the plaintiff has not reduced his claim to judgment, cannot be removed, although the State practice authorizes such a suit;⁷⁰ that a bill in equity to enforce the lien of an attachment by the plaintiff, having a simple contract debt or claim for unliquidated damages, can be removed;⁷¹ and that a garnishee proceeding, after judgment, is to be considered as a new suit, which may be reversed by the garnishee, when his citizenship is different from that of the original plaintiff and defendant.⁷²

⁶¹ *Re Silvies River*, 199 Fed. 495.

⁶² *Re City of Chicago*, 64 Fed. 897; criticised in *Re Stutsman County*, 88 Fed. 341.

⁶³ *Re Jarnecke Ditch*, 69 Fed. 161.

⁶⁴ *Drainage Dist. No. 19, Caldwell County, Mo. v. Chicago, M. & St. P. Ry. Co.*, 198 Fed. 253.

⁶⁵ *Re Stutsman County*, 88 Fed. 337.

⁶⁶ *Gurnee v. Brunswick*, Fed. Cas. No. 5,872 (1 Hughes, 270); *Fuller v. Colfax County*, 14 Fed. 177 (4 McCrary, 535).

⁶⁷ *Delaware County Com'rs v. Diebold, S. & L. Co.*, 133 U. S. 473,

33 L. ed. 674 (under Indiana statute); *Fuller v. Colfax*, 14 Fed. 177 (under Nebraska statute).

⁶⁸ *Tullock v. Webster County*, 40 Fed. 706.

⁶⁹ *Kalamazoo Wagon Co. v. Snavely*, 34 Fed. 823.

⁷⁰ *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804; *First Nat. Bank v. Pragler, C. C. A.*, 91 Fed. 689; *supra*, §§ 82, 83.

⁷¹ *Craddock v. Fulton*, 140 Fed. 426.

⁷² *Baker v. Duwamish Mill Co.*, 149 Fed. 612.

A suit, which is ancillary and supplemental to one previously brought in a State court, and which is so connected with the original suit as to form an incident thereto, and to be substantially a continuation thereof, cannot be removed into District Court of the United States, unless the original suit has been previously, or may be, simultaneously, removed.⁷³ It has been said, that "there is no language in any removal act, which jus-

⁷³ *Barrow v. Hunton*, 99 U. S. 80, 82, 25 L. ed. 407, 408; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870; *Webber v. Humphreys*, Fed. Cas. No. 17,326 (5 Dill. 223); *Chapman v. Barger*, Fed. Cas. No. 2,603 (4 Dill. 557); *Buford v. Strother*, 10 Fed. 406 (3 McCrary, 253); *Poole v. Thatcherdeft*, 19 Fed. 49; *Flash v. Dillon*, 22 Fed. 1; *Richmond & D. R. Co. v. Findley*, 32 Fed. 641; *Wolcott v. Aspen M. & S. Co.*, 34 Fed. 821; *Kalamazoo W. Co. v. Snavelly*, 34 Fed. 823. See *supra*, § 51. It has been held that the following cases are not removable: proceedings to determine the disposition of a fund which has been deposited in the registry of a State court to await its further order (*Daugherty v. Sharp*, 171 Fed. 466); proceedings where an action has been brought against an insolvent corporation for the sequestration of its property and the appointment of a receiver under the special provision of Gen. St. Minn. 1878, c. 76, in the State court, and a creditor, who is a citizen of another State, has, by order of that court, obtained leave to be made a party to the suit, he must proceed by supplemental bill or complaint to become such party, and as this is not an original suit, but an ancillary and auxiliary proceeding, where the parties to the original suit are citizens of the State of Minnesota, he cannot remove the case into the

Federal court. *Hospes v. Northwestern Mfg. & Car. Co.*, 22 Fed. 565. It was said that, where a receiver, appointed by a State court in the interest of the creditors of a construction company, proceeds with the work of construction by entering into contracts, &c., the fact that a controversy arises between him and a contractor, or between a contractor and other claimants of a common fund, does not entitle the contractor to remove the cause to a Federal court, especially after the State court has proceeded, without objection, to adjudicate upon the rights of the parties. *Buell v. Cincinnati, E. & Q. Const. Co.*, 9 Fed. 351 (10 Biss. 555. Supplementary to execution, *Webber v. Humphreys*, 5 Dill. 223; *Poole v. Thatcherdeft*, 19 Fed. 49; *Buford v. Strother*, 3 McCrary, 253; s. c., 10 Fed. 406; *Flash v. Dillon*, 22 Fed. 1. A supplemental bill to bring in newly discovered property of defendant, after a decision of the original bill on its merits, will not be removed from the State court to the United States Circuit Court. *Smith v. St. Louis Mut. Life Ins. Co.*, 3 Tenn. Ch. 350; including an application for the appointment of a receiver in such supplementary proceedings, *Cœur d'Alene Ry. & N. Co. v. Spalding*, C. C. A., 93 Fed. 28; and applications by claimants of property, which has been seized under execution, *First Nat. Bank v. Turnbell*,

16 Wall. 190, 21 L. ed. 206; *Flash v. Dillon*, 22 Fed. 1; *Hochstadter v. Harrison*, 71 Ga. 21; suits for injunctions against the sale under execution of land, *Lawrence v. Morgan's Louisiana & T. R. & S. S. Co.*, 121 U. S. 634, 7 Sup. Ct. 1013, 30 L. ed. 1018; *Besser v. Munford*, 63 Ga. 446; *Goodrich v. Hunton*, 29 La. Ann. 372; *Watson v. Bondurant*, 30 La. Ann. 1; *Calhoun v. Levy*, 33 La. Ann. 1296; *Ralston v. British & American Mortg. Co.*, 37 La. Ann. 193; *Edwards Mfg. Co. v. Sprague*, 76 Maine, 53; *Rogers v. Rogers* (New York), 1 Paige, 183; or chattels, *Kelly, Maus & Co. v. Sioux Nat. Bank*, 81 Fed. 3; proceedings by or against strangers to the original suit, in connection with garnishee process, *Pratt v. Albright*, 9 Fed. 634 (10 Biss. 511); *Buford v. Strother*, 10 Fed. 406 (3 McCrary, 253); *Poole v. Thatcher*, 19 Fed. 49; or attachments, *King v. Shepherd*, 20 Fed. 337; *contra*, when property in the hands of a Federal collector of customs had been attached, *Fischer v. Daudistal*, 9 Fed. 145. It is doubtful whether a removal can be had of an action of replevin against the sheriff to recover property, on which he has levied by writ of attachment, *Burnham v. First Nat. Bank, C. C. A.*, 53 Fed. 163. A suit in equity by a tenant to set up a defense to an action of ejectment, which, by the State practice he might have pleaded in that action, *Chapman v. Barger*, Fed. Cas. No. 2,603 (4 Dill. 557); *Richmond & D. R. Co. v. Findley*, 32 Fed. 621. See *Cable v. Ellis*, 110 U. S. 389, 28 L. ed. 186; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820. A proceeding by the plaintiff after a decree establishing his right to the products of a mine, Fed. Prac. Vol. II.—112.

to enforce his rights under such decree against the defendant to the original suit and a third person, who claims a superior title by purchase, *Wolcott v. Aspen, M. & S. Co.*, 34 Fed. 821. A proceeding under a State statute to charge with liability, to the extent of corporate assets in their hands, the directors of a railway company, which has passed out of existence pending a suit against it, *Houston & Texas Cent. R. Co. v. Shirley*, 111 U. S. 358, 28 L. ed. 455. See also *Hospes v. N. W. Mfg. & C. Co.*, 22 Fed. 565. A bill in equity setting up a prior judgment for damages for a nuisance, and an action pending at law for the same purpose, which prays consolidation, a perpetual injunction and damages subsequent to the beginning of the pending action at law; *Ladd v. West*, 55 Fed. 353; and a bill of review for errors apparent upon the face of the record, *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Goodrich v. Hunton*, 29 La. Ann. 372; *Ranlett v. Collier White Lead Co.*, 30 La. Ann. 56; *Jackson v. Gould*, 74 Maine, 564; or for fraud, *Nougue v. Clapp*, 101 U. S. 551, 25 L. ed. 1026; *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 177, 30 L. ed. 196, 204; *Marshall v. Holmes*, 141 U. S. 589, 600, 35 L. ed. 870, 874; *Caswell v. Caswell*, 24 Ill. App. 548; affirmed 120 Ill. 377, 11 N. E. 342; without showing that the facts constituting the fraud were not within the knowledge of the complainants before the rendition of the decree, or could not have been discovered in time to bring them in some appropriate mode to the attention of the State court, while the decree was within its control. It has been held that the following cases are *remov-*

able, when the requisite difference of citizenship exists: a bill in equity, such as one to reform an insurance policy, which is filed in aid of a suit of law and seeks to prevent a party from availing himself of an inequitable claim or defense in a pending suit at common law, *Charter Oak Fire Ins. Co. v. Star Ins. Co.*, Fed. Cas. No. 2,623 (6 Blatchf. 208); or to enjoin a condemnation proceeding when the relief prayed could not have been obtained in the pending action, *Georgia R. & Banking Co. v. Atlantic P. Tel. Cable Co.*, 152 Fed. 991. A bill to set aside a judgment or decree of a State court for mistake, *Pelzer Mfg. Co. v. Hamburg B. F. Ins. Co.*, 62 Fed. 1; or fraud, *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. ed. 547, 556; *Arrowsmith v. Gleason*, 129 U. S. 86, 101, 32 L. ed. 630, 635; *Marshall v. Holmes*, 141 U. S. 589, 600, 35 L. ed. 870, 874; *Carver v. Jarvis-Conklin Mtge. Tr. Co.*, 73 Fed. 9; which mistake or fraud could not, with the exercise of reasonable diligence, have been discovered before the decree passed beyond the control of the State court; a creditor's bill founded on a State judgment, *Kalamazoo Wagon Co. v. Snively*, 34 Fed. 823. Where a petition for intervention charged fraud or want of jurisdiction, without an attack on any final judgment, but only interlocutory orders, it was held that the intervenors might remove the cause, *Re Iowa & M. Const. Co.*, 10 Fed. 401 (3 McCrary, 310). A suit begun by a petition asking for an injunction against the enforcement of previous judgments against the plaintiff and alleging extinguishment by a compensation, error of fact and

law, the nullity of the judgments sought to be enforced, *Stackhouse v. Zunts*, 15 Fed. 481 (4 Woods, 171). Where a distress warrant issued by a justice of the peace was levied on land, and the defendant therein filed a "plea," which was subsequently dismissed; held that such dismissal terminated the proceedings in that court; and that a subsequent equitable action to restrain the progress of the warrant was a new, distinct, and original action, and not a mere ancillary proceeding to the justice court action, and was removable. *Withers v. John Hopkins Place Sav. Bank*, 104 Georgia, 89, 30 S. E. 766. A proceeding to enforce a judgment purporting to have been entered by confession, *Lockhart v. Morey*, 31 Fed. 497. A bill filed by a stranger to a previous suit and decree in order to prevent the execution of such decree by a levy upon property, of which the complainant was the owner before the former suit was brought, *Bondurant v. Watson*, 103 U. S. 281, 26 L. ed. 447; *Watson v. Bondurant*, Fed. Cas. No. 17,278 (2 Woods, 166). An action of replevin against a sheriff, who has levied a writ of execution on chattels claimed by a stranger to the writ, *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354. A suit by a second mortgagee to redeem property from a foreclosure in a suit to which he was not a party, *Title Guarantee & Trust Co. v. Studebaker*, 100 Fed. 358. A proceeding to enforce an attorney's lien, *Pettus v. Georgia R. & Banking Co.*, Fed. Cas. No. 11,048 (3 Woods, 620). A proceeding to enjoin a stranger from violating a decree previously entered, *Hatch v. Preston*, Fed. Cas. No. 6,208 (1 Biss. 19); *Ward v.*

tifies the removal of a cause from a State court to a Federal court, on the ground that it is ancillary to a suit in a Federal court.”⁷⁴

Congress Const. Co., C. C. A., 99 Fed. 598. It was held that a suit by a judgment creditor to subject land in the name of the debtor's brother on the ground that the purchase price was paid by the debtor, and the deed taken in the brother's name to defraud creditors, is not supplementary to the original suit, but an independent proceeding, and removable, *Kalamazoo Wagon Co. v. Snively*, 34 Fed. 823. It was held that an hypothecary action against a third possessor of mortgaged lands, who was not a party to the previous suit, and judgment of the plaintiff against the former owner of the property, is a new suit, and not the mere continuation of the previous suit, so that for a diversity of citizenship the action may be removed to the Federal court, though the previous suit could not have been removed, *Garrett v. Bonner*, 30 La. Ann. 1305. A proceeding under a statute of Arkansas, which directs that, where lands are sold by a sheriff or other public officer, the purchaser is authorized to institute proceedings in a court calling on all persons to come in and show cause why the sale should not be confirmed, is removable conformably to the act of Congress, *Parker v. Overman*, 18 How. 137, 15 L. ed. 318. Where the necessary diversity of citizenship exists the following cases may also be removed: a suit in which a State court has appointed a receiver, *Re Iowa & M. Const. Co.*, 10 Fed. 401. A suit for the appointment of a receiver ancillary to one previously appointed by a court in another suit, *Shinney v.*

N. A. Sav., L. & B'g Co., 97 Fed. 9. A suit by bondholders to foreclose a lien paramount to the rights of the stockholders, who had procured an order of a State court placing trustees in possession of the property, *Scott v. Clinton & S. R. Co.*, Fed. Cas. No. 12,527 (6 Biss. 529). A feigned issue in Pennsylvania to try the validity of a judgment obtained by a creditor, which is attacked as fraudulent, *Fuller v. Wright*, 23 Fed. 833; and a motion under the Missouri statutes, Mo. R. S., § 2517. An application for an execution against a stockholder after judgment and return of execution against his corporation, *Lackawanna, C. & I. Co. v. Bates*, 56 Fed. 737; overruling *Webber v. Humphreys*, Fed. Cas. No. 17,326 (5 Dill. 223). It was held: that a suit originally instituted in a State court by an executor, legatee, who also sued as the agent of other legatees, nonresidents, claiming a sum of money from a liquidating partner as due to the succession of his deceased partner, was not an action merely incidental to the settlement of his succession of the deceased partner; nor an action supplemental to or auxiliary of any pending proceeding in such succession; nor in any sense an ancillary suit; but a separate, distinct, and independent suit, removable on the application of either party litigant, *Filer v. Levy*, 17 Fed. 609.

⁷⁴ Taft, J., in *Gillmore v. Her- rick*, 93 Fed. 525 (when granting a motion to remand a suit brought in a State court against a Federal receiver to cover less than \$2,000).

A Federal court cannot acquire jurisdiction by removal of proceedings, of which the State courts had no jurisdiction.⁷⁵ And this was said to be the case, where the State court had a limited jurisdiction, and the suit sought to be removed was not within the same.⁷⁶ After the removal of a suit by a party who has filed no general appearance in the State or Federal court, a motion may be made by the defendant to set aside the service of process upon him and the case may be then dismissed for that reason.⁷⁷

§ 539. Removals when there are improper parties plaintiff. Where it appeared on the face of the bill, that a person had been improperly joined with others as a plaintiff; it has been held, that his citizenship should be disregarded

To the same effect are the rulings of *Baker, J.*, in *Ray v. Pierce*, 81 Fed. 881; *Thompson, J.*, in *Pitkin v. Cowen*, 91 Fed. 599. See also *State Trust Co. v. Kansas City, P. & G. R. Co.*, 110 Fed. 10. *Contra*, *Hanford, J.*, in *Carpenter v. Northern Pac. R. Co.*, 75 Fed. 850; *Phillips, J.*, in *Sullivan v. Barnard*, 81 Fed. 886; *Marshall, J.*, in *Shinney v. North American Savings, Loan & Building Co.*, 97 Fed. 9. But see *Cornue v. Ingersoll*, C. C. A., 176 Fed. 282, and § 51, *supra*.

In *People's Bank v. Calhoun*, 102 U. S. 256, 260, 262, 26 L. ed. 101, 102, 103, it was held that, by consent, a suit might be removed, in which an attachment had been levied upon property in the possession of a receiver previously appointed by a Federal court, although consent could not confer jurisdiction; and it was said, by *Miller, J.*, that a removal might have been compelled against the consent of the plaintiff.

⁷⁵ *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517; *Wabash W. R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431; *National Accident Society v. Spiro*, 164 U. S. 281, 41

L. ed. 435; *Summers v. White*, C. C. A., 71 Fed. 106; *Auracher v. Omaha & St. L. R. Co.*, 102 Fed. 1; *Cady v. Associated Colonies*, 119 Fed. 420; *Crowley v. Southern Ry. Co.*, 139 Fed. 851; *Thacker Coal & Coke Co. v. Norfolk & Western Ry. Co.*, 171 Fed. 271. It was so held: where an action was brought in a State court upon a cause of action, of which the Federal courts had exclusive jurisdiction, namely, to recover overcharges under the Interstate Commerce law, *Auracher v. Omaha & St. L. R. Co.*, 102 Fed. 1; *Sheldon v. Wabash R. Co.*, 105 Fed. 785; *R. J. Darnell, Inc. v. Illinois Cent. R. Co.*, 190 Fed. 656. Where it was instituted in what was supposed to be a State court, but in one which the Supreme Court of the State subsequently held had no legal existence, *Crowley v. Southern Ry. Co.*, 139 Fed. 851.

⁷⁶ *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 737.

⁷⁷ *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517; *Wabash W. R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431; *National Accident Society v. Spiro*, 164 U. S. 281, 41

when determining the rights of the defendants to a removal.¹ Thus, where it appeared on the face of the bill, that one of a number of plaintiffs was not entitled to relief, and that the others were the real parties litigant; his joinder did not prevent a removal.² Where, in a suit for a partition, plaintiff sued in his own right, and also as the next friend of two infants, to whom he was in nowise related, those infants being citizens of the same State as the defendants, and of a different State from that of the plaintiff; it was held, that the infants were improperly joined as plaintiffs; should be considered as defendants; and that such misjoinder could not prevent a removal.³ Where the legal owner of a cause of action, and the equitable assignees of different parts of the same, joined in an action at law; it was held, that the citizenship of the plaintiff having the legal cause of action alone could affect the right of removal.⁴ Where one of several plaintiffs is properly joined; but his presence is not indispensable to the maintenance of a bill; it has been held, that his citizenship must be considered when the right of removal is determined.⁵ Thus, the voluntary joinder of a number of complainants in enforcing a common liability of the defendants, upon which they might have sued separately, has the same effect on the right of removal because of difference of citizenship, as if they had been compelled to unite.⁶ Where it is alleged in the petition for removal, and proved to the satisfaction of the Federal court, that one of the plaintiffs has no interest in the controversy; the removal will be allowed.⁷

§ 540. Removals when there are improper parties defendant. Where persons are made defendants, against

L. ed. 435; *Cady v. Associated Colonies*, 119 Fed. 420.

§ 539. ¹ *McHenry v. New York, P. & O. R. Co.*, 25 Fed. 65; *Over v. Lake Erie & W. R. Co.*, 63 Fed. 34; *Jarvis v. Crozier*, 98 Fed. 753.

² *McHenry v. New York, P. & O. R. Co.*, 25 Fed. 65.

³ *Jarvis v. Crozier*, 98 Fed. 753.

⁴ *Over v. Lake Erie & W. R. Co.*, 63 Fed. 34.

⁵ *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North*

America, 151 U. S. 368, 38 L. ed. 195; *Florida Cent. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486; *James v. Thurston*, 6 R. I. 428.

⁶ *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 30 L. ed. 1020; *Merchants Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 38 L. ed. 195; *Florida Cent. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486.

⁷ *McHenry v. New York, P. & O. R. Co.*, 25 Fed. 65.

whom no relief is prayed; and their presence is not essential to a complete disposition of the controversy;¹ or where the plaintiff's pleading states no cause of action against defendants, against whom relief is prayed, and it manifestly appears that they were joined in the suit for the purpose of preventing a removal;² or, where it is alleged in the petition of removal, and is proved to the satisfaction of the District Court upon a motion to remand, that parties, against whom relief is prayed, and the complaint or declaration states a cause of action, in fact have no connection therewith, the allegations in the plaintiff's pleading to that effect being intentionally false; the action may be removed if the requisite difference of citizenship exists between the plaintiff and the remaining defendants.³ The

§ 540. ¹Arapahoe County v. Kansas Pac. Ry. Co., Fed. Cas. No. 502 (4 Dill. 277); Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. Ry. Co., 44 Fed. 456.

²Nelson v. Hennessey, 33 Fed. 113; Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. Ry. Co., 44 Fed. 456; Rivers v. Bradley, 53 Fed. 305; Hukill v. Maysville & B. S. R. Co., 72 Fed. 745; Prince v. Illinois Cent. R. Co., 98 Fed. 1; Mahon v. Somers, 112 Fed. 174; Loop v. Winters' Estate, 115 Fed. 362; Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Kelly v. Chicago & A. Ry. Co., 122 Fed. 286; Carothers v. McKinley Mining & Smelting Co., 122 Fed. 305; Bryce v. Southern Ry. Co., 122 Fed. 709; Henry v. Illinois Cent. R. Co., 132 Fed. 715; Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650, *aff'd* as Fritzlen v. Boatmen's Bank, 212 U. S. 364; Axline v. Toledo, W. Va. & O. R. Co., 138 Fed. 169; Curtis v. Cleveland, C., C. & St. L. Ry. Co., 140 Fed. 777; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Cella v. Brown, C. C. A., 144 Fed. 742; Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. 908; Floydt v.

Shenango Furnace Co., 186 Fed. 539; McAllister v. Chesapeake & O. Ry. Co., 198 Fed. 660; Slaughter v. Nashville, C. & St. L. Ry. Co. (Kentucky), 91 S. W. 744, 28 Ky. Law Rep. 1195; Eastin & Knox v. Texas & P. Ry. Co. (Texas), 92 S. W. 838; judgment reversed Texas & P. Ry. Co. v. Eastin & Knox (Civ. App.), 89 S. W. 440. Where the complaint charges negligence generally against several defendants and does not allege with reasonable definiteness the facts which show that the cause of action is joint, that may be an indication of the fraudulent joinder. Reinartson v. Chicago Great Western Ry. Co., 174 Fed. 707.

³Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 51 L. ed. 430. There, it was proved by the removing defendant: that his co-defendant, whose citizenship was the same as that of plaintiff, had absolutely no connection with the injury, for which plaintiff sued; and the removal was allowed. It did not appear that the plaintiff knew all this party's true relation to the transaction. The court said (185): "Even in cases where the

fact that the complaint is as to one of the defendants demurrable is in itself insufficient to justify a removal by the other.⁴ The fact, that plaintiff has previously sued the defendant seeking the removal alone upon the same cause of action, and that upon the removal of the former suit he discontinued the same and brought the present suit, joining another defendant, is a circumstance tending to show that the joinder is fraudulent;⁵ but if the fraud is denied, this has been held, not to be sufficient in the absence of other evidence to justify a removal.⁶ The fact, that a defendant, whose presence prevents a removal, is not pecuniarily responsible, does not make him either a nominal or a sham party.⁷ An action cannot be removed, however, when one of the defendants is a citizen of the same State as that of the plaintiff, and either the complaint shows a cause of action against all the defendants, which is both joint and several, whether upon tort or contract, and the plaintiff has elected to make the same joint;⁸ or where, according to the law of the

direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach." *Collins v. Wellington*, 31 Fed. 244; *Dow v. Bradstreet Co.*, 46 Fed. 824; *Shepherd v. Bradstreet Co.*, 65 Fed. 142; *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 745; *McCormack v. Illinois Cent. Ry. Co.*, 100 Fed. 250; *Diday v. N. Y., P. & O. R. Co.*, 107 Fed. 565; *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co.*, 119 Fed. 209; *Ross v. Erie R. Co.*, 120 Fed. 703; *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286; *Carothers v. McKinley Min. & Sm. Co.*, 122 Fed. 305; *Free v. W. U. Tel. Co.*, 122 Fed. 309; *Bryce v. Southern Ry. Co.*, 122 Fed. 709; *Boatner v. American Exp. Co.*, 122 Fed. 714; *Gustafson v. Chicago, R. I. & P. Ry. Co.*, 128 Fed. 85; *Crawford v. Illinois Cent. R. Co.*, 130 Fed. 395; *Dishon v. Cincinnati, N. O. & T. P. Ry. Co.*, C. C. A., 133 Fed. 471; *Southern Ry. Co. v. Edwards*, 115 Georgia,

1022, 42 S. E. 375; *Cincinnati, N. O. & T. P. Ry. Co. v. Robertson*, 115 Kentucky, 858, 74 S. W. 1061, 25 Ky. Law Rep. 265; *Davis' Adm'r v. Chesapeake & O. Ry. Co.*, 116 Kentucky, 144, 75 S. W. 275, 25 Ky. Law Rep. 342.

⁴ *Evans v. Felton*, 96 Fed. 176; *Riser v. Southern Ry. Co.*, 116 Fed. 215.

⁵ *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165; *Warax v. Cincinnati, N. O. & T. P. Ry. Co.*, 72 Fed. 637, 640.

⁶ *Warax v. Cincinnati, N. O. & T. P. Ry. Co.*, 72 Fed. 637, 640; *Chesapeake, O. & S. W. R. Co. v. Hendricks*, 88 Tenn. (4 Pickle), 710, 13 S. W. 696, 14 S. W. 488. See § 556, *infra*.

⁷ *Chicago, R. I. & Pac. Ry. Co. v. Schwyhart*, 227 U. S. 184, 56 L. ed. —; *Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co.*, 85 Fed. 876; *Welch v. Cincinnati, N. O. & T. P. Ry. Co.*, 177 Fed. 760.

⁸ *Louisville & N. R. Co. v. Ide*,

State in the courts of which the suit was brought, the liability charged was joint, although the law as enforced in the Federal courts might be to the contrary;⁹ or where there is reasonable ground for doubt as to the question of the joint liability which the plaintiff alleges, and it does not appear that the parties were fraudulently joined for the purpose of preventing a removal.¹⁰ Where the petition for removal is filed before any pleading by the plaintiff, it has been held that the question depends upon the plaintiff's sworn plea to the petition for re-

114 U. S. 52, 29 L. ed. 63; *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 29 L. ed. 66; *Pirie v. Tvedt*, 115 U. S. 41, 29 L. ed. 331; *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388; *Plymouth Min. Co. v. Amador C. Co.*, 118 U. S. 264, 30 L. ed. 232; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269; *Brooks v. Clark*, 119 U. S. 502, 30 L. ed. 482; *Boyd v. Gill*, 19 Fed. 145; *Wilson v. Union Saving Ass'n*, 30 Fed. 521; *Shaver v. Hardin*, 30 Fed. 801; *Anderson v. Appleton*, 32 Fed. 855; *Weller v. J. B. Pace T. Co.*, 32 Fed. 860; *Thomas v. Great No. Ry. Co.*, C. C. A., 147 Fed. 83; *Knuth v. Butte Electric Ry. Co.*, 148 Fed. 73.

⁹ *Cincinnati, N. O. & Texas Pac. Ry. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448; *Southern Ry. Co. v. Miller*, 217 U. S. 209, 54 L. ed. 732; *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 55 L. ed. 521; *Chicago, Rock Island and Pacific Ry. Co. v. Schwyhart*, 227 U. S. 184, 56 L. ed. —; *Illinois Cent. R. R. Co. v. Sheegog*, 215 U. S. 308, 54 L. ed. 208; *Thomas v. Great No. Ry. Co.*, C. C. A., 147 Fed. 83; *Morris v. Louisville & N. R. Co.*, 175 Fed. 491. The fact that the State court upon the trial refused to dismiss the complaint against the resident defendant and that there was a verdict against all, shows that the con-

tention that he was fraudulently joined is frivolous. *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 56 L. ed. —. The dismissal of the case by the Federal court against both defendants does not show that the joinder of the resident was fraudulent. *Stevenson v. Illinois Cent. R. Co.*, 192 Fed. 956.

¹⁰ *Alabama Great So. Ry. Co. v. Thompson*, 200 U. S. 206, 217, 50 L. ed. 441, 447; *Chicago, R. I. & Pac. Ry. Co. v. Schwyhart*, 227 U. S. 184, 56 L. ed. —; *Jacobson v. Chicago, R. I. & P. Ry. Co.*, 176 Fed. 1004; *McGarvey v. Butte Miner Co.*, 199 Fed. 671; *Doremus v. Root*, 94 Fed. 760; *Evans v. Felton*, 96 Fed. 176; *Knuth v. Butte Electric Ry. Co.*, 148 Fed. 73; *Hunter v. Illinois Cent. R. Co.*, C. C. A., 188 Fed. 645; *Lewis v. Cincinnati, N. O. & T. P. Ry. Co.*, 192 Fed. 654; *McGarvey v. Butte Miner Co.*, 199 Fed. 671. It has been said that where the complaint sets forth a joint cause of action, fraud must consist in a wilful or negligent misstatement of the facts concerning the same. *McGarvey v. Butte Miner Co.*, 199 Fed. 671. An amendment after the petition to remove has been denied will not justify another attempted removal where it merely makes the original cause of action more precise. *Chicago, R. I. & Pac.*

moval.¹¹ A statement, in a petition for the removal of a cause to the Federal court, that certain resident defendants were fraudulently joined for the purpose of preventing a removal, is of no importance; the plaintiff's motive being immaterial if he had a right to bring the joint action.¹² A suit cannot be removed, which is brought to recover damages for the alleged joint negligence, whether by act or omission, of a railway company and its engineer and conductor, or other employee, when the sole ground of the liability of the corporation, which is alleged, is the responsibility as a principal for the conduct of its servant, although not personally present, nor directing, and not charged with any concurrent act of negligence;¹³ unless

Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —.

¹¹ Welch v. Cincinnati, N. O. & T. P. Ry. Co., 177 Fed. 760.

¹² Illinois Cent. R. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Evansberg v. Insurance Stove, Range & Foundry Co., 168 Fed. 1001; Craddock-Terry Co. v. Kaufman, 175 Fed. 303; Bagenas v. Southern Pac. Co., 180 Fed. 887; Foster v. Coos Bay Gas & El. Co., 185 Fed. 979; Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Jacobson v. Chicago, R. I. & P. Ry. Co., 176 Fed. 1004; Southern Ry. Co. v. Sittasen (Indiana), 74 N. E. 898. Taft, J., in Hukill v. Maysville & B. S. R. Co., 72 Fed. 745, 750: "If a plaintiff has a good cause of action for a joint tort against several defendants, it is not fraudulent in him to join them all in his suit, even if it does appear that he would not have joined the resident defendants with the non-resident defendants except for the purpose of avoiding the jurisdiction of the Federal court. Where he has

reasonable ground for a *bona fide* belief in the facts, upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, a cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them in order to evade the jurisdiction of the Federal court, that the joinder can be said to be fraudulent, entitling the real defendant to a removal." To the same effect is Charman v. Lake Erie & W. R. Co., 105 Fed. 449.

¹³ Powers v. Ches. & Ohio Ry. Co., 169 U. S. 92, 42 L. ed. 673; Alabama Great So. Ry. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 401; Cincinnati, N. O. & Texas Pac. Ry. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Painter v. Chicago, B. & Q. R. Co., 177 Fed. 517; Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654; Stevenson v. Illinois Cent. R. Co., 192 Fed. 956. See also Ches. & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121; Evansberg v. Insurance

there is a Federal question in the case.¹⁴ When a lessor and lessee,¹⁵ or a corporation and its receiver,¹⁶ are sued jointly

Stove, Range & Foundry Co., 168 Fed. 1001 (superintendent of iron works); *Morris v. Louisville & N. R. Co.*, 175 Fed. 491 (a car inspector); *Jacobson v. Chicago, R. I. & P. Ry. Co.*, 176 Fed. 1004 (a station agent); *Foster v. Coos Bay Gas & El. Co.*, 185 Fed. 979; *Galeotti v. Diamond Match Co.*, 178 Fed. 127, charging that the employer and his resident superintendent put plaintiff to work in an unsafe place; *Welch v. Cincinnati, N. O. & T. P. Ry. Co.*, 177 Fed. 760; *Veariel v. United Eng. & Foundry Co.*, 197 Fed. 877. These cases overruled a number of decisions to the contrary in the lower courts. *Fogarty v. Southern Pac. Co.*, 123 Fed. 973; *American Bridge Co. v. Hunt, C. C. A.*, 130 Fed. 302; *Roberts v. Shelby Steel Tube Co.*, C. C. A., 131 Fed. 729; *Davenport v. Southern Ry. Co.*, C. C. A., 135 Fed. 960; *Heffelfinger v. Choctaw, O. & G. R. Co.*, 140 Fed. 75; *Thomas v. Great No. Ry. Co.*, C. C. A., 147 Fed. 83; *Knuth v. Butte Electric Ry. Co.*, 148 Fed. 73; *Southern Ry. Co. v. Grizzle*, 53 S. E. 244, 124 Ga. 735; *Illinois Cent. R. Co. v. Coley*, 121 Kentucky, 385, 1 L.R.A.(N.S.) 370, 89 S. W. 234; *Lanning v. Chicago Great Western Ry. Co.*, 94 S. W. 491, 196 Mo. 647; *Able v. Southern Ry.*, 73 South Carolina, 173, 52 S. E. 962; *Louisville & N. R. Co. v. Vincent*, 95 S. W. 179; 116 Tenn. 317; under the Tennessee statute for death caused by the negligence of a fellow servant; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; where the plaintiff was a fellow servant and relied upon a statute making his employer liable; *Henry*

v. Illinois Cent. R. Co., 132 Fed. 715; under the Iowa statute giving the right of action for negligence resulting in death, which had never been construed by the courts of the State, to create a joint liability in such cases; *Chicago, R. I. & P. Ry. Co. v. Stepp*, 151 Fed. 908; under a similar Georgia statute. See *Lathrop-Shea & Henwood Co. v. Pittsburg, S. & N. R. Co.*, 135 Fed. 619; where the suit was for services procured against a railroad and a party who had made a contract with the plaintiff, and which the plaintiff charged he made acting as agent for the railroad company; held, that there the controversy was not separable.

¹⁴ See *supra*, § 537.

¹⁵ *Illinois Cent. R. R. Co. v. Sheegog*, 215 U. S. 308, 54 L. ed. 208; *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 55 L. ed. 521; *Central Ohio R. Co. v. Mahoney*, C. C. A., 114 Fed. 732; *Person v. Illinois Cent. R. Co.*, 118 Fed. 342; *Keller v. Kansas City, St. L. & C. R. Co.*, 135 Fed. 202. *Of. Curtis v. Cleveland, C. C. & St. L. Ry. Co.*, 140 Fed. 777. *Contra*, *Spangler v. Atchison, T. & S. F. R. Co.*, 42 Fed. 305; *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286; *Williard v. Spartanburg, U. & C. R. Co.*, 124 Fed. 796; *Yeates v. Illinois Cent. R. Co.*, 137 Fed. 943.

¹⁶ *Whitcomb v. Smithson*, 175 U. S. 635, 44 L. ed. 303; *Moore v. Los Angeles I. & S. Co.*, 89 Fed. 73; *Rupp v. Wheeling & L. E. R. Co.*, C. C. A., 121 Fed. 825. *Contra*, *Chamberlain v. New York, L. E. & W. R. Co.*, 71 Fed. 636.

for an injury caused by negligence, the case cannot be removed because of difference of citizenship when either of the defendants is a citizen of the same State as that of the plaintiff, unless it clearly appears that one of them was fraudulently made a party for the sake of preventing the removal.¹⁷

§ 541. Separable controversies. The Judicial Code provides that if, in any suit, which would otherwise be removable, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district.¹ This refers to a case in which there are two controversies, one of which is separable from the other.² The removal takes the whole case, not merely the separable controversy, into the Federal court.³ It has been said that there is a clear distinction between separable controversies, as contemplated by the

¹⁷ *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 745; *Diday v. New York, P. & O. R. Co.*, 107 Fed. 565; *Williard v. Spartanburg, U. & C. R. Co.*, 124 Fed. 796; *Keller v. Kansas City, St. L. & C. Ry. Co.*, 135 Fed. 202; *Yeates v. Illinois Cent. R. Co.*, 137 Fed. 943; *Axline v. Toledo, W. V. & O. R. Co.*, 138 Fed. 169; *Curtis v. Cleveland, C. C. & St. L. Ry. Co.*, 140 Fed. 777; *McAllister v. Chesapeake & O. Ry. Co.*, 198 Fed. 660; *Reinartson v. Chicago Great Western Ry. Co.*, 174 Fed. 707; all of which are cases of lessor and lessee.

§ 541. ¹ *Jud. Code*, § 28. 36 St. at L. 1087. See 25 St. at L. 433.

² *Houston & T. C. R. Co. v. Shirley*, 111 U. S. 358, 28 L. ed. 455; *Fletcher v. Hamlet*, 116 U. S. 408, 29 L. ed. 679; *Chicago, R. I. & Pac. Ry. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055; *Western U. Tel. Co. v. Brown*, 32 Fed. 337; *Sexton v. Seelye*, 39 Fed. 705; *Arkansas V. Sm. Co. v. Cowenhoven*, 41 Fed. 450; *Rogers v. Van Nortwick*, 45

Fed. 513; *Thompson v. Chicago, St. P. & K. C. R. Co.*, 60 Fed. 773; *Watson v. Asbury Park & B. Street R. Co.*, 73 Fed. 1; *Mutual Reserve Fund Life Asso. v. Farmer, C. C. A.*, 77 Fed. 929, 23 C. C. A. 574, 36 U. S. App. 771; *Yarnell v. Felton*, 102 Fed. 369; *Huntington v. Pinney*, 126 Fed. 227; *Blackburn v. Blackburn*, 142 Fed. 901. These cases overruled a number of decisions of the Circuit Courts. *Contra*, *Arapahoe County v. Kansas City P. R. Co.*, 4 Dill. 277, Fed. Cas. No. 502; *Mutual L. Ins. Co. v. Champlin*, 22 Blatchf. 334, 21 Fed. 85; *Grindrod v. Crine*, 22 Fed. 257; *Stanbrough v. Cook*, 3 L.R.A. 400, 38 Fed. 369; *Garner v. Second Nat. Bank*, 66 Fed. 369; *Hunter v. Conrad*, 85 Fed. 803. See a note on subject of this section in 5 L.R.A. and Anni. S. 49, 57.

³ *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Hervey v. Illinois Midland Ry. Co.*, Fed. Cas. No. 6,434 (7 Biss. 103); *Carraher v.*

statute, and separate and wholly distinct controversies only joined in one proceeding by express statutory permission; and that, in the latter class of cases, nothing will be removed, except the controversy between the removing party and the plaintiff.⁴ A separable controversy to which an alien is a party cannot be thus removed; whether the alien is a plaintiff,⁵ or a defendant.⁶ Nor can a separable controversy to which a State is a party be removed.⁷ A plaintiff cannot remove a separable controversy in any case.⁸ It has been held that a defendant, who is a resident of the State where the suit is brought, cannot remove a separable controversy in the same.⁹ Any one or more of the nonresident defendants interested in a separable

Brennan, Fed. Cas. No. 2,441 (7 Biss. 497); Girardey v. Moore, Fed. Cas. No. 5,462 (3 Woods, 397); Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co., Fed. Cas. No. 4,665 (9 Biss. 133); Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. 789 (9 Biss. 307; Corbin v. Boies, 18 Fed. 3; Atlantic & V. Fertilizing Co. v. Carter, 88 Fed. 707; Barney v. Latham (Kentucky), 3 Ky. Law Rep. 144; Swan v. Mansfield, C. & L. M. R. Co., 7 Ohio Dec. 669, 4 Wkly. Law Bul. 898. But see Thomas, J., in Manufacturers' Commercial Co. v. Brown Alaska Co., 148 Fed. 308, 313. A. and B. were sued in the State court. The controversy was a separable one, and B. removed the case to the Federal court, so far as he was concerned. A. went to trial, judgment was rendered against him, and his motion for a new trial overruled. Held, that he could not then claim that the whole case was removable to the Federal court, and that the State court had no jurisdiction over his branch thereof. St. Louis, W. & W. R. Co. v. Ransom, 29 Kan. 298. It has been held that a proceeding for the collection of delinquent taxes, under the statute of North

Dakota, is not a single suit, but as many suits as there are parcels of land, and that if the same person owns several parcels, such suit is consolidated by his joining all the parcels in a single answer. *Re Stutsman County*, 88 Fed. 337.

⁴ Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co., 152 Fed. 824.

⁵ Deakin v. Lea, Fed. Cas. No. 3,695 (11 Biss. 27); Creagh v. Equitable Life Assur. Soc., 88 Fed. 1. *Contra*, Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446.

⁶ King v. Cornell, 106 U. S. 395, 27 L. ed. 60; Merchants' C. P. & S. Co. v. Insurance Co. of North America, 151 U. S. 368, 386, 38 L. ed. 195, 204; Woodrum v. Clay, 33 Fed. 897; Insurance Co. of North America v. Delaware Mutual Insurance Co., 50 Fed. 243; Tracy v. Morel, 88 Fed. 801.

⁷ Rand v. Walker, 117 U. S. 340, 29 L. ed. 907; Texas v. Day Land & Cattle Co., 49 Fed. 593.

⁸ Western Union Tel. Co. v. Brown, 32 Fed. 337.

⁹ Thurber v. Miller, 67 Fed. 371, 14 C. C. A., 432, 32 U. S. App. 209. *Contra*, Stanbrough v. Cook, 38 Fed. 369, 3 L.R.A. 490; Nat. Bank of

controversy may remove it.¹⁰ A defendant not interested therein cannot.¹¹ It has been held that an intervenor,¹² or a party brought in on the motion of the plaintiff,¹³ or of the defendant,¹⁴ may remove a separable controversy, when the necessary difference of citizenship exists between him and the party on the opposite side thereof; provided that he presents some new and independent interest or question; otherwise not;¹⁵ but that

Battle Creek v. Howard, Special Term, N. Y. Sup. Ct. March 20, 1907, N. Y. L. U. March 21, 1907.

¹⁰ *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907; *Field v. Lownsdale*, Fed. Cas. No. 4,769 (Deady, 288); *Fields v. Lamb*, Fed. Cas. No. 4,775 (Deady, 430); *Lewis v. White*, Fed. Cas. No. 8,335; *McGinnity v. White*, Fed. Cas. No. 8,802 (3 Dill. 350); *Green v. Klinger*, 10 Fed. 689; *Grindrod v. Crine*, 22 Fed. 257.

¹¹ *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907.

¹² *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337 (a party who, by an order of the court, had been appointed assignee of the property of a corporation pending a suit against it); *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442 (a landlord intervening in an ejectment suit against a tenant); distinguished in *Chicago, R. I. & Pac. Ry. Co. v. Martin*, 178 U. S. 245, 249, 250, 44 L. ed. 1055, 1056, 1057; *Burdick v. Peterson*, 6 Fed. 840, 2 McCrary, 135; *Snow v. Texas Trunk R. R.*, 16 Fed. 1, 4 Woods, 394; *Pennsylvania R. Co. v. Alleghany Val. R. Co.*, 25 Fed. 115; *Hack v. Chicago & G. S. Ry. Co.*, 23 Fed. 356 (a mortgage bondholder intervening in a creditor's suit and praying a foreclosure); *American Nat. Bank v. Nat. Benefit & Casualty Co.*, 70 Fed. 420 (a receiver of a dissolved corporation, appointed prior to a suit against a

trustee holding assets of the same). Previous cases hold: that a landlord cannot intervene in and remove an ejectment suit; *Ex parte Girard*, Fed. Cas. No. 5,457 (3 Wall. Jr. 263); *Ex parte Tunner*, Fed. Cas. No. 14,245 (3 Wall. Jr. 258); *Allin v. Robinson*, Fed. Cas. No. 249 (1 Dill. 119); and that a person becoming interested in the land in controversy cannot intervene in and remove an action of trespass to try title; *Farmers' & Merchants' Nat. Bank v. Schuster*, C. C. A., 86 Fed. 161, 29 C. C. A. 649. Indemnitors cannot remove a suit for trespass against a sheriff. *Thorn Wire-Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. ed. 1235; *Ohlquist v. Farwell*, 13 Fed. 305, 4 McCrary, 401; *Burnham v. First Nat. Bank C. C. A.*, 53 Fed. 163, 3 C. C. A. 486, 10 U. S. App. 485; *Olds Wagon Works v. Benedict*, C. C. A., 67 Fed. 1, 14 C. C. A., 285.

¹³ *Jackson & Sharp Co. v. Pearson*, 60 Fed. 113 (a purchaser of the subject-matter in controversy previous to the commencement of the suit).

¹⁴ *Greene v. Klinger*, 10 Fed. 689 (a warrantor of the original defendant's title).

¹⁵ *Ellerman v. New Orleans, etc., R. Co.*, Fed. Cas. No. 4,382 (2 Woods, 120); *Weller v. J. B. Pace Tobacco Co.*, 32 Fed. 860; *Bronson v. St. Croix Lumber Co.*, 35 Fed.

one who intervenes for the purpose of asserting a lien, prior to that of the original plaintiff, occupies the attitude of an intervening plaintiff, and cannot remove the case on the ground that there is a separate controversy between him and the original plaintiff;¹⁶ and that a person who has been denied permission to intervene cannot obtain such a removal.¹⁷ The case must be separable into parts, so that in one of them a controversy will be presented wholly between citizens of different States, which can be fully determined without the presence of the other parties.¹⁸ There can be no removal when an indispensable party to the controversy is a citizen of the same State as any party on the side opposite to him.¹⁹ The citizenship of a de-

634; *Hakes v. Burns*, 40 Fed. 33; *Olds Wagon Works v. Benedict*, C. C. A., 67 Fed. 1; *Watson v. Asbury Park & B. St. R. Co.*, 73 Fed. 1; *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. 4; *Kidder v. Northwestern Mut. Life Ins. Co.*, 117 Fed. 997; *Herbert v. Lefevre (Louisiana)*, 31 La. Ann. 363; *Davis v. Montgomery (Louisiana)*, 36 La. Ann. 874; *Baltimore & O. Tel. Co. v. Morgan's Louisiana & T. R. & S. S. Co. (Louisiana)*, 37 La. Ann. 883; *Gudger v. Western N. C. R. Co. (North Carolina)*, 87 N. C. 325; *Sifford v. Beaty (Ohio)*, 12 Ohio St. 189. *Contra*, *Beecher v. Gillett*, Fed. Cas. No. 1,225 (1 Dill. 308). But see *Connell v. Smiley*, 156 U. S. 335, 39 L. ed. 443.

¹⁶ *Re San Antonio & A. P. Ry. Co.*, 44 Fed. 145. *Contra*, *Snow v. Texas Trunk R. Co.*, 16 Fed. 1, 4 Woods, 394.

¹⁷ *Bertha Zinc & Mineral Co. v. Carico*, 61 Fed. 132.

¹⁸ *Gardner v. Brown*, 21 Wall. 36, 22 L. ed. 527; *Yulee v. Vose*, 99 U. S. 539, 25 L. ed. 355; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. ed. 131; *Winchester v. Loud*, 108 U. S. 130, 2 Sup. Ct. 311, 27 L.

ed. 677; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; *Bixby v. Couse*, Fed. Cas. No. 1,451 (8 Blatchf. 73); *Maine v. Gilman*, 11 Fed. 214; *Connell v. Utica, U. & E. R. Co.*, 13 Fed. 241; *New Jersey Zinc & Iron Co. v. Trotter*, 18 Fed. 337; *Gudger v. Western N. C. R. Co.*, 21 Fed. 81; *Capital City Bank v. Hodgins*, 22 Fed. 209; *McNulty v. Connecticut Mut. Life Ins. Co.*, 46 Fed. 305; *Scoutt v. Keck*, C. C. A., 73 Fed. 900; *Snow v. Smith*, 88 Fed. 657; *Carter v. Scott (Georgia)*, 82 Ga. 297, 8 S. E. 421; *Burch v. Davenport & St. P. R. Co.*, 46 Iowa, 449, 26 Am. Rep. 150; *Succession of Townsend v. Sykes (Louisiana)*, 38 La. Ann. 410; *National Docks & New Jersey Junction Connecting Ry. Co. v. Pennsylvania R. Co. (New Jersey)*, 52 N. J. Eq. (7 Dick.) 58, 28 Atl. 71.

¹⁹ *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. ed. 693; *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. ed. 66; affirming order *Wilson v. St. Louis & S. F. R. Co.*, 22 Fed. 3; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195. *Contra*, *Burke*

fendant, who, may be a proper, but who is not an indispensable, party, to the controversy, will not prevent such a removal.²⁰ The fact that one of the defendants has made a default in appearing or pleading,²¹ or has appeared and disclaimed,²² or that judgment has been entered against one of them before another was served with process,²³ does not make a separable controversy, as regards the other, which will justify a removal. The fact that no process has been served upon one or two or more defendants does not create a separable controversy.²⁴ The separable controversy must be real and substantial, and not one merely fanciful which has no support in the allegations of the bill.²⁵ The separability of the controversy must be determined on the plaintiff's pleading alone,²⁶ at least when no

v. Flood, 1 Fed. 541, 6 Sawy. 220; Lyddy v. Gano, 26 Fed. 177; Perrin v. Lepper, 26 Fed. 545; Vinal v. Continental Const. & Imp. Co., 35 Fed. 673; Rogers v. Van Nortwick, 45 Fed. 513; Insurance Co. of North America v. Delaware Mut. Ins. Co., 50 Fed. 243; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81, 19 U. S. App. 646.

²⁰ Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. ed. 1122; Chester v. Wellford, Fed. Cas. No. 2,662 (2 Flip 347); Stevens v. Richardson, 9 Fed. 191, 193 (20 Blatchf. 53); County Court v. Baltimore & O. R. Co., 35 Fed. 161; Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650 (a prior mortgagee or lienholder in a suit for the foreclosure of a junior incumbrance); Fritzlen v. Boatmen's Bank, aff'd 212 U. S. 364; Stewart v. Mordecai (Georgia), 40 Ga. 1, 2 Am. Rep. 555; Barney v. Latham (Kentucky), 3 Ky. Law Rep. 144.

²¹ Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. ed. 65; Fletcher v. Hamlet, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. ed. 679; affirming order Hamlet v. Fletcher,

24 Fed. 305; Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482; Hax v. Caspar, 31 Fed. 499; Fairchild v. Durand (New York), 8 Abb. Prac. 305. But see Robert v. Pineland Club, 139 Fed. 1001.

²² City of Bellaire v. Baltimore & O. R. Co., 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; New Jersey Zinc Co. v. Trotter, Fed. Cas. No. 10,167; Hax v. Caspar, 31 Fed. 499; Dow v. Bradstreet Co., 46 Fed. 824; Goodnow v. Litchfield, 47 Fed. 753.

²³ Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482; Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608.

²⁴ Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987; Patchin v. Hunter, 38 Fed. 51. *Contra*, Wormser v. Dahlman, Fed. Cas. No. 18,048 (16 Blatchf. 319); Tremper v. Schwabacher, 84 Fed. 413.

²⁵ MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., C. C. A., 119 Fed. 96, 101. See Snow v. Smith, 88 Fed. 657.

²⁶ Ames v. Chicago, S. F. & C. Ry. Co., 39 Fed. 881; Riser v. Southern Ry. Co., 116 Fed. 215; MacGinnis v. Boston & M. Consol. Copper & Silver Min. Co., 119 Fed. 96, 55

cross-bill or counter-claim has been interposed.²⁷ The pleading of the defendant, either by cross-bill counter-claim, or otherwise, of a separate claim, which is purely a matter of defense, or is directly connected with the plaintiff's original pleading, or the answer, does not present a separable controversy.²⁸ The interposition of separate defenses by answers will not make a case removable;²⁹ even though one of them, in which all the defendants are not interested, arises under the Constitution or laws of the United States.³⁰ The allegations in the petition for removal are immaterial.³¹ Where there are separate remedies against the several parties upon the same cause of action, there is no separable controversy.³² It has been

C. C. A. 648; *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co.*, 119 Fed. 209; *Dougherty v. Yazoo & M. V. R. Co.*, 122 Fed. 205, 58 C. C. A., 651; *Fogarty v. Southern Pac. Co.*, 123 Fed. 973; *Harley v. Home Ins. Co.*, 125 Fed. 792; *Southern Ry. Co. v. Sittasen (Indiana)*, 74 N. E. 898; *Illinois Cent. R. Co. v. Harris (Mississippi)*, 38 So. 225, 85 Miss. 15; *National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co. (New Jersey)*, 52 N. J. Eq. 58, 28 Atl. 71.

²⁷ *Hack v. Chicago & G. S. Ry. Co.*, 23 Fed. 356.

²⁸ *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. ed. 70; *Donohoe v. Mariposa Land & Mining Co.*, Fed. Cas. No. 3,989 (5 Sawy. 163); *Brande v. Gilchrist*, 18 Fed. 465 (where a counter-claim had been interposed in an equitable action in the State court and no repleader was had nor cross-bill filed after the removal); *Rumsey v. Call*, 28 Fed. 769; *Shaver v. Hardin*, 30 Fed. 801; *Maish v. Bird*, 48 Fed. 607.

²⁹ *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. ed. 63; *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. ed. 65; *Pirie v. Tvedt*, 115 U. S. 41,

5 Sup. Ct. 1034, 1161, 29 L. ed. 331, *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. ed. 388; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; *Core v. Vinal*, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed. 269; reversing decree *Giles v. Little*, 13 Fed. 100, 2 McCrary, 370; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. ed. 473; *Patchin v. Hunter*, 38 Fed. 51; *O'Harrow v. Henderson*, 52 Fed. 769; *Arrow-smith v. Nashville & D. R. Co.*, 57 Fed. 165; *Thurber v. Miller*, 67 Fed. 371, 14 C. C. A., 432, 32 U. S. App. 209; *Robbins v. Ellenbogen*, 71 Fed. 4, 18 C. C. A. 83, 36 U. S. App. 242; *American Bridge Co. v. Hunt*, C. C. A., 130 Fed. 302.

³⁰ *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U. S. 245, 248, 44 L. ed. 1055.

³¹ *Hazard v. Robinson*, 21 Fed. 193; *Fogarty v. Southern Pac. Co.*, 123 Fed. 973.

³² *Winchester v. Loud*, 108 U. S. 130, 27 L. ed. 677; *Ayers v. Wiswall*,

said that matters, which are mere incidents to the principal subject-matter of the suit, do not present a separable controversy;³³ and that collateral issues, connected with the case, do not destroy the right of removal.³⁴ Where the defendants are interested in separate parts of the same subject-matter, no separable controversy is presented.³⁵ Where a several liability is sought to be enforced against different defendants, a separable controversy exists between each of them and the plaintiff.³⁶ Where

112 U. S. 187, 28 L. ed. 693; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.*, 151 U. S. 368, 38 L. ed. 195; *Gudger v. Western N. C. R. Co.*, 21 Fed. 81.

³³ *Shanwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385, 27 L. ed. 691; affirming order 5 Fed. 510, 6 Sawy. 585; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; *Wilder v. Virginia, T. & C. Steel & Iron Co.*, 46 Fed. 676; *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 119 Fed. 96, 55 C. C. A. 648; *Republic Fire Ins. Co. v. Keogh (New York)*, 23 Hun, 644. *Contra*, *Langdon v. Fogg*, 18 Fed. 5 (21 Blatchf. 392). But see *Campbell v. Milliken*, 119 Fed. 981.

³⁴ *Osgood v. Chicago D. & V. R. Co.*, Fed. Cas. No. 10,604 (6 Biss. 330).

³⁵ *Temple v. Smith*, 4 Fed. 392, 2 McCrary, 226; *Merchants' Nat. Bank v. Thompson*, 4 Fed. 876; *Friedler v. Chotard*, 19 Fed. 227; *Independent District v. Bank of Rock Rapids*, 48 Fed. 2; *Re City of Chicago*, 64 Fed. 897. A defendant who is a holder of stock in a corporation co-defendant has not such an interest in the controversy, to which the latter is a party, to prevent his removal of a separate controversy in which he alone is interested. *Buck v. Felder*, 196 Fed. 419. It has been held that defendants who have been joined because they

have a right, by subrogation, to share in the recovery, have no interest in the controversy between the plaintiff and the principal defendant. *Ireton v. Pennsylvania Co., C. C. A.*, 185 Fed. 84.

³⁶ *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.*, 24 Fed. 516; *Youtsey v. Hoffman*, 108 Fed. 693; *Manufacturers' Commercial Co. v. Brown Alaska Co.*, 148 Fed. 308 (an action by the holder of a note against the maker and the indorsers, in which it was held that the liability of each indorser-presented a separable controversy from that with the others and-with the maker); *Feibleman v. Edmonds (Texas)*, 69 Tex. 334, 6 S. W. 417. A suit to establish an indebtedness against an insolvent corporation, and for judgment against a second defendant, which had assumed the indebtedness of the former. *Mecke v. Valletown M. Co.*, 93 Fed. 697, 35 C. C. A., 151; affirming 39 Fed. 209. But see *Lewis v. Weidenfeld*, 76 Fed. 145. Where the bill charged one of several defendants with failure to perform his contract to transfer a patent to the complainant, and that the others, with knowledge of his default, had bought machines of him, for the use of which they should account, *Nesmith v. Calvert*, Fed. Cas. No. 10,123, 1 Woodb. & M. 34. A suit to recover the possession of town bonds, when the par-

ty in possession disclaimed all interest in them except a lien for storage and counsel fees, while one of the depositors of the bonds and the township disputed the right of the plaintiff to possession and claimed that the bonds were void. *Wilson v. Union Sav. Ass'n*, 30 Fed. 521. Held otherwise, in a suit to recover a bank deposit, to which the bank and another claimant to the money were joined as defendants. *Bailey v. New York Sav. Bank*, 2 Fed. 314 (18 Blatchf. 77). It has been held that, upon a bill of interpleader, the controversy between the two defendants is separable from that between them and the complainant, and will justify a removal. *First Nat. Bank v. Bridgeport Trust Co.*, 117 Fed. 969. *Contra*, *Mutual L. Ins. Co. v. Allen* (Massachusetts), 134 Mass. 389; *Republic F. Ins. Co. v. Keogh* (New York), 23 Hun, 644. But see *Leonard v. Jamison*, 2 Edw. Ch. 135; *George v. Pilcher* (Virginia), 28 Gratt. 299, 26 Am. Rep. 350. In a suit to compel a corporation to transfer to the plaintiff stock standing in the name of any defendant, it was held that the controversy was *not* separable. *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. ed. 66; affirming order *Wilson v. St. Louis & S. R. Co.*, 22 Fed. 3. A suit to set aside a franchise against the assignee of the same and his mortgagee, where the mortgagee claimed that the plaintiff was estopped by his representation, when the mortgage was executed, that the franchise was valid, contains a *separable* controversy. *Galesburg v. Galesburg v. Galesburg Water Co.*, 27 Fed. 321. So is a suit by a mortgagor to remove one of the trustees under the mortgage and to restrain

it from foreclosure the same against the wishes of the other trustee and of a majority of the bondholders. *Lake St. El. R. Co. v. Farmers' L. & Tr. Co.*, 72 Fed. 804. But *not* a suit by a mortgagor against the trustees of a mortgage and the beneficiary of the same, which asks for an accounting, the removal of the trustees and the reconveyance of the property to himself and another defendant, in accordance with the terms of the trust. *Winchester v. Loud*, 108 U. S. 130, 2 Sup. Ct. 311, 27 L. ed. 677. The following controversies have been held to be *separable*, a suit to enjoin the sale of land by a defendant claiming title to part of the same under a deed of trust to secure the payment of certain promissory notes, in which the title of the trustee defendant depended upon the question whether the notes had been paid, and that of two of the other defendants, each of whom claimed an interest in the land hostile to each other, depended upon the question whether these notes were paid. *Snow v. Smith*, 4 Hughes, 204; s. c., 88 Fed. 657; a suit to cancel a promissory note, where fraud by one defendant was charged and there was no allegation that the other, as indorsee, was cognizant of such fraud. *N. Y. Construction Co. v. Simon*, 53 Fed. 1, but, in a suit to cancel notes for fraud by some of the defendants, it was held, that there was no separable controversy between the plaintiff and other defendant, to whom the notes had been delivered as collateral security for an indebtedness of the payees, there being no allegations that these holders of the notes had knowledge of the fraud, *Burgunder v. Browne*, 59 Fed. 497; a suit by the beneficiary under a will

the parties are sued jointly and severally, it seems that a separable controversy exists.³⁷ Where an accounting is prayed

against the executors, the testamentary trustees, and a lessee of part of the trust estate, where the complaint prayed, that the executors may complete the trust fund for plaintiff's benefit by conveying real estate to the trustee; that the trustees pay to her whatever may be due for interest on said trust fund, and also pay to her, for her benefit, out of the estate, other moneys which she claims; that the trustees be enjoined from charging against her certain moneys which the estate has paid, and from paying to trustees of certain residuary trusts any moneys which might be in or might hereafter come into their hands; and that the rent of the part of the trust held by them, which may become due under the lease to the remaining defendant, be paid to the plaintiff, *Stevens v. Richardson*, 9 Fed. 191 (20 Blatchf. 53). Where remaindermen sued to set aside a settlement by the life tenant with an insurance company for a less amount than the face value of the policy, charging that the life tenant held the insurance impressed with a trust for the plaintiff's benefit, and praying judgment against both defendants for the face value of the policy with interest, and that they be required to pay the same into court, to be invested for the benefit of the plaintiffs and the life tenant, interest only to be paid the latter during her life; it was held that there was a separable controversy between the insurance company and the plaintiffs. *Harley v. Home Ins. Co.*, 125 Fed. 792. But in a suit to enforce a right of subrogation to several fire insurance poli-

cies upon the same property, and to collect losses upon them resulting from the same fire, there is no separable controversy between the plaintiff and the different insurance companies. *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 38 L. ed. 195, affirming *Insurance Co. of North America v. Delaware Mut. Safety Insurance Co.*, 91 Tenn. (7 Pickle) 537, 19 S. W. 755; overruling *Insurance Co. of North America v. Delaware Mut. Insurance Co.*, 50 Fed. 243. In a suit by an insurance company to enforce its right of subrogation, and to collect the claim of the insured against a person who caused the loss, the controversy between the insured company and such wrongdoer is not separable from that to which the insured is an indispensable party. *First Presbyterian Soc. of Green Bay v. Goodrich Transp. Co.*, 7 Fed. 257 (10 Biss. 312); *Broadway Ins. Co. v. Chicago G. W. Ry. Co.*, 101 Fed. 507. Where a suit was brought against an employee of the plaintiff, who was charged with embezzlement, and the surety upon the bond guaranteeing plaintiff against loss by any of the acts of such employee; it was held that a separable controversy existed between the plaintiff and the surety. *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 446. Where exemplary damages upon special facts were claimed against one of two defendants sued upon a joint obligation; it was held that there was a separable controversy, which might be removed. *Feibelman v. Edmunds (Texas)*, 69 Texas, 334, 6 S. W. 417.

³⁷ *Langdon v. Fogg*, 18 Fed. 5,

against one or more, but not all, of the defendants, and there is an actual controversy between the remainder and the plaintiff³⁸ or where the complaint prays separate accountings by different defendants,³⁹ who are not jointly liable nor interested in the accounts of the other, in which last case the controversy between them and the plaintiff is not separable;⁴⁰ and, it has been held, when it prays a joint and several accounting by

7, 9; *Boyd v. Gill*, 19 Fed. 145 (21 Blatchf. 543).

³⁸ *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. ed. 1122, a suit to set aside a contract between two corporations, to enjoin its directors from any further disposition of its property, for a reconveyance of the same, and an accounting by the grantee for the damages caused by the transfer, with which was joined a prayer that the defendants, who were directors of the grantor, should account for their actions in the premises and be required to make good all allowance and damage caused by their wrongful conduct. In a suit against a corporation and some of its officers for an injunction against all the parties from holding a meeting called by the latter for the purpose of conveying the corporate property to another company, and also for an accounting by such officers for the corporate funds, which, it was alleged, that they had appropriated to their own use, accompanied by a prayer for a receiver of the corporation, brought by a stockholder who alleged that the corporation was under the control of these officers; held, that there was no such separable controversy between the complainants and the corporation as entitled the latter to remove the cause. *Campbell v. Millken*, 119 Fed. 981.

³⁹ *Langdon v. Fogg*, 18 Fed. 5 (21

Blatchf. 392); *Vinal v. Continental Const. & Imp. Co.*, 34 Fed. 228. See *Golden v. Bruning*, 72 Fed. 2. A suit for a conveyance of an undivided interest in lands held by a corporation, together with an accounting by such corporation of a similar proportion of the proceeds of lands by it sold, and also for an accounting by individual defendants for the proceeds of the sale of lands, acquired under the same title and sold by them before title was acquired by the defendant corporation, was held to present a separable controversy. *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514.

⁴⁰ *Burke v. Flood*, 1 Fed. 541 (6 Sawyer, 220); *Sexton v. Seelye*, 39 Fed. 705; *German Savings & Loan Soc. v. Dormitzer, C. C. A.*, 116 Fed. 471. *Regis v. United Drug Co.*, 180 Fed. 201; *Coram v. Davis*, 182 Fed. 939; *Cornue v. Coram*, 182 Fed. 941. In a stockholder's suit for an accounting by the officers of a corporation and for the appointment of a receiver of the company, the latter is an indispensable party to the accounting. *Campbell v. Milliken*, 119 Fed. 981. Held, that a prayer in the complaint that "defendants may account for all the wrongs alleged, and on such accounting repay all sums realized by said defendants, or any of them," is not a prayer for a several account, and the controversy is not separable on that ground. *Fox v. Mackay*, 60 Fed. 4.

trustees for the fraudulent misappropriation of trust funds;⁴¹ and in a suit by a receiver to collect assessments, made to enforce a statutory liability, by stockholders to a corporation under the Washington banking law;⁴² the case presents separate controversies, any one of which may be removed if there exists the requisite difference of citizenship. A suit to quiet title contains separate controversies when the defendants do not claim under a common right or through a common source;⁴³ even, it has been held, where the bill alleged that all of the defendants made some claim under a certain deed; but did not limit the controversy to the validity of such deed;⁴⁴ but not when the defendants are charged with being joined in a conspiracy to cloud the complainants' title and to defraud them of their property;⁴⁵ nor when one of two defendants holds the legal title as trustee for the other;⁴⁶ nor in any case in which the defendants claim a joint or common right, or through a common source, with no difference between their titles, which affects the controversy in suit.⁴⁷ A proceeding to recover the

Where a joint accounting was prayed, but the allegations in the complaint showed that the liability was several, it was held that the case could be removed. *Chicago & A. R. Co. v. N. Y., L. E. & W. R. Co.*, 24 Fed. 516.

⁴¹ *Langdon v. Fogg*, 18 Fed. 5, 7, 9; *Boyd v. Gill*, 19 Fed. 145 (21 Blatchf. 543).

⁴² *Calderhead v. Downing*, 103 Fed. 27. But, it has been held, that a creditors' bill, brought by several on behalf of the rest, to enforce a statutory liability of stockholders under a Colorado statute, by requiring them each to pay the full amount of the same to a master, to be applied upon the debts *pro rata*, together with such sums as might be collected from other stockholders, the remainder to be returned, does not present a separate controversy between the plaintiff and any one of the defendants. *Miller v. Clifford*,

133 Fed. 880, 67 C. C. A. 52, 5 L.R.A.(N.S.) 49.

⁴³ *Field v. Lownsdale*, Fed. Cas. No. 4,769 (Deady, 288); *Good-enough v. Warren*, Fed. Cas. No. 5,534 (5 Sawy. 494); *Steinkuhl v. York*, Fed. Cas. No. 13,356 (2 Flip. 376); *Illinois v. Illinois Cent. R. Co.*, 16 Fed. 881; *Chapman v. Chapman*, 28 Fed. 1; *Bates v. Carpenter*, 98 Fed. 452; *Carothers v. McKinley Mining & Smelting Co.*, 116 Fed. 947; *McMullen v. Hallack Cattle Co.*, 193 Fed. 283 (water rights). But see *Smedley v. Smedley*, 110 Fed. 255; *Lomax v. Foster Lumber Co.*, C. C. A., 174 Fed. 959.

⁴⁴ *Bacon v. Felt*, 38 Fed. 870.

⁴⁵ *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed. 269; reversing decree *Giles v. Little*, 13 Fed. 100, 2 McCrary, 370.

⁴⁶ *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907.

⁴⁷ *Re Foley*, 80 Fed. 949.

possession of land may be removed under similar circumstances;⁴⁸ but not, it has been held, a suit for a partition, where one of the defendants claimed to own the plaintiff's

⁴⁸ *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. ed. 883 (a suit for an assignment of dower); *Collins v. Wellington*, 31 Fed. 244; *Anderson v. Appleton*, 32 Fed. 855 (an action to establish a sale); *Stanbrough v. Cook*, 38 Fed. 369, 3 L.R.A. 400; *Knight v. Litcher & Moore Lumber Co.*, 136 Fed. 404, 69 C. C. A. 248; rehearing denied, 139 Fed. 1007; *Forsyth Mfg. Co. v. Putnam, Hooker & Co.*, 139 Fed. 1007; *Cleveland v. Cleveland, C. C. & St. L. Ry. Co.*, C. C. A., 147 Fed. 171 (lessor and lessee). It was held, in a suit to enforce a right to enter a park, that the owner and the lessees thereof had separate controversies with the plaintiff. *Sharp v. Whiteside*, 19 Fed. 150. A separate controversy exists between the petitioner and each of the lot owners, in a proceeding to condemn different lots of land for a public use, when the only question in dispute is the amount of damages, and the respondents have no joint interest in any of the parcels to be condemned, nor in the damages to be awarded; *Pacific R. R. Removal Cases*, 115 U. S. 2, 23, 29 L. ed. 319, 327; affirming 19 Fed. 150; *City of Chicago v. Hutchinson*, 15 Fed. 129 (11 Biss. 484); *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. 339 (9 Sawy. 348); *New York, N. H. & H. R. Co. v. Cockerott*, 46 Fed. 881; *South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, C. C. A., 141 Fed. 578; *Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co.*, 152 Fed. 824 (where the State statute authorized a proceed-

ing against the land owners, either jointly or separately; and it was held that any one of them could remove so much as affected his land leaving the controversies between the others and the railway company in the State court); *Drainage Dist. No. 19 v. Chicago, M. & St. P. Ry. Co.*, 198 Fed. 253; except when the State statute directs that the proceedings against all of the respondents shall be tried together, and that a single finding be made including all the awards and all the assessments for benefits; in which case, it has been held that no separable controversy can exist. *Kansas City v. Hennegan*, 152 Fed. 249. And one of two or more respondents to a condemnation proceeding, who hold different interests in the same lot, cannot remove the case, since there is no separable controversy as regards them. *Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117, 36 L. ed. 910; *Seattle & M. Ry. Co. v. State*, 52 Fed. 594; *Washington v. Columbus & C. M. R. Co.*, 53 Fed. 673; *Helena Power Transmission Co. v. Spratt*, 146 Fed. 310. But see *Oroville & N. R. Co. v. Leggett*, 162 Fed. 571. A mortgagee or a trustee, for the benefit of the holders of mortgage bonds, cannot claim to be interested in a separate controversy from that to which the mortgagor is a party. *Colorado Fuel & Iron Co. v. Four Mile Ry. Co.*, 66 Pac. 902, 29 Colo. 90. But, where only a part of the land was leased, held that there was a separate controversy as regards that not leased between the lessor and the lessee. *Sugar Creek, P. B. & P. C. Ry. Co.*

undivided share of the land.⁴⁹ It has been held that, in a suit for specific performance against the vendor and his grantee of the land, there is a separable controversy between the plaintiff and such grantee;⁵⁰ and that in an action to set aside a conveyance, to which the grantor and the grantee are defendants, there is no separable controversy between the plaintiff and the grantee.⁵¹ The contracts and liabilities of the maker and the indorsers of a promissory note are separate and distinct from each other. When they are joined as defendants, there is a separable controversy between the plaintiff and each of the indorsers.⁵² It has been held that separable controversies exist in an action to recover damages for negligence, when the negligence charged against the different defendants is different and not concurrent;⁵³ even when charges of concurrent negligence

v. McKell, 75 Fed. 34. It was held that a party who has leased the property to another for the term of ninety-nine years is indispensable to the controversy between his lessee and the person who institutes the condemnation proceeding, *City of Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; *City of Le Mars v. Iowa Falls & S. C. R. Co.*, 48 Fed. 661; *City of Washington v. Columbus & C. M. R. Co.*, 53 Fed. 673; even, although such lessor files a disclaimer. *City of Washington v. Columbus & C. M. R. Co.*, 53 Fed. 673. It has been held that, where there is a dispute concerning the right of the petitioner to condemn all the property, there is but a single controversy between him and all of those who dispute the right. *Re Jarnecke Ditch*, 69 Fed. 161; *Perkins v. Lake Superior & S. E. Ry. Co.*, 140 Fed. 904. Where the right to condemn only a part of the land is disputed, there is a separable controversy between the owners of that part and the petitioner, to which the powers of the other parts sought to be condemned are not parties. *South Da-*

kota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 141 Fed. 578, 73 C. C. A. 176; *Re Silvies River*, 199 Fed. 495.

⁴⁹ *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528.

⁵⁰ *Elkins v. Howell*, 140 Fed. 157.

⁵¹ *Moore v. North River Const. Co.*, 19 Fed. 803; *Winnemans v. Edgington*, 27 Fed. 324; *Reineman v. Ball*, 33 Fed. 692; *German Savings & Loan Soc. v. Dormitzer, C. C. A.*, 116 Fed. 471.

⁵² *Sheldon v. Keokuk Northern Line Packet Co.*, 1 Fed. 789 (9 Biss. 307); *Manufacturers' Commercial Co. v. Brown Alaska Co.*, 148 Fed. 308.

⁵³ *Yeates v. Illinois Cent. R. Co.*, 137 Fed. 943. A removal was allowed upon the petition of a railroad company, in a suit by its employee charging the corporation with negligence in furnishing a defective engine, and the other defendants, who were fellow servants of the plaintiff, with negligence in not keeping a proper lookout. *Ferguson v. Chicago, M. & St. P. Ry. Co.*, 63 Fed. 177. And where the plaintiff charged the railroad company with

are joined with a distinct charge of negligence against one defendant;⁵⁴ and also where plaintiff sued to recover damages for a personal injury and based his cause of action against each of two defendants upon a separate contract;⁵⁵ but that there is *no* separable controversy in an action to recover damages for the alleged joint negligence, by act or omission, of a railroad company and its engineer, conductor or other employee, when the sole ground alleged for the liability of the corporation is its responsibility as principal for the conduct of its servant, although not personally present nor directing and not charged with any specific concurrent act of negligence;⁵⁶ nor

negligence in permitting a dangerous obstruction in the immediate vicinity of the track, and a contractor for building the obstruction. *Hartshorn v. Atchison, T. & S. F. R. Co.*, 77 Fed. 9. A similar ruling was made in *Coker v. Monaghan Mills*, 110 Fed. 803. See *Veariel v. United Eng. & Foundry Co.*, 197 Fed. 877; *Lewis v. Cincinnati, N. O. & T. P. Ry. Co.*, 192 Fed. 654, *supra*, § 540, *infra*, § 543. But not in a joint action against the owner of an engine and cars and the owner of the tracks upon which they ran. *Haire v. Rome R. Co.*, 57 Fed. 321.

⁵⁴ *McIntyre v. Southern Ry. Co.*, 131 Fed. 985; *Henry v. Illinois Cent. R. Co.*, 132 Fed. 715; *Southern Ry. Co. v. Edwards*, 115 Georgia 1022, 42 S. E. 375; *Adderson v. Southern Ry. Co.*, 177 Fed. 571; *Jackson v. Chicago, R. I. & P. Ry. Co.*, C. C. A., 178 Fed. 432, where the liability of the different defendants was fixed by different statutes fixing different grounds of liability and permitting different defenses. *Bainbridge Grocery Co. v. Atlantic Coast Line R. Co.*, 182 Fed. 276; *Nichols v. Chesapeake & O. Ry. Co.*, C. C. A., 195 Fed. 913.

⁵⁵ *Batey v. Nashville, C. & St. L. Ry.*, 95 Fed. 368.

⁵⁶ *Powers v. Ches. & Ohio Ry. Co.*, 169 U. S. 92, 42 L. ed. 673; *Alabama Great So. Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441; *Cincinnati, N. O. & Texas Pac. Ry. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448; (These cases overruled a number of decisions to the contrary in the lower courts.) See also *Ches. & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121; *Fogarty v. Southern Pac. Co.*, 123 Fed. 973; *American Bridge Co. v. Hunt*, C. C. A., 130 Fed. 302; *Roberts v. Shelby Steel Tube Co.*, C. C. A., 131 Fed. 729; *Davenport v. Southern Ry. Co.*, C. C. A., 135 Fed. 960; *Heffelfinger v. Choctaw, O. & G. R. Co.*, 140 Fed. 75; *Thomas v. Great No. Ry. Co.*, C. C. A., 147 Fed. 83; *Knuth v. Butte Electric Ry. Co.*, 148 Fed. 73; *Bowles v. H. J. Heinz Co.*, 188 Fed. 937; *Illinois Cent. R. Co. v. Coley* (Kentucky), C. C. A., 89 S. W. 234; *Able v. Southern Ry.*, 73 South Carolina, 173, 52 S. E. 962. Where a passenger sued a railroad company and its conductor for the same injuries, alleging negligence on the part of the corporation in accepting and carrying a lunatic as a passenger without adequate protection, and charged the conductor with negligence in failing to restrain the lunatic so as to pre-

where a lessor and lessee,⁵⁷ or a corporation and its receivers,⁵⁸ or a city and a landowner,⁵⁹ are sued jointly for an injury caused by their concurrent negligence. In a suit to prevent one corporation from obtaining and exercising control over another, there is *no* separable controversy between the plaintiff and the former.⁶⁰ In a stockholder's suit to set aside a contract by his corporation, the controversy between him and the contractor is not separable from that to which the corporation is a party.⁶¹

It has been said that, "where an action is brought by one plaintiff against several defendants, not because they claim any joint interest or are subject to any joint liability in respect to the subject-matter of the action, but merely for convenience, it will generally be capable of resolution into *separable* controversies between the plaintiff and the individual defend-

vent him from assaulting the plaintiff; held that there was no separable controversy. *Dougherty v. Atchison, T. & S. F. R. Co.*, 126 Fed. 239. *Lathrop-Shea & Henwood Co. v. Pittsburg, S. & N. R. Co.*, 135 Fed. 619 (where the suit was for services against a railroad and a party who had made a contract with the plaintiff, which the plaintiff charged was made as agent for the railroad company; held that the controversy was not separable). See § 540, *supra*.

⁵⁷ *Central Ohio R. Co. v. Mahoney* C. C. A., 114 Fed. 732; *Person v. Illinois Cent. R. Co.*, 118 Fed. 342; *Keller v. Kansas City, St. L. & C. R. Co.*, 135 Fed. 202; *Curtis v. Cleveland, C. C. & St. L. Ry. Co.*, 140 Fed. 777. *Contra*, *Spangler v. Atchison, T. & S. F. R. Co.*, 42 Fed. 305; *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286; *Williard v. Spartanburg, U. & C. R. Co.*, 124 Fed. 796; *Yeates v. Illinois Cent. R. Co.*, 137 Fed. 943.

⁵⁸ *Whitcomb v. Smithson*, 175 U. S. 635, 44 L. ed. 303; *Moore v. Los*

Angeles, I. & S. Co., 89 Fed. 73; *Dougherty v. Atchison, T. & S. F. R. Co.*, 126 Fed. 239. *Contra*, *Chamberlain v. New York, L. E. & W. R. Co.*, 71 Fed. 636. There is no separate controversy in an action against joint receivers founded upon transactions of their predecessor. *Wrightsville Hardware Co. v. Hardware & Woodenware Mfg. Co.*, 180 Fed. 586.

⁵⁹ *Goe v. City of Colorado Springs*, 200 Fed. 99.

⁶⁰ *MacGinnis v. Boston & M. Consol. Copper and Silver Min. Co.*, C. C. A., 119 Fed. 96; overruling *Lamm v. Parrot, S. & C. Co.*, 111 Fed. 241.

⁶¹ *Cape Girardeau & St. L. R. R. v. Winston*, Fed. Cas. No. 2,390; *Wilder v. Virginia, T. & C. Steel & Iron Co.*, 46 Fed. 676; *Hanover Nat. Bank v. Credits Commutation Co.*, 118 Fed. 110; *Douglas v. Richmond & D. R. Co.* (North Carolina), 106 N. C. 65, 10 S. E. 1048. An analogous case is *Shumway v. Chicago & I. R. Co.*, 4 Fed. 385. It has been held: that there is no separable controversy between the corporation

ants.”⁶² Where plaintiff sued upon two similar claims, one of which had been assigned to him; it was held that there was a separable controversy as regards the claim, to which he had an original right.⁶³ When the plaintiffs sue to enforce a common right, which they might have asserted in separate actions, there is *no* separable controversy, even though their rights depend upon different circumstances.⁶⁴ There is no separable controversy between defendants, against whom the plaintiff seeks to establish a joint liability alone, either in contract,⁶⁵ or in

and the complainant in a stockholders' suit in which are joined as defendants the officers, *Campbell v. Milliken*, 119 Fed. 981; or the officers, directors, trustee under a mortgage, and bondholders, when it is sought to set aside an exchange of stock for bonds; or there is a joinder of another corporation holding capital stock of the former company, a cancellation of which is prayed, together with an injunction against the latter's exercising any control over the former and against the former's permitting any transfer of such shares upon its books or any vote thereupon by the latter and against the directors of the former from acting as such. *MacGinniss v. Boston & M. Consol. Copper and Silver Min. Co.*, C. C. A., 119 Fed. 96; overruling *Lamm v. Parrot, S. & C. Co.*, 111 Fed. 241. The fact that plaintiffs, in such a suit, hold stock of different classes, or that creditors, in a suit for an accounting by directors, hold claims of different kinds, does not make the controversy separable, although they might have prosecuted several suits which they properly brought jointly. *Wilder v. Virginia, T. & C. Steel & Iron Co.*, 46 Fed. 676. Where a suit was brought against two corporations and the directors of one of them, to set aside a conveyance made by this to the other, for an in-

junction against the directors as managing the affairs of the corporation and for the appointment of a receiver; thereof it was held that the controversy between the complainant and the directors was *separable* from that between him and the two corporations, and that the latter might remove the suit. *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122.

⁶² *Bates v. Carpenter*, 98 Fed. 452, 454.

⁶³ *Sharkey v. Port Blakely Mill Co.*, 92 Fed. 425.

⁶⁴ *Reineman v. Ball*, 33 Fed. 692; *Wilder v. Virginia, T. & C. S. & I. Co.*, 46 Fed. 676; per *Fuller, C. J.* (where the plaintiffs were different stockholders, some holding full paid stock, and others stock that was assessable, and also creditors holding separate claims to enforce a cause of action by the corporation). See also *Re McClean's Estate*, 26 Fed. 49.

⁶⁵ *Stone v. State*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; *Folsom v. Continental Nat. Bank*, 14 Fed. 497, 4 Woods, 521; *Western Union Tel. Co. v. Brown*, 32 Fed. 337; *Woodburn v. Clay*, 33 Fed. 897; *Mutual Reserve Fund Life Ass'n v. Farmer*, 77 Fed. 929, 23 C. C. A. 574; *Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, C. C. A., 80 Fed. 766; *Lathrop-*

tort;⁶⁶ although the liability of the defendants is joint and several;⁶⁷ even when a State statute permits judgment to be entered for or against one or more of the plaintiffs, and for or against one or more of the defendants,⁶⁸ or when the plaintiff sues less than all of those who are jointly and severally liable,⁶⁹ provided that the allegations in the bill do not clearly show that the liability is several; nor in a suit or proceeding to compel the joint performance of a duty by mandamus, or

Shea & Henwood Co. v. Pittsburg, S. & N. R. Co., 135 Fed. 619; Fusz v. Trager (Louisiana), 38 La. Ann. 173; O'Kelly v. Richmond & D. R. (North Carolina), 89 N. C. 58.

⁶⁶ Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; Core v. Vinal, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232; Tuedt v. Carson, 13 Fed. 353 (4 McCrary, 426); Southworth v. Reid, 36 Fed. 451; Kaitel v. Wylie, 38 Fed. 865; Dow v. Bradstreet Co., 46 Fed. 824; O'Harrow v. Henderson, 52 Fed. 769; Brown v. Cox Bros. & Co., 75 Fed. 689; Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co., 85 Fed. 876; Moore v. Los Angeles Iron & Steel Co., 89 Fed. 73; Evans v. Felton, 96 Fed. 176; Marrs v. Felton, 102 Fed. 775; Ward v. Franklin, 110 Fed. 794; Riser v. Southern Ry. Co., 116 Fed. 215; Person v. Illinois Cent. R. Co., 118 Fed. 342; Hoyer v. Great Northern Ry. Co., 120 Fed. 712; Dougherty v. Yazoo & M. V. R. Co., C. C. A., 122 Fed. 205, 58 C. C. A. 651; Fogarty v. Southern Pac. Co., 123 Fed. 973; American Bridge Co. v. Hunt, C. C. A., 130 Fed. 302; Davenport v. Southern Ry. Co., 135

Fed. 960, 68 C. C. A. 444; reversing judgment 124 Fed. 983. *Contra*, Clark v. Chicago, M. & St. P. Ry. Co., 11 Fed. 355 (3 McCrary, 591); Kerling v. Cotzhausen, 16 Fed. 705 (11 Biss. 582).

⁶⁷ Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; Core v. Vinal, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; Tuedt v. Carson, 13 Fed. 353 (4 McCrary, 426); Kaitel v. Wylie, 38 Fed. 865; Brown v. Cox Bros. & Co., 75 Fed. 689; Moore v. Los Angeles Iron & Steel Co., 89 Fed. 73. *Contra*, Clark v. Chicago, M. & St. P. Ry. Co., 11 Fed. 355 (3 McCrary, 591); Kerling v. Cotzhausen, 16 Fed. 705 (11 Biss. 582).

⁶⁸ Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63.

⁶⁹ Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; Core v. Vinal, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; Tuedt v. Carson, 13 Fed. 353 (4 McCrary, 426); Kaitel v. Wylie, 38 Fed. 865; Fox v. Mackay, 60 Fed. 4. *Contra*, Clark v. Chicago, M. & St. P. Ry. Co., 11 Fed. 355 (3 McCrary, 591); Kerling v. Cotzhausen, 16 Fed. 705 (11 Biss. 582).

otherwise,⁷⁰ or to enjoin them all from the performance of the same act,⁷¹ or of acts directly connected with each other.⁷² In a suit to foreclose a mortgage or other lien, a defendant, who is alleged to be personally liable for a deficiency, has *no* separable controversy from that between the plaintiff and the owner of the equity of redemption;⁷³ and defendants charged to be junior incumbrancers cannot remove a suit because their controversy with the mortgagee is separate from that of the mortgagor,⁷⁴ although they contest the validity or privity of the mortgage, and the mortgagor does not.⁷⁵ It has been held that, where there is a dispute as to the amount

⁷⁰ *Ohio v. Columbus & X. R. Co.*, 48 Fed. 626.

⁷¹ *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. 28; affirming 21 Fed. 592; *New York v. New Jersey S. B. Transp. Co.*, 24 Fed. 817; *Yearian v. Horner*, 36 Fed. 130; *McMillan v. Noyes*, 146 Fed. 926; *National Docks & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co.* (New Jersey), 52 N. J. Eq. 58, 28 Atl. 71.

⁷² *Anderson v. Bowers*, 40 Fed. 708; *Davis v. County Court of Randolph County*, 88 Fed. 705; *Vulcan Detinning Co. v. American Can Co.*, 130 Fed. 635; *Anderson v. Orient Fire Ins. Co.* (Iowa), 88 Iowa, 579, 55 N. W. 348.

⁷³ *Ames v. Chicago, S. F. & C. Ry. Co.*, 39 Fed. 881; *Lewis v. Weidenfeld*, 76 Fed. 145; *Union Iron & Foundry Co. v. Sonnefeld & Emmins*, 113 Louisiana 436, 37 So. 20; *United States Mortg. Co. v. McClure* (Oregon), 70 P. 542, 42 Or. 190.

⁷⁴ *First Nat. Bank of Manhattan v. King Wrought Iron Bridge Co.*, Fed. Cas. No. 4,803; *Donohoe v. Mariposa Land & Mining Co.*, Fed. Cas. No. 3,989 (5 Sawy. 163); *Sweeney v. Grand Island & W. C. R. Co.*, 61 Fed. 3; *Robbins v. Ellen-*

bogen, 71 Fed. 4, 18 C. C. A. 83, 36 U. S. App. 242; *Maher v. Tower Hotel Co.*, 94 Fed. 225; *Flynn v. Des Moines & St. L. Ry. Co.* (Iowa), 63 Iowa, 490, 19 N. W. 312; *Springer v. Sheets* (North Carolina), 115 N. C. 370, 20 S. E. 469; *Northwestern & Pacific Hypotheek Bank v. Suksdorf* (Washington), 46 Pac. 1027, 15 Wash. 475. *Contra*, *Osgood v. Chicago, D. & V. R. Co.*, Fed. Cas. No. 10,604 (6 Biss. 330). See also *Bybee v. Hawkett*, 5 Fed. 1 (6 Sawy. 593). It has been held that a suit to foreclose a mortgage, in which subsequent incumbrancers are defendants, may be removed by the mortgagor, upon the ground that a separable controversy exists between it and the plaintiff. *Wabash, St. L. & Pac. Ry. Co. v. Central Trust Co.*, 23 Fed. 513.

⁷⁵ *Bissell v. Canada & St. L. R. Co.*, 39 Fed. 225; *Marsh v. Atlanta & F. R. Co.*, 53 Fed. 168; *Thurber v. Miller*, 67 Fed. 371, 14 C. C. A. 432, 32 U. S. App. 209. *Contra*, *Foster v. Chesapeake & N. Ry. Co.*, 47 Fed. 369; distinguishing *Fidelity Ins., Trust & Safe Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. ed. 898; *California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power*

of land covered by the mortgage, there is a *separable* controversy between the plaintiff, mortgagee, and those of the defendants who are interested in the disputed portion of the property;⁷⁶ and that, since a prior mortgagor or other incumbrancer is not a necessary party to a suit to foreclose a junior lien when he is joined, the controversy between the plaintiff and owner of the equity of redemption is removable.⁷⁷ Upon a creditor's bill for the collection and preservation of the debtor's assets, and their distribution *pro rata* among the creditors, there is no separate controversy between the plaintiff and

Co., 56 Fed. 257. But see *Capital City Bank v. Hodgin*, 22 Fed. 209; *Rich v. Gross* (Nebraska), 29 Neb. 337, 45 N. W. 468.

⁷⁶ *New England Water-Works Co. v. Farmers' Loan & Trust Co.*, 136 Fed. 521, 69 C. C. A. 297. Where a complaint in a foreclosure suit alleged that a defendant claimed an interest in the mortgaged property, without stating the nature of the same, and it subsequently appeared that the latter's claim was to a title paramount to that of the mortgagor and mortgagee, which would make the controversies in the suit multifarious; it was held that the cause should be remanded. *California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co.*, 56 Fed. 257. A similar ruling was made in *Thompson v. Dixon*, 28 Fed. 5.

⁷⁷ *Snow v. Texas Trunk R. Co.*, 16 Fed. 1 (4 Woods, 394); *Boatmen's Bank v. Fritzlen*, C. C. A., 135 Fed. 650; reversing *Weldon v. Fritzlen*, 128 Fed. 608. *Contra*, *Foster v. Chesapeake & N. R. Co.*, 47 Fed. 369. See *Marsh v. Atlantic & F. R. Co.*, 53 Fed. 168. It has been held that a prayer for the reformation of the mortgage is incidental to a foreclosure suit, and does not cre-

ate a separable controversy, *Winchell v. Coney*, 27 Fed. 482; see *Gates Iron Works v. James E. Pepper & Co.*, 98 Fed. 449; that, in a suit to cancel a mortgage, there is no separable controversy between plaintiff and the defendants, mortgagor and mortgagee, *Oakes v. Yonah Land & Mining Co.*, 89 Fed. 243; that the same rule prevails in a suit by a mortgagor against the different lienholders upon his property, for the adjustment of their rights, although separate suits might have been brought for the same purpose against the different mortgagees, *Springer v. Sheets* (North Carolina), 115 N. C. 370, 20 S. E. 469; that there is no separable controversy in a suit to enjoin a foreclosure sale and to redeem a mortgage, when the right of the complainant in the equity of redemption is disputed by the person in whose name the title stands, and who is joined as defendant with the mortgagee, *Faison v. Hardy* (North Carolina), 114 N. C. 429, 19 S. E. 701, and that, in a suit to establish an interest in land in the possession of a mortgagor, the mortgagor and mortgagee are interested in the same controversy with the plaintiff, *Chester v. Chester*, 7 Fed. 1.

defendants, who claim a prior lien upon the assets;⁷⁸ nor between him and defendants, who he contends should be excluded from participating in the distribution;⁷⁹ nor, it has been held, between him and a party, who is alleged in the bill to have assumed the obligations of the insolvent debtor.⁸⁰ The same principles apply to similar suits by an administrator,⁸¹ or by an assignee for the benefit of creditors,⁸² or by a partner for a dissolution and the distribution of the assets of the firm.⁸³ In proceedings upon an application for the admission of a will to probate,⁸⁴ or to contest the validity of the same,⁸⁵ or an action to establish a will,⁸⁶ or, it has been held, in a suit to determine the construction thereof;⁸⁷ there is no separable controversy.

§ 542. Parties who may remove cases. Where the necessary jurisdictional facts exist, an infant defendant may remove a case through his next friend or guardian *ad litem*, in the same manner and under the same circumstances of any other defendant;¹ but, it has been held, that this cannot be

⁷⁸ Fidelity Ins., Trust & Safe Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. ed. 898; Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; reversing decree Corbin v. Boies, 34 Fed. 692; Torrence v. Shedd, 144 U. S. 527, 531, 36 L. ed. 528, 531; Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399; Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4; Peters v. Peters (Georgia), 41 Ga. 242; State v. Adams (Ohio), 2 Ohio Dec. 119, 9 Ohio Cir. Ct. R. 21. *Contra*, Corbin v. Boies, 18 Fed. 3; Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356. The same principle has been applied to a bill by a judgment creditor for his own benefit. Palmer v. Inman (Georgia), 122 Ga. 226, 50 S. E. 86.

⁷⁹ Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; reversing Corbin v. Boies, 34 Fed. 692; Colburn v. Hill, 101 Fed. 500, 41 C. C. A. 467; Burts v. Lloyd

(Georgia), 45 Ga. 104, 12 Am. Rep. 574.

⁸⁰ Mecke v. Valleytown Mineral Co., 122 North Carolina 790, 29 S. E. 781.

⁸¹ Peters v. Peters (Georgia), 41 Ga. 242; Burts v. Lloyd (Georgia), 45 Ga. 104, 12 Am. Rep. 574. See State v. Adams (Ohio), 2 Ohio Dec. 119, 9 Ohio C. C. R. 21.

⁸² Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399.

⁸³ Shainwald v. Lewis, 108 U. S. 158, 27 L. ed. 691.

⁸⁴ Fraser v. Jennison, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. ed. 131.

⁸⁵ Reed v. Reed, 31 Fed. 40.

⁸⁶ Anderson v. Appleton, 32 Fed. 855.

⁸⁷ Security Co. v. Pratt, 64 Fed. 405.

§ 542. ¹ Woolridge v. McKenna, 8 Fed. 650. *Of. Re* Moore, 209 U. S. 490, 52 L. ed. 904. But see Kingsbury v. Kingsbury, Fed. Cas. No. 7,817 (3 Biss. 60).

done until the infant has been served with process, or otherwise subjected to the jurisdiction of the State court, in accordance with the law of the State.² It has been held that a husband may join the wife in an application for the removal of a suit affecting property, which belonged to her before the marriage, and has not yet been reduced to possession.³ It has been held that a New York corporation, over whose property receivers have been appointed by the Supreme Court of New York and the Chancellor of New Jersey, may, without the consent of those receivers, remove a suit begun by the levy of a writ of foreign attachment in a New Jersey court.⁴ A receiver, authorized to sue and be sued in his own name, may, when the necessary jurisdictional facts exist, remove a suit to which he is the defendant.⁵ An intervenor, who presents some new and independent interest or question, may remove a case under circumstances that would warrant such a removal by the original defendant.⁶ An intervenor, who is substituted in the place of another defendant, or who comes in because he has succeeded to such other's rights, cannot remove a cause, which the original defendant could not have removed.⁷ Where the party

² Woolridge v. McKenna, 8 Fed. 650.

³ Carswell v. Schley, 59 Ga. 17.

⁴ Second Nat. Bank v. New York Silk Mfg. Co., 11 Fed. 532. Under the New Jersey statute, which, for the purpose of the prosecution and defense of actions, continues the existence of a corporation that has been dissolved, such a company can remove a case notwithstanding its dissolution. Groom v. Mortimer Land Co., C. C. A., 192 Fed. 849.

⁵ American Nat. Bank v. National Benefit & Casualty Co., 70 Fed. 420.

⁶ Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356; Jackson & Sharp Co. v. Pearson, 60 Fed. 113; American Nat. Bank of Denver v. National Benefit & Casualty Co., 70 Fed. 420; Chase v. Beech

Creek R. Co., 144 Fed. 571. As to the right of intervenors to remove a separable controversy, see *supra*, § 541.

⁷ Cable v. Ellis, 110 U. S. 389, 4 Sup. Ct. 85, 28 L. ed. 186; Houston & T. C. Ry. Co. v. Shirley, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. ed. 455; Jefferson v. Driver, 117 U. S. 272, 6 Sup. Ct. 729, 29 L. ed. 897; Ellis v. Sisson, 11 Fed. 353 (11 Biss. 187); Shirley v. Waco Tap. R. Co., 13 Fed. 705 (4 Woods, 411); Ohlquist v. Farwell, 13 Fed. 305 (4 McCrary, 401); Goodnow v. Dolliver, 26 Fed. 469; Richmond & D. R. Co. v. Findley, 32 Fed. 641; Re San Antonio & A. P. Ry. Co., 44 Fed. 145; Burnham v. First Nat. Bank of Leith, 53 Fed. 163, 166, 3 C. C. A., 486, 10 U. S. App. 485; Grand Trunk Ry. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237; United

whose place he takes might still remove the case if he had remained in the suit and the intervenor's citizenship is the same, the latter may have a removal.⁸ It has been intimated that an intervenor, who asserts rights prior to that of the plaintiff, must be treated as a new plaintiff rather than as a defendant, and cannot remove the case.⁹ It has been held that a party, who has been wrongfully denied the right of intervention, may remove a case;¹⁰ but that one who has not applied for leave to intervene cannot.¹¹ A suit between citizens of the same State, claiming lands under grants by different States, may be recovered by any one or more of the plaintiffs or defendants.¹² In every other case a defendant only may procure a removal;¹³ except where parties have been joined as plaintiffs, who are on the same side of the controversy as the defendants, when, it might be held, that they could join with the other defendants in the petition.¹⁴ It has been held that the pleading by the original defendant of a cross-bill, a counter-claim or a demand in re-convention, which exceeds the jurisdictional amount, does not put the original plaintiff in the position of a defendant, so that he can remove the cause;¹⁵ nor debar the defendant of

Electric Securities Co. v. Louisiana Electric Light Co., 68 Fed. 673; *Olds Wagon Works v. Benedict*, 67 Fed. 1, 14 C. C. A. 285; *Baltimore & O. Tel. Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 37 La. Ann. 883; *Howard v. Stewart*, 34 Neb. 765, 52 N. W. 714. But see *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337; *Greene v. Klingler*, Fed. Cas. No. 5,767; *American National Bank of Denver v. National Benefit & Casualty Co.*, 70 Fed. 420.

⁸ *Howard v. Stewart*, 34 Neb. 765, 52 N. W. 714.

⁹ *Re San Antonio & A. P. Ry. Co.* 44 Fed. 145; *Nash v. McNamara*, 145 Fed. 541.

¹⁰ *Hack v. Chicago & G. S. Ry. Co.*, 23 Fed. 356. *Contra*, *Bertha Zinc & Mineral Co. v. Carico*, 61 Fed. 132.

¹¹ *State v. Barnes*, 5 N. D. 350, 65 N. W. 688.

¹² 25 St. at L., p. 433, § 3, *supra*, §§ 50, 537.

¹³ *Western Union Tel. Co. v. Brown*, 32 Fed. 337 (separable controversy); *La Montagne v. T. W. Harvey Lumber Co.*, 44 Fed. 645; *Campbell v. Collins*, 62 Fed. 849 (for prejudice or local influence); *Waco Hardware Co. v. Michigan Stove Co.*, C. C. A., 91 Fed. 289; *McKown v. Kansas & T. Coal Co.*, 105 Fed. 657; *Chappell v. Chappell*, 86 Md. 532, 39 Atl. 984.

¹⁴ *Removal Cases*, 100 U. S. 457, 468, 25 L. ed. 593, 597; *supra*, §§ 40, 41, 537.

¹⁵ *West v. Aurora City*, 6 Wall. 139, 18 L. ed. 819; *La Montagne v. T. W. Harvey Lumber Co.*, 44 Fed. 645; *Waco Hardware Co. v.*

his right to remove.¹⁶ Upon the removal of a condemnation proceeding, pending an appeal from the decision of the commissioners, the land owner, who was the respondent below, is usually regarded as a defendant.¹⁷ Upon an appeal from an application for the probate of a will, the party opposing the probate is considered as the defendant.¹⁸ It has been held that, upon an appeal from a decision of a board of county commissioners upon a county claim, the claimant must be considered to be the plaintiff, and that he cannot remove the cause, although he is the respondent upon such appeal.¹⁹ In Colorado, it was held that a claimant against an assignee for the benefit of creditors, who had filed his claim, and subsequently a reply to the exception filed by the assignee, must be considered to

Michigan Stove Co., C. C. A., 91 Fed. 289; McKown v. Kansas & T. Coal Co., 105 Fed. 657; City of Aurora v. West, 25 Ind. 148; aff'd 6 Wall. 139, 18 L. ed. 819; Chappell v. Chappell, 39 Atl. 984; Illinois Cent. R. Co. v. A. Waller & Co., 164 Fed. 358, 85 Md. 532; Smithers v. Smith (Tex. Civ. App.), 80 S. W. 646; rehearing granted (Sup.) 81 S. W. 283. But where, pending an appeal by a landowner from the award of a sheriff's jury in condemnation proceedings under the statute of Iowa, he filed a pleading which was tantamount to a cross-bill praying an injunction against the institution of the proceedings for want of power in the corporation; it was held that this made the defendant the latter as regards the issues raised thereupon and entitled it to remove the case when the other statutory prerequisites existed. Hagerla v. Mississippi River Power Co., 202 Fed. 771. *Contra*, Carson v. Rand Lumber Co. v. Holtzclaw, 39 Fed. 578 (for prejudice or local influence); Price & Hart v. T. J. Ellis & Co., 129 Fed. 482.

¹⁶ Meissner v. Buek, 28 Fed. 161; Fed. Prac. Vol. II.—114.

La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645.

¹⁷ Mason City & Fort Dodge R. Co. v. Boynton, 204 U. S. 570, 51 L. ed. 629 (under Iowa statute, which said that on an appeal "the land owner shall be plaintiff and the corporation defendant"); Mt. Washington Ry. Co. v. Coe, 50 Fed. 637 (under New Hampshire statute); Hudson River R. & T. Co. v. Day, 54 Fed. 545 (under New Jersey statute). *Contra*, White v. City, 8 Phila. 241. But see Hagerla v. Mississippi River Power Co., 202 Fed. 771; *supra*, note 15. Before the case in 204 U. S. 570, 51 L. ed. 629 it was held that, under similar circumstances in proceedings under the same Iowa statute, the railroad company might remove the case. Kirby v. Chicago & N. W. R. Co., 106 Fed. 551; Myers v. Chicago & Northwestern Ry. Co., 118 Iowa, 312, 324, 91 N. W. 1076.

¹⁸ Brodhead v. Shoemaker, 44 Fed. 518.

¹⁹ Delaware County Commissioners v. Diebold S. & L. Co., 133 U. S. 473, 33 L. ed. 674; Tullock v. Webster County, 40 Fed. 706.

be a plaintiff, and had no right to remove the cause.²⁰ It seems that civil suits or criminal prosecutions against revenue officers or persons having defenses under the revenue laws may be removed by such defendant alone, although other parties not having such a defense have been joined with him;²¹ and that actions against any person for or on account of anything done by him while an officer of either House of Congress, in the discharge of his official duty, may be similarly removed.²² It seems that civil suits or criminal prosecutions where any defendant is denied or cannot enforce his rights, secured by the civil rights laws, or where any defendant has a defense under the civil rights laws, may be removed by such defendant, although his co-defendants do not join in his petition.²³ Suits between citizens of the same State claiming land under grants of different States may be removed by any one or more of the plaintiffs or defendants.²⁴ Suits arising under the Constitution or laws or treaties of the United States, except those previously specified, cannot be removed unless all the defendants join in the petition, even though some of them are not interested in the controversy.²⁵ It seems that suits to which an alien is a party cannot be removed unless all the parties on the opposite side of the controversy to that of the plaintiff join in the application.²⁶ Where the sole ground of the removal is that the only controversy in the suit is between citizens of different States, the preponderance of authority supports the proposition that all the parties named in the plaintiff's pleading, who are on the opposite side of the controversy to him, must join in the application.²⁷ The fact that one of the defendants has not been

²⁰ Hill v. Graham 11 Colorado App. 536, 53 Pac. 1060.

²¹ U. S. R. S., § 643.

²² 18 St. at L., p. 401, ch. 130, § 8.

²³ U. S. R. S., § 641.

²⁴ 25 St. at L., p. 433, ch. 866, § 3; *supra*, §§ 20, 383.

²⁵ Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U. S. 245, 248, 44 L. ed. 1055, 1056; Yarnell v. Felton, 102 Fed. 369; Yarnell v. Felton, 104 Fed. 161; Scott v. Choctaw, O. & G. R. Co., 112 Fed. 180;

Heffelfinger v. Choctaw, O. & G. R. Co., 140 Fed. 75; Chicago, R. I. & P. Ry. Co. v. Martin, 59 Kansas 437, 53 Pac. 461; Texas & P. Ry. Co. v. Young (Texas Civ. App.), 27 S. W. 145.

²⁶ 25 St. at L. p. 433, Ch. 866, § 2. See authorities cited, *supra*, § 537.

²⁷ Houston & T. C. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679; Chicago, R. I. & Pac. Ry. Co. v. Martin. 178 U. S. 245,

served,²⁸ or has made default,²⁹ or that judgment was entered against one before service upon the other,³⁰ or that one had appeared and disclaimed,³¹ will not obviate the necessity of his joinder in the application.

Defendants who are described in the plaintiff's pleadings as unknown need not join in the petition for the removal.³² Formal parties need not join in the petition.³³ Improper³⁴ and perhaps unnecessary³⁵ parties need not join in the petition. Where there are two controversies in the case, and one of them is removable, any one or more of the non-resident defendants interested in that controversy may remove the cause.³⁶ It has been held that in such a case the joinder of a party, who has no

44 L. ed. 1055; *Arkansas Val. Sm. Co. v. Cowenhoven*, 41 Fed. 450; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. 773; *Yarnell v. Felton*, 102 Fed. 369; *Huntington v. Pinnney*, 126 Fed. 237; *Blackburn v. Blackburn*, 142 Fed. 901; *International & G. N. R. Co. v. Hoyle*, C. C. A., 149 Fed. 180. *Contra*, *Mutual Life Ins. Co. v. Champlin* (S. D. N. Y.), 21 Fed. 85; *Garner v. Second Nat. Bank of Providence* (S. D. N. Y.), 66 Fed. 369; *Boston S. D. & Tr. Co. v. Mackay* (S. D. N. Y.), 70 Fed. 801; *Hunter v. Conrad* (D. R. I.), 85 Fed. 803; *Mumford Rubber Tire Co. v. Consolidated Rubber Tire Co.* (S. D. N. Y.), 130 Fed. 496.

²⁸ *Brown v. Trousedale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987; *Patchin v. Hunter*, 38 Fed. 51. *Contra*, *Wormser v. Dahlman*, Fed. Cas. No. 18,048 (16 Blatchf. 319); *Tremper v. Schwabacher*, 84 Fed. 413; *Bowles v. H. J. Heinz Co.*, 188 Fed. 937.

²⁹ *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. ed. 65; *Fletcher v. Hamlet*, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. ed. 679; affirming order, *Hamlet v. Fletcher*, 24 Fed. 305; *Brooks v. Clark*, 119 U. S.

502, 30 L. ed. 482; *Hax v. Caspar*, 31 Fed. 499; *Fairchild v. Durand* (New York), 8 Abb. Prac. 305.

³⁰ *Brooks v. Clark*, 119 U. S. 502; ³¹ *City of Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; *New Jersey Zinc Co. v. Trotter*, Fed. Cas. No. 10,167; *Hax v. Caspar*, 31 Fed. 499; *Dow v. Bradstreet Co.*, 46 Fed. 824; *Goodnow v. Litchfield*, 47 Fed. 753.

³² *Walker v. Richards*, 55 Fed. 129.

³³ *Henderson v. Cabell*, 43 Fed. 257; *Shattuck v. North British & Mercantile Ins. Co.*, 58 Fed. 609, 7 C. C. A. 386.

³⁴ *Cooke v. Seligman*, 7 Fed. 262 (17 Blatchf. 452). See *supra*, § 540.

³⁵ *Supra*, § 43. But see *Buck v. Felder*, 196 Fed. 419.

³⁶ *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907; *Field v. Lownsdale*, Fed. Cas. No. 4,769 (Deady, 288); *Fields v. Lamb*, Fed. Cas. No. 4,775 (Deady, 430); *Lewis v. White*, Fed. Cas. No. 8,335; *McGinnity v. White*, Fed. Cas. No. 8,802 (3 Dill. 350); *Greene v. Klingner*, 10 Fed. 689; *Grindrod v. Crine*, 22 Fed. 257; *supra*, § 541.

right of removal, does not affect the removal by the other.³⁷ Where a case is removable for prejudice or local influence, the petition may be filed by any one of the defendants who has the right of removal without the joinder of his co-defendants.³⁸ A removal because of alienage,³⁹ or because the parties to the controversy are citizens of different States,⁴⁰ can only be made by parties who are non-residents of the State where the suit is brought. Under the Judiciary Act of 1875, it was held: that the exception of suits by assignees, which could not have been there instituted by the assignors, from the original jurisdiction of the Circuit Courts of the United States, did not affect the right of removal; and that the right of a defendant to remove was not affected by the citizenship of his assignor.⁴¹ Where, by the State practice, the assignee of a cause of action sued in his own name, but by the practice of the Federal courts the action could only be sustained in the name of his assignor, and the latter was a citizen of the same State as defendant; it was held, that there could be no removal.⁴²

³⁷ *Snow v. Smith*, 88 Fed. 657.

³⁸ 25 St. at L., p. 433, ch. 866, § 2; *Fisk v. Henarie*, 32 Fed. 417 (reversed upon another point, 142 U. S. 459, 35 L. ed. 1080); *Whelan v. N. Y., L. E. & W. R. Co.*, 35 Fed. 849; *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1; *Haire v. Rome R. Co.*, 57 Fed. 321; *infra*, § 549.

³⁹ *Cooley v. McArthur*, 35 Fed. 372; *Cudahy v. McGeoch*, 37 Fed. 1; *Walker v. O'Neill*, 38 Fed. 374; *Eddy v. Casas*, 118 Fed. 363.

⁴⁰ *Martin v. Snyder*, 148 U. S. 663, 37 L. ed. 602; *Wichita National Bank v. Smith, C. C. A.*, 72 Fed. 568. It has been held that, where there were several defendants, all of whom were citizens of a different State from the plaintiff, and one of whom only was a resident of the State where the suit was brought, there could be no removal. *Parkinson v. Barr*, 105 Fed. 81.

⁴¹ *Clafin v. Commonwealth Ins.*

Co., 110 U. S. 81, 28 L. ed. 76; *Delaware County Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 473, 33 L. ed. 674; *Waterbury v. Laredo, Fed. Cas. No. 17,252* (3 Woods, 371); *Rosenblatt v. Reliance Lumber Co.*, 18 Fed. 705; *Bell v. Noonan*, 19 Fed. 225; *Rosenbaum v. Council Bluffs Ins. Co.* 3 L.R.A. 189, 37 Fed. 724; *Leutze v. Butterfield* (New York), 7 Daly 24; *Leutze v. Butterfield* (New York), 52 How. Prac. 376; *Leutze v. Butterfield* (New York), 1 Abb. N. C. 367. A number of decisions by the Circuit Courts to the contrary were overruled. But see *Sharkey v. Port Blakely Mill Co.*, 92 Fed. 425; *Flynn v. Fidelity & Casualty Co.*, 145 Fed. 265. Compare *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264.

⁴² *Anderson v. Manufacturers' Bank* (New York), 14 Abb. Prac. 426.

§ 543. **Time of removal.** In suits or criminal prosecutions against revenue officers,¹ officers of either House of Congress,² or persons claiming rights under the revenue laws,³ or against persons who seek protection under the Civil Rights law;⁴ a removal may be had "at any time before the trial or final hearing." Removals for prejudice or local influence, of controversies between citizens of different States,⁵ and removals of suits between citizens of the same State claiming land under grants of different States,⁶ must be made "before the trial" thereof. Ordinary suits arising under the Constitution or laws of the United States, or treaties made under their authority, or where there are controversies between citizens of different States, must be removed "at the time, or any time before the defendant is required by the laws of the State or by the rule of the State court, in which said suit is brought, to answer or plead to the declaration of the complaint of the plaintiff."⁷ According to the preponderance of authority, the removal may take place during a vacation of the State court.⁸ It has been held: that a case is properly removed if the petition and bond are duly filed, although they are not actually presented to the court until the time to plead has expired;⁹ and that it is sufficient if the papers are actually filed in the clerk's office in time, although they are not then endorsed by the clerk as "filed."¹⁰ It has been held: that a defendant may remove the case be-

§ 543. ¹ U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

² 18 St. at L., ch. 130, § 8, p. 401.

³ U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

⁴ U. S. R. S., § 641.

⁵ 25 St. at L. p. 433, ch. 866, § 3.

⁶ 25 St. at L., p. 433, ch. 866, § 3.

⁷ 25 St. at L. p. 433, ch. 866, § 3.

⁸ Daugherty v. Sharp, 171 Fed. 466.

⁹ Osgood v. Chicago, D. & V. R. Co., Fed. Cas. No. 10,604 (6 Biss. 330); Burek v. Taylor, 39 Fed. 581; Brown v. Murray, Nelson & Co., 43 Fed. 614; State v. Coosaw Min. Co., 45 Fed. 804, 811; Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151. See Remington v. Cen-

tral Pacific R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Monroe v. Williamson, 81 Fed. 977; Johnson v. Computing Scale Co., 139 Fed. 339. *Contra*, Scott v. Otis, Fed. Cas. No. 12,543; Williams v. Massachusetts Ben. Ass'n, 47 Fed. 533; Fox v. Southern Ry. Co., 80 Fed. 945; Howard v. Southern Ry. Co., 122 North Carolina 944, 29 S. E. 778.

⁹ Burek v. Taylor, 39 Fed. 581; judgment affirmed, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; Texas & P. Ry. Co. v. Bloom, 85 Tex. 279, 20 S. W. 133.

¹⁰ Waite v. Phoenix Insurance Co., 62 Fed. 769.

fore an attempt has been made to serve him with process;¹¹ but that a corporation, not a party to the record, which had refused to enter itself as a defendant, could not;¹² and that an irregularity in the filing of the removal papers, before the entry of an order making the remover a party, was cured by the subsequent entry of an order making him a party and reciting the filing of the removal papers.¹³ A case may be removed before the defendant has filed any pleading.¹⁴ A case cannot be removed after it has been dismissed;¹⁵ nor, it has been held, after a stipulation has been filed by the defendant admitting the plaintiff's claim, and there is no other controversy in the suit.¹⁶ After the time to remove a case has expired, it cannot be extended by the court;¹⁷ even though defendant's attorney was prevented by inevitable accident from reaching the court house until after the last day on which the petition and bond were filed.¹⁸ It has been held that, when the time to remove an action of ejectment has expired, and that case has been tried, a subsequent cross action of ejectment cannot be removed;¹⁹ that, if a case has been remanded for failure to file a transcript, it cannot again be removed upon the same grounds;²⁰ nor upon other grounds; such as local prejudice, when he does not show that such ground did not exist at the time of the first removal.²¹

¹¹ *Parkinson v. Barr*, 105 Fed. 81.

¹² *Bertha Z. & M. Co. v. Carico*, 61 Fed. 132.

¹³ *First Nat. Bank v. Merchants' Bank*, 37 Fed. 657, 2 L.R.A. 469.

¹⁴ *Hodson v. Lake Shore & M. R. Co.*, Fed. Cas. No. 6,571a; *Bailey v. American Cent. Ins. Co.* 8 Fed. 686 (2 McCrary, 413); *Egan v. Chicago, M. & St. P. Ry. Co.*, 53 Fed. 675; *Creach v. Equitable Life Assur. Soc.*, 83 Fed. 849; *Memphis Sav. Bank v. Houchens*, 115 Fed. 96, 52 C. C. A. 176. A New York case holds that a defendant must enter his appearance in the State court at the time he files his petition for a removal. *Kerille v. Phoenix Life Ins. Co.*, 3 Thompson & C. 788. But see *Durand v. Hollins*, 10 New York Superior Court (3 Duer), 686.

¹⁵ *New England Mortg. Sec. Co. v. Aughe*, 12 Neb. 504, 11 N. W. 753.

¹⁶ *Keith v. Levi*, 2 Fed. 743 (1 McCrary, 343).

¹⁷ *Gibson v. Johnson*, Fed. Cas. No. 5,397 (Pet. C. C. 44); *Ward v. Arredondo*, Fed. Cas. No. 17,148 (1 Paine, 410); *Daugherty v. Western Union Tel. Co.*, 61 Fed. 138. But see *Livingston v. Frick*, 76 Ga. 839.

¹⁸ *Daugherty v. W. U. Tel. Co.*, 61 Fed. 138. But see *Livingston v. Frick*, 76 Ga. 639.

¹⁹ *Evans v. Smith*, 21 Fed. 1.

²⁰ *St. Paul & C. Ry. Co. v. McLean*, 108 U. S. 212, 27 L. ed. 703, 2 Sup. Ct. 498.

²¹ *Pope v. Cheney*, 22 Fed. 177.

The objection that the petition was filed too late may be waived by taking a subsequent proceeding in the Federal court without raising it.²² A removal of a suit where there is a controversy between citizens of different States, and there is no claim of prejudice or local influence, and a removal of an ordinary suit arising under the Constitution or laws of the United States or treaties made under their authority, must be made "at the time or any time before the defendant is required by the laws of the State or the rule of the State court, in which said suit is brought, to answer or plead to the declaration or complaint of the plaintiff."²³ It

²² *French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Martin's Adm'r v. Baltimore & Ohio R. Co.*, 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. 533; dismissing writ of error, *Martin v. Baltimore & Ohio R. Co.*, 41 Fed. 125; *Knight v. International & G. N. R. Co.*, 61 Fed. 87, 9 C. C. A. 376, 23 U. S. App. 356; *certiorari* dismissed, 17 Sup. Ct. 995, 41 L. ed. 1187; *Newman v. Schwerin*, 61 Fed. 865, 10 C. C. A. 129, 22 U. S. App. 393; *Collins v. Stott*, 76 Fed. 613; *infra*, § 556.

²³ *Jud. Code*, § 29, 36 St. at L. 1087, see 25 St. at L., p. 433, ch. 866, § 3. As to the day before which the removal must be made in different States, see: *California*, *MacNaughton v. Southern Pac. C. R. Co.*, 19 Fed. 881 (holding that the word "session" in the Constitution of California is equivalent to that of "term" in the act of Congress); *Case v. Olney*, 106 Fed. 433; *Connecticut*, *Head v. Selleck*, 110 Fed. 786; *Georgia*, *Stafford v. Hightower*, 68 Ga. 394; *Southern Pac. Co. v. Stewart*, 88 Ga. 13, 13 S. E. 824. As to the day before which a removal must be made in *Indiana*, see *McKeen v. Ives*, 35 Fed. 801; *Browning v. Reed*, 39 Fed. 625; *Amsden v. Norwich*, U. F. Co., 44

Fed. 515; *Kansas*, *Burnham v. First Nat. Bank*, 53 Fed. 163, 3 C. C. A. 486, 10 U. S. App. 485; *Van Allen v. Atchison, C. & P. R. Co.*, 3 Fed. 545 (1 McCrary, 598); *Kentucky*, *Fidelity Tr. & S. V. Co. v. Newport N. & M. V. Co.*, 70 Fed. 403; *Maine*, *Craven v. Turner*, 82 Me. 383, 19 Atl. 864; *Massachusetts*, *Frink v. Blackinton Co.*, 80 Fed. 306; *American Finance Co. v. Bostwick*, 151 Mass. 19, 23 N. E. 656; *Olds v. City Trust, Safe Deposit & Surety Co.*, 180 Mass. 1, 61 N. E. 223; *Michigan*, *Detroit v. Detroit City R. Co.*, 54 Fed. 1; *Missouri*, *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286; *Nevada*, *Wedekind v. Southern Pac. Co.*, 36 Fed. 279 (13 Sawy. 475); *New Hampshire*, *Mt. Washington R. Co. v. Coe*, 50 Fed. 637; *New York*, *Woolf v. Chisolm*, 30 Fed. 881; *Doyle v. Beaupre*, 39 Fed. 289; *Mayer v. Ft. Worth & D. C. R. Co.*, 93 Fed. 601; *North Carolina*, *Williams v. Southern Bell Telephone & Telegraph Co.*, 116 N. C. 558, 21 S. E. 298; *Avent v. Deep River Lumber Co.*, 174 Fed. 298; *Higson v. North River Ins. Co.*, 184 Fed. 165; *North Dakota*, *Minneapolis, St. P. & S. S. M. Ry. Co. v. Nestor*, 50 Fed. 1; *State v. Barnes*, 5 N. D. 350; 65 N. W. 688; *Pennsylvania*,

seems, that a case, not belonging to one of the five classes above specified, cannot be removed after the time to plead in abatement has expired, although the defendant has further time in which to plead or to answer to the merits.²⁴ The time is not extended by the filing of a plea to the jurisdiction of the State court.²⁵ Upon appeals in condemnation proceedings it was held, under the New Hampshire statute, that the rule of the State court limiting the time for filing special pleas in proceedings at law applied;²⁶ and, under that of North Dakota, that the time allowed for the demand of a jury trial was the limit of the time of removal.²⁷ Such a removal cannot be made after the time to demur has expired, although a demurrer has been overruled with leave to answer;²⁸ nor after the time to file the first pleading has expired, although the defendant has

McHenry v. N. Y., P. & O. R. Co., 25 Fed. 65; First Nat. Bank of Garrett, Pa., v. A. E. Appleyard & Co., 138 Fed. 939; *South Carolina*, Tenney v. Am. P. Mfg. Co., 96 Fed. 919; *South Dakota*, South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co., C. C. A., 141 Fed. 578; *Tennessee*, Deford v. Mehaffy, 13 Fed. 481; Gavin v. Vance, 33 Fed. 84; Tennessee Coal, Lumber & Tanbark Co. v. Waller, 37 Fed. 545; Lockhart v. Memphis & L. R. Co., 38 Fed. 274; Turner v. Illinois Cent. R. Co., 55 Fed. 689; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654. The Federal court declined to take judicial notice of a rule of the State court permitting pleading to be filed after the statutory time. Yarnell v. Felton, 102 Fed. 369; *Vermont*, Sowles v. Witters, 43 Fed. 700; *Virginia*, Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 673, 38 L. ed. 311; Mahoney v. New So. B. & L. Ass'n, 70 Fed. 513; Mays v. Newlin, 143 Fed. 574; *West Virginia*, Wilson v. Winchester & T. R. Co., 82 Fed. 15.

²⁴ Martin's Adm'r v. Baltimore &

O. R. Co., 151 U. S. 673, 38 L. ed. 311; Gurnee v. Brunswick County, Fed. Cas. No. 5,872 (1 Hughes, 270); City of Chicago v. Hutchinson, 15 Fed. 129 (11 Biss. 484); First Littleton Bridge Corp. v. Con. R. L. Co., 71 Fed. 225; Olds v. City Tr., S. D. & Security Co., 114 Fed. 975; Fidelity & Casualty Co. v. Hubbard, 117 Fed. 949; First Nat. Bank of Garrett, Pa., v. A. E. Appleyard & Co., 138 Fed. 939. But see Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274; Mahoney v. New South B. & L. Ass'n, 70 Fed. 513; Wilson v. Winchester & P. R. Co., 82 Fed. 15.

²⁵ Olds v. City Trust, Safe Deposit & Surety Co., 114 Fed. 975.

²⁶ Mt. Washington R. Co. v. Coe, 50 Fed. 637.

²⁷ Minneapolis, St. Paul & S. S. M. Ry. Co. v. Nestor, 50 Fed. 1; State v. Barnes, 5 N. D. 350, 65 N. W. 688.

²⁸ Delbanco v. Singletary, 40 Fed. 177; McDonald v. Hope Min. Co., 48 Fed. 593; Frink v. Blackinton, 80 Fed. 306; Maher v. Tower Hotel Co., 94 Fed. 225; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305.

the right to amend, as of course, within a specified time.²⁹ It has been held that the Federal court will not take notice of a rule of the State court limiting the time for pleading, unless such rule is brought to its attention by a pleading or an affidavit.³⁰ Where the State statute did not fix the time within which the pleadings must be filed; it was held that it was the duty of the State court to fix the time, and that this having been done, the time so fixed was the limit for the removal.³¹ The preponderance of authority supports the proposition: that if the defendant's time to plead or answer has been, before its expiration, extended by an order of the State court,³² or by a

²⁹ *Woolf v. Chisolm*, 30 Fed. 881; *Doyle v. Beaupre*, 39 Fed. 289.

³⁰ *Yarnell v. Feltin*, 102 Fed. 369; *Randall v. New England Order of Protection*, 118 Fed. 782.

³¹ *Van Allen v. Atchison C. & P. R. Co.* 3 Fed. 545 (1 *McCrary*, 598).

³² That it does, is said in *Winberg v. Berkeley Co. Ry. & L. Co.* (S. D. N. Y.), 29 Fed. 721; *Simonsen v. Jordan* (S. D. N. Y.), 30 Fed. 721; *Wedekind v. So. Pac. Co.*, 36 Fed. 279, 281; *Sowles v. Witters* (D. Vt.), 43 Fed. 700; *Rycroft v. Green* (E. D. Pa.), 49 Fed. 177; *People's Bank v. Aetna Ins. Co.* (D. S. C.), 53 Fed. 161; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.* (D. S. C.), 60 Fed. 929; *Allmark v. Platte S. S. Co.* (S. D. N. Y.), 76 Fed. 614; *Chiatovitch v. Hanchett* (D. Nev.), 78 Fed. 193; *Tracy v. Morel* (D. Nev.), 88 Fed. 801; *Mayer v. Ft. Worth & D. C. R. Co.* (S. D. N. Y.), 93 Fed. 601; *Lord v. Lehigh Val. R. Co.* (S. D. N. Y.), 104 Fed. 929; *Dancel v. Goodyear Shoe Mach. Co.* (S. D. N. Y.), 106 Fed. 551; *Sanderlin v. People's Bank* (E. D. N. C.), 140 Fed. 191; *Russell v. Harriman Land Co.* (E. D. N. Y.), 145 Fed. 745; *Avent v. Deep River Lumber Co.* (E. D. N. C.) 174 Fed. 298;

Higson v. North River Ins. Co., (E. D. N. C.) 184 Fed. 165. See also *McKeen v. Ives* (D. Ind.), 35 Fed. 801. *Contra*, *Dixon v. W. U. Tel. Co.* (N. D. Cal.), 38 Fed. 377; *Austin v. Gagan* (N. D. Cal.) 5 L.R.A. 476, 39 Fed. 626; *Velie v. Manufacturers' Acc. Ind. Co.* (E. D. Wis.), 40 Fed. 545; *Spangler v. Atchison, T & S. F. Co.* (W. D. Mo.), 42 Fed. 305, 306; *Martin v. Carter* (D. Mont.), 48 Fed. 596; *Rock Island Nat. Bank v. J. S. Keator L. Co.* (D. Ill.), 52 Fed. 897; *Ruby C. G. Min. Co. v. Hunter* (W. D. S. D.), 60 Fed. 305; *Fox v. Southern Ry. Co.* (D. N. C.), 80 Fed. 945; *Mecke v. Valletown Mineral Co.*, 122 N. C. 790, 29 S. E. 781; *Bryson v. Southern Ry. Co.* 141 N. C. 594, 54 S. E. 434. See for *dicta* tending the same way, *Murray v. Holden* (W. D. Mo.), 2 Fed. 740; *Heller v. Ilwaco Mill & Lumber Co.*, (D. Oregon) 178 Fed. 111; *Wayt v. Standard Nitrogen Co.*, (N. D. Ga.) 189 Fed. 231. See also *Pullman's P. C. Co. v. Speck*, 113 U. S. 84, 86, 28 L. ed. 925, 926; *Kajital v. Wylie* (N. D. Ill.), 38 Fed. 865; *Delbanco v. Singletary* (D. Nev.), 40 Fed. 177; *Daugherty v. W. U. Tel. Co.* (D. Ind.), 61 Fed. 138.

stipulation authorized by a State statute or court rule,³³ his time to remove is likewise extended. It has been held: that an *ex parte* order of extension,³⁴ or an oral stipulation,³⁵ not authorized by the State practice, will not extend the time of removal. After the time to plead in a case, which the plaintiff's pleading previously showed to be removable, has once expired, the time to remove cannot be extended by an order opening the default and allowing him to plead;³⁶ although the right to have the default opened is given the defendant by statute.³⁷ The omission to enter judgment by default does not extend the time.³⁸ It has been held: that the fact that the defendant's attorney was prevented by inevitable accident from filing his petition,³⁹ and that there was an oral understanding that no default should be taken,⁴⁰ will not enlarge the time. Where

³³ *Peoples' Bank v. Aetna Ins. Co.*, 53 Fed. 161; judgment reversed, *Aetna Ins. Co. v. Peoples' Bank of Greenville*, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554; *Allmark v. Platte S. S. Co.*, 76 Fed. 614; *Chiatovich v. Hanchett*, 78 Fed. 193; *Tracy v. Morel*, 88 Fed. 801; *Mayer v. Ft. Worth & D. C. R. Co.*, 93 Fed. 601; *Groton Bridge & Mfg. Co. v. Am. Bridge Co.*, 137 Fed. 284; *Sanderlin v. Peoples' Bank of Buffalo*, N. Y., 140 Fed. 191; *Russell v. Hariman Land Co.*, 145 Fed. 745; *Tervis v. Palatine Ins. Co.*, 149 Fed. 560. But see *Pullman's Palace Car Co. v. Speck*, 113 U. S. 84, 5 Sup. Ct. 374, 28 L. ed. 925. *Contra*, *Dixon v. Western Union Tel. Co.*, 38 Fed. 377; *Austin v. Gagan*, 39 Fed. 626, 5 L.R.A. 476; *Velie v. Manufacturers' Acc. Indemnity Co.*, 40 Fed. 545; *Martin v. Carter*, 48 Fed. 596; *Ruby Canyon Gold Min. Co. v. Hunter*, 60 Fed. 305; *Schippear v. Consumer Cordage Co.*, 72 Fed. 803; *Howard v. Southern Ry. Co.* (North Carolina), 29 S. E. 778; *Mecke v. Valleytown Mineral Co.*, Id. 781; *Heller v. Ilwaco Mill & Lumber Co.*, (D. Oregon) 178 Fed. 111; *Wayt v.*

Standard Nitrogen Co., (N. D. Ga.) 189 Fed. 231.

³⁴ *Hurd v. Gere*, 38 Fed. 537.

³⁵ *Dwyer v. Peshall*, 32 Fed. 497; *Price v. Lehigh Valley R. Co.*, 65 Fed. 825; *Disbrow v. Driggs* (New York), 8 Abb. Prac. 305; *Id.*, 16 How. Prac. 346.

³⁶ *Hurd v. Gere*, 38 Fed. 537; *Rock Island Nat. Bank v. J. S. Keator L. Co.*, 52 Fed. 897; *Price v. Lehigh Val. R. Co.*, 65 Fed. 825; *Quilhot v. Hamer*, 158 Fed. 188; *Williams v. Southern Bell Telephone & Telegraph Co.*, 116 N. C. 558, 21 S. E. 298. See *McCallon v. Waterman*, Fed. Cas. No. 8,675 (1 Flip. 651); *Berrian v. Chetwood*, 9 Fed. 678.

³⁷ *Davis v. Harris*, 124 Fed. 713.

³⁸ *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963; *Heller v. Ilwaco Mill & Lumber Co.*, 178 Fed. 111; *Wayt v. Standard Nitrogen Co.*, 189 Fed. 231.

³⁹ *Daugherty v. W. U. Tel. Co.*, 61 Fed. 138.

⁴⁰ *Price v. Lehigh Valley R. Co.*, 65 Fed. 825.

the defendant made a default in pleading, after service of a summons without a complaint, and the default was opened; it was held that the case might be removed.⁴¹ A removal may be had after the opening of a judgment, taken by default against a defendant, who had not been properly served.⁴² Where there are two defendants, and but one controversy, and the time for removal has expired as to one; it is too late for the other to remove the case, although he has not been previously served; provided that he was named as a party in the plaintiff's original pleading.⁴³ An intervenor cannot remove the case, when his intervention takes place after the expiration of the original defendant's time to remove.⁴⁴ Where, however, after the expiration of the time of the original defendant, others are brought in by amendment, they may remove the case because of a Federal question that appeared in the plaintiff's original pleading;⁴⁵ or, it has been held, because of a difference of citizenship.⁴⁶ The time to remove the case is not shortened by the pleading of the defendant before his time to plead has expired;⁴⁷ nor by the denial of a motion to take the bill off the

⁴¹ *Remington v. Central Pac. R. R. Co.*, 198 U. S. 95; *Dancel v. Good-year Shoe Mach. Co.*, 106 Fed. 551.

⁴² *Harter Tp. v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *City of Detroit v. Detroit City Ry. Co.*, 54 Fed. 1; *Tortat v. Hardin, M. & M. Co.*, 111 Fed. 426; *State v. Barnes*, 5 N. D. 360, 65 N. W. 688; *Smith v. Life Ass'n of America*, 76 Va. 380.

⁴³ *Houston & T. C. Ry. Co. v. Shirley*, 111 U. S. 358, 28 L. ed. 455; *Fletcher v. Hamlet*, 116 U. S. 408, 29 L. ed. 679; *Hakes v. Burns*, 40 Fed. 33; *Rogers v. Van Nortwick*, 45 Fed. 513; *Davis v. Tillotson*, 48 Fed. 606; *Calderhead v. Downing*, 103 Fed. 27. But see *Mutual L. Ins. Co. v. Champlin*, 21 Fed. 85; *Swan v. Mansfield, C. & L. M. R. Co. (Ohio Com. Pl.)*, 4 Wkly. Law Bul. 898, and *infra*.

⁴⁴ *Hakes v. Burns*, 40 Fed. 33; *Kidder v. N. W. Mutual Life Ins.*

Co., 117 Fed. 997. But see *Jackson v. Stiles (New York)*, 4 Johns. 493.

⁴⁵ *Green v. Valley*, 101 Fed. 882.

⁴⁶ *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337; *American Nat. Bank of Denver v. National Benefit & Casualty Co.*, 70 Fed. 420; *Green v. Valley*, 101 Fed. 882 (in which case the defendant, whose time had expired, joined with them in the application). See *Robert v. Pineland Club*, 139 Fed. 1001.

⁴⁷ *Gavin v. Vance*, 33 Fed. 384; *Tennessee Coal, L. & T. B. Co. v. Waller*, 37 Fed. 545; *Conner v. Skagit C. C. Co.*, 45 Fed. 7802; *Brisenden v. Chamberlain*, 53 Fed. 397; *Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co.*, 83 Fed. 853; *Champlain Const. Co. v. O'Brien*, 104 Fed. 930; *Atlanta, K. & N. Ry. Co. v. Southern Ry. Co.*, 131 Fed. 657. See *Burck v. Taylor*, 39 Fed. 581; *Evans*

file;⁴⁸ nor by his appearance and argument against a motion for an injunction,⁴⁹ for a receiver,⁵⁰ or for any other provisional remedy;⁵¹ even though an appeal has been taken to a higher State court from the decision upon such a motion;⁵² nor by overruling a demurrer.⁵³ But, it has been held, that the time to answer runs while the demurrer is pending;⁵⁴ and that a cause cannot be removed after it has been set down for trial, without objection by the defendant who had previously answered.⁵⁵ Where the plaintiff's original pleading does not present a removable case, but subsequent events make it plain that there then existed a removable controversy between the original parties, a removal may be made as soon as this appears.⁵⁶ Where the plaintiff's original pleading does not present a removable case, but he consents to a discontinuance or to a nonsuit or a voluntary dismissal as regards those defendants who are citizens of the same State as himself; the remaining defendant, who is a citizen of another State, may remove the cause as soon as he is notified of such dismissal or discontinuance;⁵⁷ although the defendants thus dismissed appear to be necessary parties to

v. Dillingham, 43 Fed. 177. *Contra*, Duncan v. Associated Press, 81 Fed. 417; Howard v. Southern Ry. Co. (North Carolina), 29 S. E. 778.

⁴⁸ Tennessee Coal, L. & T. B. Co. v. Waller, 37 Fed. 545.

⁴⁹ Champlain Const. Co. v. O'Brien, 104 Fed. 930; Cella v. Brown, 136 Fed. 439.

⁵⁰ Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381.

⁵¹ Garrard v. Silver Peak Mines, 76 Fed. 1; Champlain Const. Co. v. O'Brien, 104 Fed. 930; Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Cella v. Brown, 136 Fed. 439.

⁵² Farmers' Loan & Trust Co. v. Chicago, P. & W. S. R. Co., Fed. Cas. No. 4,665 (9 Biss. 133); Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381.

⁵³ Tennessee Coal, L. & T. B. Co. v. Waller, 37 Fed. 545; Garrard v.

Silver Peak Mines, 76 Fed. 1. But see Delbanco v. Singletary, 40 Fed. 177; Case v. Olney, 106 Fed. 433; Lantz v. Fretts, 173 Fed. 1007.

⁵⁴ Martin v. Carter, 48 Fed. 596.

⁵⁵ American Bonding Co. v. Mills, 152 Fed. 107. See Case v. Olney, 106 Fed. 433.

⁵⁶ Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, affirming judgment 65 Fed. 129; Fritzlen v. Boatmen's Bank, 212 U. S. 364.

⁵⁷ Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 42 L. ed. 673, 18 S. Ct. 264; affirming judgment 65 Fed. 129; Cookerly v. Great Northern R. Co., 70 Fed. 277; Fogarty v. Southern Pac. Co., 121 Fed. 941 (where the motion for a removal was made 19 days after the voluntary dismissal, and it did not appear when the remaining defendant first learned of the dismissal of the

the suit; ⁵⁸ and even when the discontinuance or voluntary dismissal takes place upon the trial of the action.⁵⁹ Where the plaintiff sued a citizen of his own State and a citizen of another State, jointly in tort, and having failed to serve the former when the case was called for trial, refused to continue it for such service, but elected to proceed against the citizen of the other State alone; it was held that this should be treated as an election and severance of the suit; and that it was thereupon removable by the defendant, who had been served.⁶⁰ Where a separable controversy first appeared upon the filing of a reply by the plaintiff, a removal was then allowed.⁶¹ Where the plaintiff, in good faith, insists on the joint liability of all the defendants throughout the trial, and the complaint is dismissed upon the merits as to such as are citizens of his State, the remaining defendants cannot then remove the case.⁶² Where

case as against his co-defendant, nor when the petition and bond were filed). Where an action of ejectment had been succeeded by a suit against the plaintiffs by some of the defendants therein, to determine the title to a patent for the same land, as to which the latter had made an adverse claim, and after judgment in favor of the plaintiffs in the first suit, which had been vacated upon the payment by the defendants of the costs and their demand for a new trial, the second suit had been dismissed as to some of the defendants, upon the plaintiff's request, thus making the remainder of the parties on opposite sides citizens of different States; it was held to be too late to remove this second suit, *Evans v. Smith*, 21 Fed. L.

⁵⁸ *Cuyler v. Smith*, 78 Ga. 662; 3 S. E. 408.

⁵⁹ *Powers v. Ches. & O. Ry. Co.*, 169 U. S. 92, 94, 42 L. ed. 673, 674. It was so held, when the plaintiff elected to proceed to trial against a foreign defendant without having

served process on the one who was a citizen of his own State, *Berry v. St. Louis & S. F. R. Co.*, 118 Fed. 911.

⁶⁰ *Berry v. St. Louis & San Francisco R. Co.*, 118 Fed. 911.

⁶¹ *Fritzen v. Boatmen's Bank*, 212 U. S. 364.

⁶² *Whitecomb v. Smithson*, 175 U. S. 635, 44 L. ed. 303; *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63, 47 L. ed. 76; *Southern Ry. Co. v. Carson*, 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907; affirming judgment, *Carson v. Southern Ry. Co.*, 46 S. E. 525; *Lathrop, Shea & Henwood Co. v. Interior Construction & Improvement Co.*, 215 U. S. 246; overruling *dicta* to the contrary in *Illinois Cent. R. Co. v. Coley*, 121 Ky. 385, 89 S. W. 234, 1 L.R.A. (N.S.) 370; *Dudley v. Illinois Cent. R. R. Co.*, 127 Ky. 221, 96 S. W. 835, 13 L.R.A. (N.S.) 1186, 128 Am. St. Rep. 335; *Underwood's Adm'r v. Illinois Cent. R. R. Co.*, (Ky.) 103 S. W. 322; *Haynes' Adm'r v. C., N. O. & T. P. R. R. Co.*, 145 Ky. 209, 140 S. W. 1763.

an action was brought against several defendants jointly, some of whom were citizens of the same State as the plaintiff, and after a dismissal as to all, the State court of appeals affirmed such judgment of dismissal, except as regards a citizen of another State; it was held that there was thus a severance of the action, and that the remaining defendant might remove the same.⁶³ Where, in a suit upon a joint cause of action against a domestic and a foreign corporation, judgment had been entered against the latter upon substituted service by default; and at the trial the domestic corporation secured a judgment in its favor from which plaintiff appealed; it was held that, until the final disposition of the appeal, the foreign corporation could not apply for a removal.⁶⁴ The resignation of a trustee, who is a citizen of the same State as the complainant, does not make the cause removable by the remaining defendants.⁶⁵ Where the plaintiff's original pleading does not present a removable case, but an amendment thereto, by omitting some of the original parties,⁶⁶ or by showing that one of the defendants, who was originally charged jointly with the other, is a nominal party,⁶⁷ or by correcting a previous misstatement of the citizenship of one of the parties,⁶⁸ or by a new allegation concerning the value of the matter in dispute,⁶⁹ or by showing that the case arises under the Constitution or laws of the United States,⁷⁰

See *McAllister v. Chesapeake & O. Ry. Co.*, 198 Fed. 660, 669, 674; *Illinois C. R. Co. v. Harris* (Illinois), 85 Miss. 15, 38 So. 225; *Howe v. Northern Pac. Ry. Co.*, 70 Pac. 1100, 30 Wash. 569.

⁶³ *Yulee v. Vose*, 99 U. S. 539, 25 L. ed. 355 (reversing 64 N. Y. 449, 4 Hun, 628).

⁶⁴ *Lathrop, Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 143 Fed. 687.

⁶⁵ *Ruohs v. Jarvis-Conklin Mortg. Trust Co.*, 84 Fed. 513.

⁶⁶ *Powers v. Ches. & O. Ry. Co.*, 160 U. S. 92, 99, 42 L. ed. 673, 675; *supra*, notes 56-62. See *Robert v. Pineland Club*, 139 Fed. 1001.

⁶⁷ *Bagenas v. Southern Pac. Co.*, 180 Fed. 887. See *supra*.

⁶⁸ *Robinson v. Parker-Washington Co.*, 170 Fed. 850.

⁶⁹ *Northern Pac. R. Co. v. Austin*, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. ed. 218; *Huskins v. Cincinnati, N. O. & T. P. Ry. Co.*, 37 Fed. 504; *Enders v. Lake Erie & W. R. Co.*, 101 Fed. 202; *Barber v. Boston & M. R. Co.*, 145 Fed. 52. A consolidation of two cases between the same parties, the matter in dispute in each case being less than the jurisdictional amount, although their aggregate exceeds the same, does not authorize a removal when the original time has expired. *E. A. Holmes & Co. v. United States Fire Ins. Co.*, 142 Fed. 863.

⁷⁰ *Speckert v. German Nat. Bank*, 85 Fed. 12; *Bailey v. Mosher*, 95

brings it within the removal act; the time to remove is extended until the defendant must plead to the amended pleading. It has been held that the same rule applies where the amendment presents an entirely new case;⁷¹ but not otherwise.⁷² It was said: "If the time fixed by the rule of the State court, to answer or plead to an amended complaint, is so short as to deny to the defendant a reasonable time within which to prepare and file a petition and bond, such rule, it would seem, ought not to defeat the right of removal, if exercised with reasonable promptness."⁷³

Removals for prejudice or local influence,⁷⁴ and removals of actions between citizens of the same State, claiming land under grants of different States,⁷⁵ must be made "before the trial." It has been said that the statute requires, in the case of removals because of prejudice or local influence, "the application to remove to be filed before or at the term which the cause could first be tried and before the trial thereof."⁷⁶ A removal for prejudice or local influence must be made before the first trial of the cause.⁷⁷ A mistrial because of a

Fed. 223; *Guarantee Co. v. Hanway*, C. C. A., 104 Fed. 369. But see *Houston & T. C. Ry. Co. v. State* (Tex. Civ. App.), 39 S. W. 390.

⁷¹ *Edrington v. Jefferson*, 111 U. S. 770, 4 Sup. Ct. 683, 28 L. ed. 594; *Phoenix Mut. Life Ins. Co. v. Walrath*, 117 U. S. 365, 6 Sup. Ct. 768, 29 L. ed. 924; affirming judgment, *Id.*, 16 Fed. 161 (11 Biss. 432); *Wehl v. Wald*, Fed. Cas. No. 17,356 (17 Blatchf. 342); *Evans v. Dillingham*, 43 Fed. 177, 180; *Mattoon v. Reynolds*, 62 Fed. 417; *Mecke v. Valleytown Mineral Co.*, 89 Fed. 209; *Youtsey v. Hoffman*, 108 Fed. 693; *Bailey v. Cincinnati Leaf Tobacco Warehouse Co.*, *Id.*

⁷² *Kaitel v. Wylie*, 38 Fed. 865; *Gregory v. Boston S. D. & Tr. Co.*, 88 Fed. 3; *Painter v. New R. M. Co.*, 98 Fed. 544; *Beyer v. Soper Lumber Co.*, 76 Wis. 145, 44 N. W. 750, 833.

⁷³ *Enders v. Lake Erie & W. R. Co.*, 101 Fed. 202, 203; per *Baker*, D. J. See *Jones v. Mosher*, 107 Fed. 561, 46 C. C. A. 471.

⁷⁴ 25 St. at L. 433, § 2.

⁷⁵ 25 St. at L. 433, § 3.

⁷⁶ *Fuller*, C. J., in *McDonnell v. Jordan*, 178 U. S. 229, 239, 44 L. ed. 1048, 1052. *Contra*, *Huskings v. Cincinnati, N. O. & T. P. Ry. Co.*, 37 Fed. 504, 3 L.R.A. 545; writ of error dismissed, 154 U. S. 506, 14 Sup. Ct. 1147, 38 L. ed. 1076; *Taft, J.*, *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 11; *Parker v. Vanderbilt*, 136 Fed. 246.

⁷⁷ *Fisk v. Henarie*, 142 U. S. 459; 12 Sup. Ct. 207, 35 L. ed. 1080; reversing 32 Fed. 417 (13 Sawyer, 38), and 35 Fed. 230 (13 Sawyer, 318); *McDonald v. Jordan*, 178 U. S. 229.

disagreement of the jury,⁷⁸ or an order for a new trial,⁷⁹ does not enlarge the time. Such a removal must be made before the first step in the trial is taken.⁸⁰ It has been held: that it is too late after a jury has been accepted, but not sworn;⁸¹ after the case has been called and a motion by defendant for a continuance has been made and overruled;⁸² or the plaintiff has answered ready and time granted the defendant to present an application for a continuance;⁸³ or an hour's time allowed defendant for the procurement of counsel;⁸⁴ or the defendant has, after his motion for a postponement was denied, consented to a reference in order to prevent an immediate trial;⁸⁵ but that it is not too late, when upon the cause being called for trial, objections were made that it was not ready and it is sent to another part of the court, for the hearing of a motion to vacate an order extending the time to amend the answer;⁸⁶ nor when an attempt has been made to begin the trial of a case before it was properly triable in the regular course of procedure.⁸⁷ The preponderance of authority holds that the argument of a general demurrer is a trial within the meaning of the statute.⁸⁸ It was

⁷⁸ *McDonnell v. Jordan*, 178 U. S. 229, 44 L. ed. 1048; *Davis v. Chicago & N. W. Ry. Co.*, 46 Fed. 307; *Farmers' & Merchants' Nat. Bank v. Schuster*, 86 Fed. 161, 29 C. C. A. 649.

⁷⁹ *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. ed. 1080; reversing 32 Fed. 417, 13 Sawyer, 38, and 35 Fed. 230, 13 Sawyer, 318.

⁸⁰ *Bank of Maysville v. Claypool*, 120 U. S. 268, 7 Sup. Ct. 545, 30 L. ed. 632; *Manning v. Amy*, 140 U. S. 137, 11 Sup. Ct. 707, 35 L. ed. 386; affirming *Amy v. Manning*, 144 Mass. 153, 10 N. E. 737; *Waggener v. Cheek*, Fed. Cas. No. 17,035 (2 Dill. 560); *Lewis v. Smythe*, Fed. Cas. No. 8,333 (2 Woods, 117); *Davis v. Chicago & N. W. Ry. Co.*, 46 Fed. 307; *Fleming v. Fire Ass'n of Philadelphia*, 76 Ga. 678; *Adams' Exp. Co. v. Trego*, 35 Md. 47; *St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co.*, 23

Minn. 186, 23 Am. Rep. 682; *Anglo-American Provision Co. v. Evans*, 34 Neb. 44, 51 N. W. 310; *Strong v. Black* (New York), 5 Alb. Law J. 214; *Watt v. White*, 46 Tex. 338.

⁸¹ *Anglo-American Provision Co. v. Evans*, 34 Neb. 44, 51 N. W. 310.

⁸² *Fleming v. Fire Ass'n of Philadelphia*, 76 Ga. 678.

⁸³ *Watt v. White*, 46 Tex. 338.

⁸⁴ *Fleming v. Fire Ass'n of Philadelphia*, 76 Ga. 678.

⁸⁵ *Hanover Nat. Bank v. Smith*, Fed. Cas. No. 6,035 (13 Blatchf. 224).

⁸⁶ *Maloy v. Duden*, 25 Fed. 673.

⁸⁷ *Removal Cases*, 100 U. S. 457, 25 L. ed. 593.

⁸⁸ *Alley v. Nott*, 111 U. S. 472, 28 L. ed. 491; *Scharff v. Levy*, 112 U. S. 711, 28 L. ed. 825; *Gregory v. Hartley*, 113 U. S. 742, 28 L. ed. 1150; *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. ed. 883; *Boyd v. Gill*, 19 Fed. 145 (21

held that the hearing and decision of a motion for an injunction and a temporary receiver was not a trial.⁸⁹ Where the court of ordinary had made a decree admitting a will to probate, and an appeal had been taken to a court of record, which had the right to try the question anew; it was held that it was not too late to remove the case under the act of 1887 for prejudice or local influence.⁹⁰ It has been held: that after the decree of a court of probate upon a petition by an administratrix for final accounting and for a distribution, in which she claimed to be the sole heir at law of the decedent, the cause could not be removed upon an appeal to a court of record, where the questions then decided could be tried anew;⁹¹ that a case could not be removed pending an appeal from an award of arbitrators under the Pennsylvania statute,⁹² although it may be after the report of commissioners, to whom a claim had been referred by a probate court under the Michigan statute;⁹³ nor upon an appeal from the decision of a board of county commissioners upon a claim against their county;⁹⁴ nor upon an appeal from an appraisal by commissioners in a condemnation

Blatchf. 543); *Wilson v. Rock Island Paper Co.*, 20 Fed. 705; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. 176; *Miller v. Kent* (New York), 60 How. Prac. 451; all these cases were under the similar language under the act of 1875. *Lookout Mountain Ry. Co. v. Houston*, 32 Fed. 711; *Winkler v. Chicago & E. I. R. Co.*, 108 Fed. 305. (Both of these were under the act of 1887). *Contra*, *Whelan v. N. Y., L. E. & W. R. Co.*, 35 Fed. 849, 1 L.R.A. 65; under act of 1887. It was held, under the act of 1875, that a case could not be removed after a demurrer to the answer had been sustained and a cross-petition dismissed. *Meyer v. Norton*, 9 Fed. 433. Where the State statute provided that a demurrer should be disposed of at the first term, and that the second trial, after service

had been perfected "should be the trial term of all equity causes;" it was held that the cause might be removed, under the act of March 2d, 1867, because of local prejudice after a demurrer had been overruled. *Hone v. Dillon*, 29 Fed. 465.

⁸⁹ *Franklin v. Wolf*, 78 Ga. 446, 3 S. E. 696. *Contra*, *Lehigh Coal & Nav. Co. v. Central R. Co.*, Fed. Cas. No. 8,213.

⁹⁰ *Brodhead v. Shoemaker*, 44 Fed. 518. Under Georgia statute, *contra*, *In re Frazer*, Fed. Cas. No. 5,068.

⁹¹ *Craigie v. McArthur*, Fed. Cas. No. 3,341, 4 Dill. 474 (under the Minnesota statute).

⁹² *Thorne v. Towanda Tanning Co.*, 15 Fed. 289.

⁹³ *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. ed. 927 (under act of 1875).

⁹⁴ *Delaware County Com'rs v.*

proceeding, when their proceeding was purely administrative in its nature.⁹⁵ It has been said that the trial court is under no obligation to delay the trial of the cause in order to enable a party to prepare an application for a removal.⁹⁶

In suits or criminal prosecutions against revenue officers,⁹⁷ officers of either House of Congress,⁹⁸ or persons claiming rights under the revenue laws,⁹⁹ or against persons who seek protection under the Civil Rights law!¹⁰⁰ a removal may be had "at any time before the trial or final hearing." It has been held that a prosecution begun by information before a justice of the peace for a misdemeanor, which is not the subject of indictment, may be thus removed.¹⁰¹ No removal can be had before indictment or information in the State court.¹⁰²

Under previous statutes authorizing removals in cases "before trial or final hearing," or "before final hearing or trial;" it was held: that a removal might be made after a new trial had been ordered,¹⁰³ or the unsuccessful party had performed all the conditions precedent to obtain the right to a new trial,¹⁰⁴ that the defendants were not bound to take affirmative action in case of a reversal, until the complainants had caused the case

Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674 (under U. S. R. S., § 639, ch. 3).

⁹⁵ Union Pac. Ry. Co. v. Myers, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; reversing judgment, Myers v. Union Pac. Ry. Co., 16 Fed. 292, 3 McCrary, 578 (under act of 1875). See *supra*, § 538.

⁹⁶ United States Sav. Inst. v. Brockschmidt, 72 Ill. 370.

⁹⁷ U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

⁹⁸ 18 St. at L., ch. 130, § 8, p. 401.

⁹⁹ U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

¹⁰⁰ U. S. R. S., § 641.

¹⁰¹ Virginia v. Bingham, 88 Fed. 561.

¹⁰² Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386.

¹⁰³ Baltimore & O. R. Co. v. Bates, 119 U. S. 464, 7 Sup. Ct. 285, 30

L. ed. 436; Dart v. McKinney, Fed. Cas. No. 3,583 (9 Blatchf. 359); Kellogg v. Hughes, Fed. Cas. No. 7,662 (3 Dill. 357); Minnett v. Milwaukee & St. P. Ry. Co., Fed. Cas. No. 9,636 (3 Dill. 460); Sims v. Sims, Fed. Cas. No. 12,894, (17 Blatchf. 369); Melendy v. Currier, 22 Fed. 129 (22 Blatchf. 503); Sutherland v. Jersey City & B. R. Co., 22 Fed. 356; Virginia v. Bingham, 88 Fed. 561; Brayley v. Hedges, 53 Iowa, 582, 5 N. W. 748; Dart v. Walker (New York), 4 Daly, 188; Rosenfield v. Condict, 44 Tex. 464.

¹⁰⁴ Insurance Co. v. Dunn, 19 Wall. 214, 224, 22 L. ed. 68 (where the language of the statute construed was "before a hearing or trial;" but there were *dicta* to the effect that this language is synonymous with "trial or final hearing").

to be redocketed on notice to them;¹⁰⁵ that a removal might be had after a jury had disagreed,¹⁰⁶ after a general demurrer had been overruled,¹⁰⁷ after the appellate court had reversed an order for a reference to hear and determine and had ordered issues to be framed for trial in the court below;¹⁰⁸ and that the language construed meant a final hearing or trial on the merits;¹⁰⁹ but that there could be no removal pending a motion for a new trial, which had not been decided;¹¹¹ nor pending an appeal, which had not been decided;¹¹² nor after the appellate court had directed a reversal and a new trial, but the time allowed for a rehearing had not expired, and subsequent to the attempted removal a rehearing was granted and the judgment was affirmed;¹¹² nor after the court of review had directed the court below to enter a decree in conformity with its opinion;¹¹³ nor after the appellate court had ordered an accounting before a master.¹¹⁴

§ 544. Practice on removals in general. "Where the sole ground of removal is a difference of citizenship, whether or not there is a separable controversy in the case, and in ordinary suits arising under the Constitution of laws or treaties of the United States, the practice upon removals is the same. The party entitled to remove must make and file in the State court a petition duly verified for the removal of the suit into the circuit court to be held in the district where the suit is pending;

¹⁰⁵ *Pettillon v. Noble*, Fed. Cas. No. 11,044 (7 Biss. 449).

¹⁰⁶ *Osborn v. Osborn*, 5 Fed. 389 (2 McCrary, 455); *Burson v. National Park Bank*, 40 Ind. 173, 13 Am. Rep. 285; *Clark v. Delaware & H. Canal Co.*, 11 R. I. 36.

¹⁰⁷ *Field v. Williams*, 24 Fed. 513.

¹⁰⁸ *Douglas v. Caldwell*, 65 N. C. 248.

¹⁰⁹ *Akerley v. Vilas*, 24 Wis. 165; 1 Am. Rep. 166.

¹¹⁰ *Vannevar v. Bryant*, 21 Wall. 41, 22 L. ed. 476; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311.

¹¹¹ *Stevenson v. Williams*, 19 Wall. 572, 22 L. ed. 162; *Lowe v. Williams*, 94 U. S. 650, 24 L. ed.

216; *Brice v. Somers*, Fed. Cas. No. 1,856 (1 Flip. 574); *Williams v. Succession of Williams*, 24 La. Ann. 55; *Meaux v. Pittman*, 32 La. Ann. 405; *Miller v. Finn*, 1 Neb. 254; *Whittier v. Hartford Ins. Co.*, 55 N. H. 141, 20 Am. Rep. 185; *Beery v. Irick* (Virginia), 22 Grat. 484, 12 Am. Rep. 539.

¹¹² *Chicago & N. W. R. Co. v. McKinley*, 99 U. S. 147, 25 L. ed. 272; affirming *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748.

¹¹³ *Darst v. Peoria*, 13 Fed. 561.

¹¹⁴ *Jifkins v. Sweetser*, 102 U. S. 177, 26 L. ed. 129.

and he must make and file therewith a bond, with good and sufficient surety, for his or their entering into such district court within thirty days from the date of the filing of the petition a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court, if said district court shall hold that said suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requested therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same.”¹

§ 544. ¹Jud. Code, § 29, 36 St. at L. 1087, re-enacting with alterations, 25 St. at L., p. 433, ch. 866, § 3; *Goins v. Southern Pac. Co.*, 198 Fed. 432, 434, 435, 436; *per* Van Fleet, J.: “What was the purpose intended to be subserved by the requirement of preliminary notice of such proceedings in the state court? Plaintiff, as indicated, takes the extreme ground that it was intended to make the notice a jurisdictional prerequisite, in the absence of which the proceeding cannot be competently initiated. If by this is meant that it is jurisdictional in the same sense that a cognizable controversy is necessary, I cannot accede to the proposition, since manifestly, under well-settled principles, the requirement of notice may be waived. And if plaintiff intends to assert, as would seem to be implied by his argument, that by this new requirement Congress intended to work so radical a change in the effect of removal proceedings as vesting in the state, instead of the federal, courts the power to pass upon the sufficiency of such proceedings, to this I am equally unable to assent, since the provisions of the act in other

respects, in the light of established principles of construction, do not sustain any such theory. Moreover, it is at variance with the rule of construction provided by the Code itself (section 294) for the interpretation of its provisions. But I do not deem it at all needful to ascribe to Congress the intention to bring about a change in the established procedure so fundamental as that suggested, in order that we may perceive a sufficiently valuable purpose to be subserved by the requirement. The right of removal is justly regarded as one of great moment to the suitor, and its exercise not infrequently involves important changes in the aspects if not the results, of the controversy; and the history of many cases involving the right tends to disclose the great desirability, if not the necessity, in order to fully protect the rights of the adverse party, by avoiding expensive and unseemly delays and other inconveniences of a more or less serious nature that some notice of the proceeding be had. . . . Without the effect of materially changing the method of procedure, it will tend to protect the parties and the courts

as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed. This view, however, does not aid defendant's position. Defendant relies solely upon cases to the effect that, the cause being one within the jurisdiction of the court, errors or irregularities in merely formal matters, directly in nature and not involving the substance of the right, will be overlooked or allowed to be corrected by amendment, and that the court will not for such a lapse remand the cause. *Deford et al. v. Mehaffy* (C. C.) 14 Fed. 381; *Bryant Bros. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *Northern Pacific T. Co. v. Lowenberg* (C. C.) 18 Fed. 339; *Woolridge v. McKenna* (C. C.) 8 Fed. 650. These cases do not meet defendant's necessities, for such is not this case. If it were a question of the formal sufficiency of a notice actually given, those cases would present some analogy; but it is an instance, where a plain and unequivocal requirement of the statute has been wholly ignored, and it is now too late to supply the omission by amendment. The right of removal is purely statutory, and it has always been required that the statute be complied with in its substance. Can it be said that notice, prescribed as the initial step in the proceeding, is not of the substance? It matters not in such a case that the requirement be one not intended as jurisdictional in the extreme sense that it may not be waived.

It has not here been waived, and must, I am satisfied, be considered as sufficiently of the substance that it may not be disregarded against objection. As I regard it, it is akin in its jurisdictional effect to the requirement of the statute involved in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. ed. 264, and *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. ed. 904, 14 Ann. Cas. 1164, that 'suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In analogy with the ruling made in the last case as to the effect of that requirement, if notice be waived, its lack will not prevent jurisdiction attaching; but if it be lacking, and the objection duly insisted upon the court cannot ignore it and retain jurisdiction." Previously to the Judicial Code, no notice to the plaintiff was required. This seems to give the plaintiff a right to a hearing in the State court before the removal asked. See *People ex rel. Mayor v. Nichols*, 79 N. Y. 582; *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,828 (8 Blatchf. 243); *Wormser v. Dahlman*, Fed. Cas. No. 18,048 (16 Blatchf. 319, 57 How. Prac. 286); *Wehl v. Wald*, Fed. Cas. No. 17,356 (17 Blatchf. 342); *Stevens v. Richardson*, 9 Fed. 191 (20 Blatchf. 53); *Chiatovitch v. Hanchett*, 78 Fed. 193; *Creagh v. Equitable Life Assur. Soc.*, 83 Fed. 849; *Crotts v. Southern Ry. Co.*, 90 Fed. 1; *Ficklin v. Tarver*, 59 Ga. 263; *Southern Ry. Co. v. Hudgins*, 107 Georgia, 334, 33 S. E. 442; *Louisiana State Bank v. Morgan* (Louisiana), 4 Mart. (N. S.) 344; except, perhaps, when the removal was prayed because of prejudice or local influence. See § 549, *infra*.

According to the preponderance of authority, the petition and bond may be filed during a vacation of the State court.² In the Supreme Court of New York, the papers must be filed in the clerk's office of the county in which the venue is laid.³ The approval by the presiding justice of another county in the same district, when there was no court in session in the county where the case was pending, did not cure this error.⁴

A case cannot be removed by stipulation or consent, where the record does not show the jurisdiction.⁵

It is the usual and the safer practice to present the petition and bond to a judge of a state court, where the suit is pending, and to obtain the formal acceptance of the same by that court;⁶ but some authorities hold that, when they are filed in the clerk's office, this is unnecessary.⁷ Where, after the petition and bond

² Osgood v. Chicago, D. & V. R. Co., Fed. Cas. No. 10,604 (6 Biss. 330); Burck v. Taylor, 39 Fed. 581; Brown v. Murray, Nelson & Co., 43 Fed. 614; State v. Coosaw Min. Co., 45 Fed. 804, 811; Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151. See Remington v. Central Pac. R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Monroe v. Williamson, 81 Fed. 977; Johnson v. Computing Scale Co., 139 Fed. 339. *Contra*, Scott v. Otis, Fed. Cas. No. 12,543; Williams v. Massachusetts Ben. Ass'n, 47 Fed. 533; Fox v. Southern Ry. Co., 80 Fed. 945; Howard v. Southern Ry. Co. (North Carolina), 29 S. E. 778, 122 N. C. 944. See Higson v. North River Ins. Co., 184 Fed. 165.

³ Remington v. Central Pac. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Noble v. Massachusetts Benefit Ass'n, 48 Fed. 337; Loop v. Winters' Estate, 115 Fed. 362; Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284; Johnson v. Computing Scale Co., 139 Fed. 339.

⁴ Noble v. Massachusetts Ben. Ass'n, 48 Fed. 337.

⁵ People's Bank v. Calhoun, 102

U. S. 256, 26 L. ed. 101; Kingsbury v. Kingsbury, Fed. Cas. No. 7,817 (3 Biss. 60); First Nat. Bank v. Prager, C. C. A., 91 Fed. 689.

⁶ Noble v. Massachusetts Ben. Ass'n, 48 Fed. 337, 338, 339; Sanderlin v. Peoples' Bank, 140 Fed. 191 (where, in the State of North Carolina, the clerk had power to enter certain *ex parte* orders, and the petition was presented to such clerk). It has been held that the bond, as well as the petition, must be presented. Roberts v. Carrington, 2 N. Y. Super. Ct. (2d Hall) 694; Mayo v. Dockery, 108 Fed. 897; Higson v. North River Ins. Co., 184 Fed. 165, 168.

⁷ Osgood v. Chicago, D. & V. R. Co., 6 Biss. 330, 340; Miller v. Tobin, 18 Fed. 609, 613; Brown v. Murray, Nelson & Co., 43 Fed. 614; Noble v. Massachusetts Ben. Ass'n, 48 Fed. 337; Wills v. Baltimore & O. R. Co., 65 Fed. 532; North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co., 3 S. D. 590, 54 N. W. 659. *Contra*, Shedd v. Fuller, 36 Fed. 609; Roberts v. Chicago, St. P., M. & O. R. Co., 45 Fed. 433; writ of error dismissed, Chicago, St.

had been filed, a motion was made in the State court for a removal, which was denied as premature, and the defendant's counsel then asked leave to withdraw his motion for the time being which was granted; it was held, that the removal did not take effect, and that the State court retained jurisdiction until a subsequent motion was made and granted.⁸ When the time expires during vacation, it is the better practice to present the petition and bond to the State judge in chambers, if that is practicable, and to file the petition and bond in the clerk's office.⁹ The endorsement by the clerk of an erroneous file mark,¹⁰ or the omission of any file mark, will not affect the validity of the proceedings provided the petition and bond are actually filed.¹¹

The District Court of the United States, to which the suit is properly removed, is that held in the district, within the boundaries of which the suit is pending in the State court.¹² This is ordinarily that held in the district, within the limits of which process was served upon the defendant, although the cause of action arose in another district;¹³ but if the suit, at the time of the removal, is pending in another district from that within which it was first brought; the District Court of the United

P., M. & O. R. Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. 123, 25 L. ed. 902; Hall v. Chattanooga Agricultural Works, 48 Fed. 599, 601; La-Page v. Day, 74 Fed. 977; Fox v. Southern Ry. Co., 80 Fed. 945; Mays v. Newlin, 143 Fed. 574 (where an oral motion in the State court for the removal was held to be a sufficient presentation of the petition and bond, which were on file with the clerk); Rhode Island Horseshoe Co. v. Goodenough Horseshoe Co., 52 How. Pr. (N. Y.) 111, 1 Abb. N. C. 11; Tunstall v. Parish of Madison (Louisiana), 30 La. Ann. 471; Mayo v. Dockery, 108 Fed. 897; Higson v. North River Ins. Co., 184 Fed. 165, 168.

⁸ Mays v. Newlin, 143 Fed. 574.

⁹ Mecke v. Valletown M. Co., C. C. A., 93 Fed. 697.

¹⁰ Wills v. Baltimore & O. R. Co., 65 Fed. 532.

¹¹ Waite v. Phoenix Ins. Co., 62 Fed. 769.

¹² *Ex parte* State Ins. Co. of Missouri, 18 Wall. 417, 21 L. ed. 904; Cobb v. Globe Mut. Life Ins. Co., Fed. Cas. No. 2,921 (3 Hughes, 452); Knowlton v. Congress & Empire Spring Co., Fed. Cas. No. 7,902 (13 Blatchf. 170); Burek v. Taylor, 39 Fed. 581; affirming judgment, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; *Ex parte* Groom, 40 Ala. 731. But see Suydam v. Smith, 1 Denio (N. Y.) 263.

¹³ Burek v. Taylor, 39 Fed. 581; affirming judgment, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; Suydam v. Smith, 1 Denio (N. Y.) 263.

States held within the district where it is pending when the petition is filed is the one to which the case should be removed.¹⁴ The Judicial Code provides: that the removal of suits between citizens of the same State claiming land under grants of different States,¹⁵ where the defendants are revenue officers of the United States, sued for official acts; or persons claiming defenses under the revenue laws;¹⁶ or officers of either House of Congress, sued because of acts done in the discharge of their official duty,¹⁷ or cases where the defense depends upon the civil rights laws,¹⁸ shall be to the next District Court, too be held in the district where the suit is pending. It has been held: that, in the case of prosecutions against revenue officers, this direction is not mandatory that the petition may be filed in any Federal Court within the district;¹⁹ that it need not then be filed at the place where the next session of such District Court is held after the indictment, where there are several places for holding that court within the district;²⁰ that a petition and an order for a removal, because of difference of citizenship, into the District Court for another district than that where the case is pending, although such district is in the same State, are void;²¹ that where the petition prayed for a removal to a division of the district which did not exist, but correctly designated the city where the court in one of the divisions thereof was held, the defect was immaterial and would be disregarded;²² and that a prayer for a removal to the District instead of the Circuit Court of the United States, for the proper district might be cured by an amendment.²³

§ 545. Petition for removal in ordinary cases. The petition should be addressed to the State Court not to a judge thereof,¹ state the facts which justify the removal and give ju-

¹⁴ *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. ed. 927.

¹⁵ Jud. Code, § 30, re-enacting 25 St. at L., p. 433, § 3.

¹⁶ *Ibid.*, § 33, re-enacting U. S. R. S., § 643.

¹⁷ *Ibid.*, re-enacting 18 St. at L., p. 401.

¹⁸ *Ibid.*, § 31, re-enacting U. S. R. S., § 641.

¹⁹ *Virginia v. Felts*, 133 Fed. 85.

²⁰ *Virginia v. Felts*, 133 Fed. 85.

²¹ *Ex parte* State Ins. Co. of Missouri, 18 Wall. 417, 21 L. ed. 904; *Ex parte* Groom, 40 Alabama, 731.

²² *Hodge v. Chicago & A. Ry. Co.*, 121 Fed. 48, 57 C. C. A. 388.

²³ *Hadfield v. N. W. Life Assur. Co.*, 105 Fed. 530.

§ 545. ¹ *Higson v. North River Ins. Co.*, 184 Fed. 165.

isdiction to the District Court of the United States.² It has been said that these facts must be stated positively; not on information and belief;³ and specifically.⁴ Allegations upon inferences will be disregarded.⁵ A general allegation in the language of the statute is insufficient.⁶ It is the safer practice to state, in the petition, that the time has not arrived at which defendant must answer or plead;⁷ but it seems that a general allegation, in the language of the state, is a sufficient allegation of this matter.⁸ It is the safer practice specifically to state, in the petition, that there is a controversy between the parties; and in that case, the petition need not be accompanied by any pleading.⁹ It has been said that the petition must aver that the suit was duly filed in the State court.¹⁰ An omission from the

² *Railway Co. v. Ramsey*, 22 Wall. 322, 328, 22 L. ed. 823, 824; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278, 27 L. ed. 932; *Fife v. Whittell*, 102 Fed. 537.

³ *Wolff v. Archibald*, 14 Fed. 369. *Contra*, *Carlisle v. Sunset Tel. & T. Co.*, 116 Fed. 896; *N. Y. & T. Land Co. v. Martin* (Texas), 25 S. W. 475.

⁴ *Gold W. & W. Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278, 27 L. ed. 932.

⁵ *Dodd v. Louisville Bridge Co.*, 130 Fed. 186, 193; where, after allegations that did not show a difference of citizenship, the petition continued: "Your petitioner therefore avers that, in respect to the obligations said to be enforced by this suit, your petitioner is . . . a citizen of the State of Indiana and no other State."

⁶ *Gold W. & W. Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278, 27 L. ed. 932; *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992; *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. ed. 132; *Smith v. Horton*, 7 Fed. 270; *Jones v. Adams*

Express Co., 129 Fed. 618; *Lalor v. Dunning* (New York), 56 How. Prac. 209; *Pacific Express Co. v. Needham* (Texas), 94 S. W. 1070.

⁷ *Remington v. Central Pacific R. Co.*, 198 U. S. 95, 99, 49 L. ed. 959, 963; *Aldrich v. Crouch*, 10 Fed. 305 (11 Biss. 180).

⁸ *Remington v. Central Pacific R. Co.*, 198 U. S. 95, 99, 49 L. ed. 959, 963.

⁹ *Wilcoxon v. Chicago, B. & Q. R. Co.*, 116 Fed. 444. An averment in the petition for the removal: that the "matter and amount in dispute" exceeded two thousand dollars was held sufficient to show that a "controversy existed." *Egan v. Chicago, M. & St. P. R. Co.*, 53 Fed. 675. The petition need not state that the petitioner has a just cause or a just defense and intends to prosecute the same. *Chase v. Erhardt*, 198 Fed. 305. In Iowa, it was held that the petition must show that defendants had a defense to the action, and that they had pleaded or answered therein. *Stanbrough v. Griffin*, 52 Iowa, 112, 2 N. W. 1011; *Bosler v. Booge*, 54 Iowa, 251, 6 N. W. 301.

¹⁰ *Wilson v. Giberson*, 124 Fed. 701.

petition of a jurisdictional fact will be cured, if the same appears in an accompanying affidavit,¹¹ or in the record in the State court.¹² An allegation in an amended complaint, filed after a remand, does not cure a defect in the original petition.¹³ A conditional application, in which the petition requests a removal, in case a pending motion should be denied or a plea in abatement not sustained, is bad.¹⁴ It has been held that a petition is not fatally defective when it contains the jurisdictional allegations, but refers in its prayer to a wrong statute,¹⁵ or is based upon an erroneous ground.¹⁶ But, it has been held that, where the petition was based upon a difference of citizenship, the removal would not be sustained because it subsequently ap-

¹¹ *Yulee v. Vose*, 99 U. S. 539, 25 L. ed. 355; *Bixby v. Blair*, 56 Iowa, 416, 9 N. W. 318.

¹² *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 101, 42 L. ed. 673, 676; *Remington v. Central Pacific R. R. Co.*, 198 U. S. 95, 99, 49 L. ed. 959, 963; *Chambers v. McDougal*, 42 Fed. 694; *Shattuck v. North British & Mercantile Ins. Co.*, 58 Fed. 609, 7 C. C. A. 386, 19 U. S. App. 215; *Jumeau v. Brooks*, 109 Fed. 553, 48 C. C. A. 397; *Hayes v. Todd*, 34 Fla. 233, 15 So. 752; *Goodsell v. Delta & Pine Land Co.*, 72 Miss. 580, 18 So. 452; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812. *Contra*, *Sherman v. Windsor Mfg. Co.*, 11 Fed. 852 (19 Blatchf. 314). But see *Woolridge v. McKenna*, 8 Fed. 650; *Craswell v. Belanger*, 56 Fed. 529, 6 C. C. A. 1, 15 U. S. App. 104. Where the record contains a reference to a person with the same name as the plaintiff, it will be presumed that the plaintiff is thereby intended, although there is no statement in the record to that effect. *Hoge v. Canton Ins. Office*, 103 Fed. 513.

¹³ *Jones v. Mosher*, 107 Fed. 561, 46 C. C. A. 471.

¹⁴ *Manning v. Amy*, 140 U. S. 137, 35 L. ed. 386.

¹⁵ Removal Cases; *Meyer v. Delaware R. R. Construction Co.*, 100 U. S. 457, 25 L. ed. 593; *Canal & C. Sts. R. Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226; *Norris v. Mineral Point Tunnel*, 7 Fed. 272 (19 Blatchf. 201); *Stanley v. Chicago, R. I. & P. R. Co.*, 62 Mo. 508; *Dart v. Walker* (New York), 4 Daly, 188. Where the petition prayed for removal to a division of the district, which did not exist, but correctly designated the city where the court in one of the divisions was held, it was held that the defect was immaterial and would be disregarded. *Hodge v. Chicago & A. Ry. Co.*, 121 Fed. 48, 57 C. C. A. 388.

¹⁶ Removal Cases; *Meyer v. Delaware R. R. Construction Co.*, 100 U. S. 457, 25 L. ed. 593; *Canal & C. Sts. R. Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226; *Norris v. Mineral Point Tunnel*, 7 Fed. 272; 19 Blatchf. 201. In all of these the ground stated was prejudice or local influence; but the petitions showed sufficient to justify a removal under the ordinary circumstances of a difference of citizen-

peared that one of the parties was an alien,¹⁷ or because the record showed that the case arose under the Constitution or laws of the United States.¹⁸ An irregularity in the prayer, by limiting the relief sought to the petitioners, will not prevent a removal of the whole case, when the averments authorize it.¹⁹ The petition must be duly verified.²⁰ The petition may be signed by either the petitioner or his attorney in fact or law,²¹

ship. *Northern Pacific Terminal Co. v. Lowenberg*, 18 Fed. 339, 9 Sawyer, 348 (where the petition was based upon prejudice and local influence; but it showed a ground for removal because of a separable controversy); *Ruckman v. Ruckman*, 1 Fed. 587; *Merchants, etc., Bank v. Thompson*, 4 Fed. 876. In both of these cases, the petition sought a removal upon the general grounds of a difference of citizenship; but it averred that there was a separable controversy, which made the case removable. See *Sharkey v. Port Blakely Mill Co.*, 92 Fed. 425. In *Cleveland v. Cleveland, C. C. & St. L. Ry. Co.*, C. C. A., 147 Fed. 171, 173, the Circuit Court of Appeals for the Sixth Circuit refused to admit or to controvert the soundness of this position. Where the petition alleged that the parties were citizens of different States, and upon the trial it appeared that the plaintiff was an alien, a motion by the defendant to dismiss for want of jurisdiction was denied. *Katala Co. v. Romes*, C. C. A., 186 Fed. 30, affirming 182 Fed. 946. Where no petition or bond was filed in the State court, but the formal papers for a removal of a suit against a revenue officer were filed in the Federal court, and the State court entered an order for a removal; it was held that, since the plaintiff's pleading showed that the cause arose under the Constitution

and laws of the United States, there should be no remand, although it was doubtful whether a removal could be sustained upon the former ground. *Bryant Bros. Co. v. Robinson*, C. C. A., 149 Fed. 321, 324, 326.

¹⁷ *Wallenburg v. Missouri Pac. Ry. Co.*, 159 Fed. 217.

¹⁸ *Woolridge v. McKenna*, 8 Fed. 650.

¹⁹ *Northern Pacific Terminal Co. v. Lowenberg*, 18 Fed. 339 (9 Sawyer, 348). A prayer "that said surety and bond may be accepted that his suit may be removed into the next district court of the United States," is sufficient as a prayer for a removal; a semicolon after the word "accepted" being obviously inadvertently omitted. *Gruetter v. Cumberland Tel. & T. Co.*, 181 Fed. 248.

²⁰ *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 303, 34 L. ed. 963, 964; *Offner v. Chicago & E. R. Co.*, 148 Fed. 201, 203; *Houser v. Clayton*, Fed. Cas. No. 6,739 (3 Woods, 273); *Jud. Code*, § 29, 36 St. at L. 1087. Formerly this was unnecessary.

²¹ *Sweeney v. Coffin*, Fed. Cas. No. 13,686 (1 Dill. 73); *Osgood v. Chicago, D. & V. R. Co.*, Fed. Cas. No. 10,604 (6 Biss. 330); *Connor v. Scott*, Fed. Cas. No. 3,119 (4 Dill. 242); *Houser v. Clayton*, Fed. Cas. No. 6,739 (3 Woods, 273); *Harley v. Home Ins. Co.*, 125 Fed. 792 (a

or, it has been held, by an agent upon whom the process was served.²² An omission to sign the petition is waived, unless objection upon this ground is made in the State court.²³ When the removal is based upon difference of citizenship, the petition must show that the difference of citizenship existed at the time of the beginning of the suit,²⁴ and also at the time when the

case of a separable controversy). See *Canal & Claiborne Sts. R. Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226; *Union Pac. R. Co. v. Myers*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319. *Contra*, *Goddard v. Bosson*, 21 Kan. 139; except when the removal is for prejudice or local influence, *infra*, § 549; or the suit is between citizens of the same State claiming land under grants of different States, *infra*, § 550; or the proceedings are instituted against revenue officers of the United States, U. S. R. S., § 643; *infra*, § 551; or against persons who are or have been officers of either House of Congress for acts done by them in the discharge of their official duties, 18 St. at L. 401; *infra*, § 551; or against persons having defenses under the revenue laws, U. S. R. S., § 643; *infra*, § 551; or perhaps when fraudulent misjoinder is charged, *Offner v. Chicago & E. R. Co.*, 148 Fed. 201, 203; *supra*, §§ 538, 539. The petition may be signed by either the petitioner or his attorney in fact or in law, *Dennis v. Alachua County*, 3 Woods, 683; *Wormser v. Dahlman*, Fed. Cas. No. 18,048 (16 Blatchf. 319, 57 How. Prac. N. Y. 286); *Cooke v. Seligman*, 7 Fed. 263 (17 Blatchf. 452); *Fisk v. Fisk* (Louisiana), 4 Mart. (N. S.) 676; *Guinault v. Louisville & N. R. Co.* (Louisiana), 42 La. Ann. 52, 7 South. 62; *Vandervoort v. Palmer* (New York), 11 N. Y. Super. Ct. (4 Duer) 677; *Shaff*

v. Phoenix Mut. Life Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138. See also *Removal Cases*, 100 U. S. 457, 25 L. ed. 593; where there is a dictum that objections as to the form of the signature are waived unless raised in the State court.

²² *Fayette Title & T. Co. v. Maryland P. & W. V. T. & T. Co.*, 180 Fed. 928.

²³ *Removal Cases*; *Meyer v. Delaware R. R. Const. Co.*, 100 U. S. 457, 25 L. ed. 593; *Cooke v. Seligman*, 7 Fed. 263.

²⁴ *Phoenix Ins. Co. v. Pechner*, 95 U. S. 183, 24 L. ed. 427; *Gibson v. Bruce*, 108 U. S. 561, 2 Sup. Ct. 873, 27 L. ed. 825; *Houston & T. C. Ry. Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. ed. 455; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Smith v. Akers*, 117 U. S. 197, 6 Sup. Ct. 669, 29 L. ed. 888; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. ed. 914; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249; *La Confiance Campagnie D'Assurance Contre L'Incendie v. Hall*, 137 U. S. 61, 11 Sup. Ct. 5, 34 L. ed. 573; *Kellam v. Keith*, 144 U. S. 568, 12 Sup. Ct. 922, 36 L. ed. 544; *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53, 15 Sup. Ct. 725, 39 L. ed. 894; *Rawle v. Phelps*, Fed. Cas. No. 11,588 (2 Flip. 471); *Beede v. Cheeney*, 5 Fed. 388; *Kaeiser v. Illinois Cent. R. Co.*, 6 Fed. 1 (2 McCrary, 187); *Brinker-*

petition is filed;²⁵ unless these facts appear in the pleadings, or elsewhere on the record.²⁶ It has been held, however, that a petition for removal by an intervenor, which is filed simultaneously with his petition of intervention, is sufficient, if it aver the citizenship of the parties in the present tense.²⁷ Where the plaintiff is the assignee of the cause of action, it is the safer practice to state the citizenship of his assignor at the time of the assignment, and also at the times when the suit was begun and the petition for removal made.²⁸ The citizenship of each defendant should be separately alleged.²⁹ It has been held that it is insufficient: to allege merely the residence and citizenship of the plaintiff, the residence of the defendants, and that none of the petitioners are residents and citizens of the plaintiff's State;³⁰ to present a petition in the name of a copartnership

hoff v. Morris Canal & Banking Co., 18 Fed. 97; Ferry v. Town of Merrimack, 18 Fed. 657; McNaughton v. South Pac. C. R. Co., 19 Fed. 881; Carrick v. Landman, 20 Fed. 209; Endy v. Commercial Fire Ins. Co., 24 Fed. 657; Hone v. Dillon, 29 Fed. 465; Seddon v. Virginia, T. & C. Steel & Iron Co., 36 Fed. 6 (1 L.R.A. 108); Camprelle v. Balbach, 46 Fed. 81; Laskey v. Newtown Min. Co., 56 Fed. 628; Foster v. Paragould S. E. R. Co., 74 Fed. 273; Dalton v. Germania Insurance Co., 118 Fed. 936; People v. Superior Court of Chicago, 34 Ill. 356; Laird v. Connecticut & P. R. R. R., 55 N. H. 375, 20 Am. Rep. 215; Holden v. Putnam Fire Ins. Co., 46 N. Y. 1, 7 Am. Rep. 287; Tugman v. National S. S. Co., 76 N. Y. 207; affirming 13 Hun, 332; Pechner v. Phoenix Ins. Co. (New York), 6 Lans. 411; affirmed 65 N. Y. 195; Herndon v. Aetna Ins. Co., 107 N. C. 194, 12 S. E. 240, 10 L.R.A. 53.

²⁵ Gibson v. Bruce, 108 U. S. 561, 2 Sup. Ct. 873, 27 L. ed. 825; Bruce v. Gibson, 9 Fed. 540; Foster v. Paragould S. E. R. Co., 74 Fed. 273.

Contra, Houser v. Clayton, Fed. Cas. No. 6,739 (3 Woods, 273).

²⁶ Bondwant v. Watson, 103 U. S. 281, 285, 26 L. ed. 447, 449; Steamship Co. v. Tugman, 160 U. S. 118, 40 L. ed. 362. Where the complaint averred that, at certain specified dates, which were before the commencement of the action, the diversity of citizenship existed, and the petition for removal stated that the diversity then existed; it was held that the case must be remanded, since it did not sufficiently appear that the diversity existed at the time of the commencement of the action. Craswell v. Belanger, 56 Fed. 529.

²⁷ Burdick v. Peterson, 6 Fed. 840 (2 McCrary, 135).

²⁸ Flynn v. Fidelity & Casualty Co., 145 Fed. 265. See Hall v. Tevis, 177 Fed. 600, and § 63, *supra*.

²⁹ Grace v. American C. Ins. Co., 109 U. S. 278, 27 L. ed. 932; Thomas v. Board of Trustees of the Ohio State University, 195 U. S. 207, 218, 49 L. ed. 160, 167; Laden v. Meek, C. C. A., 130 Fed. 877.

³⁰ Laden v. Meek, C. C. A., 130 Fed. 877.

stating that the firm, without naming the members individually, was a citizen of a certain State;³¹ to allege "that said plaintiffs as such executors are citizens of" a specified State;³² and that the Board of Trustees of a State institution, which is made a defendant by that name, is a citizen of a specified State without averring the citizenship of its different members, although the Constitution of the State provides that no person shall be elected or appointed to office unless he is a citizen of the State.³³

An allegation that the State, of which a party is a citizen or resident, is unknown, is insufficient to show that his citizenship is different from that of the other.³⁴ An allegation of residence in a certain State, without an allegation of citizenship, is insufficient,³⁵ unless it is alleged, that the plaintiff is a citizen of the United States and a resident of one of those States; in

³¹ *Adams v. May*, 27 Fed. 907; *Van Horn v. Kittitas County*, 112 Fed. 1; *Fred Macey Co. v. Macey*, 135 Fed. 725, 88 C. C. A. 363.

³² *Amory v. Amory*, 95 U. S. 186, 24 L. ed. 428. But, it was held sufficient to allege, that the defendants, who were named, "as they are the qualified executors of the last will and testament of James Brown, deceased, were each and all, at the time of the commencement of this suit, and still are, citizens of the State of New York, and that the defendant, John S. Schultze, also a qualified executor of the last will and testament of James Brown, deceased, was then, and still is, a citizen of the State of New Jersey." *Cooke v. Seligman*, 7 Fed. 263 (17 Blatchf. 452).

³³ *Thomas v. Board of Trustees of the Ohio State University*, 195 U. S. 207, 218, 49 L. ed. 160, 167.

³⁴ *Tug River C. & S. Co. v. Bridge*, 67 Fed. 625; *Tracy v. Moral*, 88 Fed. 801.

³⁵ *Parker v. Overman*, 18 How.

137; 15 L. ed. 318; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. ed. 932; *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 Sup. Ct. 591, 37 L. ed. 441; *Neel v. Pennsylvania Co.*, 157 U. S. 153; 15 Sup. Ct. 589, 39 L. ed. 654; *Overman v. Parker*, Fed. Cas. No. 10,623; *Merchants' Nat. Bank v. Brown*, 17 Fed. 161 (4 Woods, 263); *Kelly v. Houghton*, 23 Fed. 417; *Southwestern Telegraph & Telephone Co. v. Robinson*, 48 Fed. 769, 1 C. C. A. 91; *Craswell v. Belanger*, 56 Fed. 529, 6 C. C. A. 1, 15 U. S. App. 104; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; *Gale v. Southern Building & Loan Ass'n*, 117 Fed. 732; *Board of Trustees of Mochican Tp., Ashland County v. Johnson*, 133 Fed. 524, 66 C. C. A. 592; *Harding v. Standard Oil Co.*, 182 Fed. 421; *Herndon v. Aetna Ins. Co.*, 107 N. C. 194, 12 S. E. 240, 10 L.R.A. 53; *Pechner v. Phoenix Ins. Co. (New York)*, 6 Lans. 411; affirmed 65 N. Y. 195.

which case, it has been held that, under the Fourteenth Amendment, it will be presumed that he is a citizen of the State also.³⁶

If one of the parties is an alien, it is sufficient for the petitioner to allege that he is, and when the suit was brought was, a citizen or subject of a specified foreign State.³⁷ So is a mere description of a party as "of" a specified State;³⁸ or of a certain county,³⁹ city, or town, in a specified State;⁴⁰ or that a party "lives" or "lived" in a specified city and State.⁴¹

The petition should also state the non-residence of the defendant at the time, both when the action was begun⁴² and when the

³⁶ *Clausen v. American Ice Co.*, 144 Fed. 723.

³⁷ *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 23 Sup. Ct. 532, 47 L. ed. 697; *Hennessy v. Moise*, 189 U. S. 35, 23 Sup. Ct. 534, 47 L. ed. 698; *C. H. Nichols Lumber Co. v. Franson*, 203 U. S. 278, 51 L. ed. 181. *Contra*, *Von Voight v. Michigan Cent. R. Co.*, 130 Fed. 398 (where an allegation of citizenship alone, in a foreign monarchy, was held to be insufficient). See *Wilson v. City Bank (New York)*, 3 Sumner, 422. It was held that the description of the plaintiff "as a citizen of London, England," was not a sufficient averment that he was a subject of the United Kingdom of Great Britain and Ireland. *Stuart v. Easton*, 156 U. S. 46, 39 L. ed. 341. Where a bill alleged that the complainant was by birth a citizen of one of the United States, but by her marriage to a British subject became a citizen of Great Britain, no British law making her a citizen by reason of such acts being pleaded; it was held that her alienage was not sufficiently averred, although the bill set forth a Canadian statute, which it was claimed effected her naturalization. *Jennes v. Landes*, 84 Fed. 73.

³⁸ *Grand Trunk R. Co. v. Twitch-*

ell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; *Dinet v. Delavan*, 117 Fed. 978; *Carswell v. Schley*, 59 Ga. 17.

³⁹ *Carswell v. Schley*, 59 Georgia, 17.

⁴⁰ *Grand Trunk R. Co. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; *Dinet v. Delavan*, 117 Fed. 978.

⁴¹ *Gale v. Southern Building & Loan Ass'n*, 117 Fed. 732.

⁴² *Martin v. Snyder*, 148 U. S. 663, 11 Sup. Ct. 706, 37 L. ed. 602; *Freeman v. Butler*, 39 Fed. 1; *Camprelle v. Balbach*, 46 Fed. 81. It has even been held that an allegation that the defendant was, "at the time of the filing of the said complaint," a citizen and resident of another State, without an express allegation of non-residence, is insufficient. *Fife v. Whittell*, 102 Fed. 537. *Contra*, where the petitioner alleged that he was, at the time of the commencement of the suit, and still was when the petition was filed, a citizen and resident of another State. *Zebert v. Hunt*, 108 Fed. 449. An allegation of citizenship and residence in another State is equivalent to an allegation of non-residence in the State where the suit is brought. *Lawrence v. Southern Pac. Co.*, 165 Fed. 241.

petition was filed.⁴³ It is the safer practice to allege the residence of the plaintiff within the district at both those times.⁴⁴ It seems that an averment that a party is "of" a specified place is equivalent to the statement that he is a resident thereof.⁴⁵ The omission from the plaintiff's writ,⁴⁶ or pleading;⁴⁷ of any allegation of diversity of citizenship, is immaterial; provided that the same is duly alleged in the petition of removal.

Where a corporation is a party, the petition should state that it was organized or created by, or under, the laws of a specified State or foreign government.⁴⁸ The allegation that it is a citizen of a certain State is insufficient; although it has a company name.⁴⁹ An allegation that a corporation is "duly established by law, having its principal place of business" in a specified

⁴³ *Martin v. Snyder*, 148 U. S. 663. *Contra*, *Baltimore & O. R. Co. v. Doty*, C. C. A., 133 Fed. 866.

⁴⁴ *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264. *Contra*, *Baltimore & O. R. Co. v. Doty*, C. C. A., 133 Fed. 866. See *Gillespie v. Pocahontas Coal & Coke Co.*, 162 Fed. 742.

⁴⁵ *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 23 Sup. Ct. 532, 47 L. ed. 697; *Hennessy v. Moise*, 189 U. S. 35, 23 Sup. Ct. 534, 47 L. ed. 698.

⁴⁶ *Ladd v. Tudor*, Fed. Cas. No. 7,975 (3 Woodb. & M. 325).

⁴⁷ *City of Ysleta v. Canda*, 67 Fed. 6.

⁴⁸ *Sun Printing & Publishing Ass'n v. Edwards*, 194 U. S. 377, 48 L. ed. 1027; *Loneragan v. Illinois Central R. R. Co.*, 55 Fed. 550; *Ward v. Blake Mfg. Co.*, C. C. A., 56 Fed. 437; *Frisbie v. Chesapeake & O. Ry. Co.*, 57 Fed. 1; *Shattuck v. No. Br. & Mer. Ins. Co.*, 58 Fed. 609; *De Loy v. Travelers' Ins. Co.*, 59 Fed. 319; *Robertson v. Scottish U. & Nat. Ins. Co.*, 68 Fed. 173; *Continental W. P. Co. v. Lewis Voight & Sons*, 106 Fed. 550; *Winkler v. Chicago & E. I. R. Co.*, 108 Fed. 305; *Dalton v. Milwaukee Me-*

chanics' Ins. Co., 118 Fed. 876; *Knight v. Lutch & Moore Lumber Co.*, 136 Fed. 404. See *Southern Ry. Co. v. Hudgins*, 33 S. E. 1011, 108 Ga. 524. An allegation that defendant is a corporation under the laws of the State of Virginia, and a citizen of Virginia, and a resident of the Western District of that State, is equivalent to an allegation that it was created by, or organized under, or existing under, the Virginia laws. *Mathieson Alkali Works v. Mathieson*, 150 Fed. 241. A description of the plaintiff in the title of a pleading, as a national bank, is insufficient to show that it was incorporated under the laws of the United States, when the only allegation upon the subject in the pleading is that plaintiff is a corporation engaged in the banking business in a specified State and county. *Alexandria Nat. Bank v. Willis C. Bates Co.*, C. C. A., 160 Fed. 839.

⁴⁹ *Thomas v. Board of Trustees of Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160; *Loneragan v. Illinois Cent. R. Co.*, 55 Fed. 550; *Frisbie v. Chesapeake & O. R. Co.*, 57 Fed. 1; *De Loy v.*

State, is insufficient.⁵⁰ It is insufficient to allege that the defendant "claims to be" a corporation organized under the laws of a specified State as a company of a specified character.⁵¹ Where the corporation is chartered by several States, the facts which show the difference of citizenship, such as the name of the State which first gave it its charter, must be specifically pleaded.⁵² It is insufficient to allege merely the residence,⁵³ or the location,⁵⁴ of the corporation, even if it is a national bank.⁵⁵ It is unnecessary to aver the citizenship of the corporation, when its creation or organization by the laws of a specified State are sufficiently pleaded.⁵⁶ It has been held: that it is unnecessary to aver that a corporation, created by or under the laws of another State, or of foreign country, is not a resident of the State and district where the suit is brought;⁵⁷ nor that the defend-

Travelers' Ins. Co., 59 Fed. 319; American S. R. Co. v. Johnson, 60 Fed. 503; *infra*, § 544; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Knight v. Litcher & Moore Lumber Co., 136 Fed. 404. *Contra*, Oakey v. Commercial & Railroad Bank, 14 La. 515; Guarantee Co. of North America v. First Nat. Bank, 95 Virginia, 480, 28 S. E. 909.

⁵⁰ New York & New England R. Co. v. Hyde, C. C. A., 56 Fed. 188, 191. Where the one of the original defendants who is omitted by the amendment was described by a fictitious Christian name, his surname, being given, and further described as the conductor of the train which caused the plaintiff's injury; it was held that the remaining defendant had not lost his right of removal by waiting until the amendment. Bagenas v. Southern Pac. Co., 180 Fed. 887, 889.

⁵¹ Lownsedale v. Gray's Harbor Boom Co., 117 Fed. 983.

⁵² Dodd v. Louisville Br. Co., 130 Fed. 186.

⁵³ Winkler v. Chicago & E. I. R. Co., 108 Fed. 305; Cleveland, C., C. & St. L. Ry. Co. v. Doerr, 41 Ill. App. 530.

⁵⁴ Germania Fire Ins. Co. v. Francis, 11 Wall. 210, 20 L. ed. 77.

⁵⁵ Thomas v. National Bank, C. C. A., 106 Fed. 438.

⁵⁶ Shattuck v. No. Br. & Mer. Ins. Co., 58 Fed. 609; Robertson v. Scottish U. & Nat. Ins. Co., 68 Fed. 173; Block v. Standard Distilling & Distributing Co., 95 Fed. 978; Continental W. P. Co. v. Lewis Voight & Sons, 106 Fed. 550; Lee v. Atlantic Coast Line R. Co., 150 Fed. 775.

⁵⁷ Myers v. Murray, Nelson & Co., 43 Fed. 695, 11 L.R.A. 216; Shattuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 7 C. C. A. 386, 19 U. S. App. 215; Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co., 60 Fed. 929; Charleston Bridge Co. v. Phoenix Ins. Co., 60 Fed. 929; judgment affirmed, Phoenix Ins. Co. v. Charleston Bridge Co., 65 Fed. 628, 13 C. C. A. 58, 25 U. S. App. 190; Howard v. Gold Reefs of Georgia, 102 Fed. 657; Roberts v. Pac. & A. Ry. & Nav. Co., 104 Fed. 577; Baltimore & O. R. Co. v. Doty, C.

ant corporation had the same citizenship at the time of the commencement of the suit as when the petition was filed,⁵⁸ although the fact that the plaintiff's citizenship, at the time when the suit was brought, was the same as when the petition was filed, must be alleged when the corporation removes the case; but it is the safer practice to allege both those facts.⁵⁹ When the removal is because of a separable controversy, the petition should show how the controversy arises and should name the parties to the same, in addition to the other jurisdictional allegations except perhaps when that clearly appears in the plaintiff's pleading.⁶⁰

Where a defendant, who is a citizen of the same State as the plaintiff, is joined with another, who is a citizen of a different State, and a removal is sought because of his fraudulent misjoinder, the petition or its accompanying affidavits must state specifically, the facts which show the fraud;⁶¹ except, perhaps,

C. A., 133 Fed. 866; *Koshland v. National Fire Ins. Co. (Oregon)*, 49 P. 845. *Contra*, *Hirschl v. J. I. Case Threshing-Mach. Co.*, 42 Fed. 803; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. 577; *Guinault v. Louisville & N. R. Co.*, 41 La. Ann. 571, 6 South. 850.

⁵⁸ *National Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87 (where the complaint averred that the defendant was then a foreign corporation); *Roberts v. Pacific & A. Ry. & Nav. Co.*, 104 Fed. 577, 579; *Continental Wall Paper Co. v. Lewis Voight & Sons*, 106 Fed. 550. *Contra*, *Dalton v. Germania Ins. Co.*, 118 Fed. 936.

⁵⁹ *Laskey v. Newtown Mine Co.*, 56 Fed. 628; *Foster v. Paragould S. E. R. Co.*, 74 Fed. 273.

⁶⁰ *Gates Iron Works v. James E. Pepper & Co.*, 98 Fed. 449; *Laden v. Meck*, C. C. A., 130 Fed. 877. See *Connell v. Smiley*, 156 U. S. 335, 341, 39 L. ed. 443, 445. But see *Donovan v. Wells-Fargo & Co.*, C. C. A., 169 Fed. 363.

⁶¹ *Offner v. Chicago & E. R. Co.*,

C. C. A., 148 Fed. 201 (where the allegations that one of the defendants "was not a party to the alleged negligence" and "was fraudulently joined as a party defendant, solely for the purpose of defeating your petitioner's right to remove this cause," were held to be insufficient, since the declaration charged facts sufficient to establish a cause of action against that defendant); *Clark v. Chicago, R. I. & P. Ry. Co.*, 194 Fed. 505, holding that the petition should also aver that the plaintiff knew when he joined a resident defendant, or had then sufficient reason in law to know, that he had no cause of action against the latter. *Eastin & Knox v. Texas & P. Ry. Co. (Texas)*, 92 S. W. 838; reversing 89 S. W. 440. But see *Donovan v. Wells, Fargo & Co.*, C. C. A., 169 Fed. 363. The following allegations have been held to be sufficient: "As to Wettengel, the citizen of Missouri, it was alleged in the removal petition that he was not, at the time of the accident or prior thereto, charged with the superin-

tendence and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the furnace, or providing a reasonably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged with the duty of placing reasonably safe and sufficient hoisting apparatus, nor with the duty of instructing the petitioner in respect to his duties, as charged in the complaint, and, after stating that Schenck, like the defendant corporation, was a non-resident of Missouri and a citizen of another State, charged that Wetengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that the plaintiff well knew, at the time of the beginning of the suit, that Wetengel was not charged with the duties aforesaid, and that he was joined as a party defendant to prevent the removal of the cause and not in good faith." *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 180, 51 L. ed. 430, 433. "That the defendant Strause was at the time of the injury in question an employe of the petitioner, and had nothing whatever to do with the inspection or other control over the engine of which the plaintiff complains, and that the duties of said Strause were those of a yard master—confined exclusively to the making up of trains; and that said Strause was joined as a codefendant for the sole purpose of avoiding and defeating the jurisdiction of the United States court, and to fraudulently deprive the petitioner of the right of removal." *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286, 289. "Your petitioner further says: that in this suit plaintiff has fraudulently, wrongfully, improperly, and illegally joined as co-defendant one George Coffman, who is alleged by plaintiff in his petition to be a citizen and resident of the State of Kentucky; and your petitioner says that George Coffman was fraudulently, wrongfully, improperly and illegally joined as a co-defendant in this suit because of the alleged fact, if it is a fact, that said George Coffman is a citizen and resident of the State of Kentucky, for the sole purpose of defeating the jurisdiction of the United States court. Your petitioner says that it denies that the said George Coffman is a citizen and resident of the State of Kentucky, and says that George Coffman has never been served with summons herein, and that it is not the purpose or intent of the plaintiff to prosecute the action in good faith against the said George Coffman, but that the said George Coffman was made a party defendant herein for the sole purpose and reason of attempting to defeat the removal of this cause to the Circuit Court of the United States, and to defeat the jurisdiction of the said Circuit Court of the United States; and your petitioner further says that the said George Coffman did not in any manner or degree contribute to the death or injury of said plaintiff's decedent through his own negligence, or through any joint negligence with this petitioner. Your petitioner further says that it is the only defendant in court in this action, and that said plaintiff at the time of filing his said petition well knew that the said George

when they are manifest upon the face of the plaintiff's pleading.⁶² The allegations in the plaintiff's pleading upon this point are not conclusive.⁶³ A mere denial in the petition of the joint negligence alleged in the complaint is insufficient to raise the issue of fraudulent joinder,⁶⁴ or that the purpose of the joinder of the defendants was to prevent a removal.⁶⁵ So is the naked allegation that the resident defendant has no interest in the controversy.⁶⁶ An averment that the resident defendant is without means, when coupled with a denial of the allegations of joint negligence, has been held to be insufficient.⁶⁷

Where a removal is claimed upon the ground that the suit arises under the Constitution and laws of the United States, the petition must state the facts showing that such is the case, unless they appear in pleadings previously filed or served.⁶⁸ If so, they may be incorporated into the petition by reference.⁶⁹ Where it does not appear in the plaintiff's pleading, that the

Coffman was not guilty with the petitioner of any joint negligence, and that said George Coffman is a sham defendant, and is so made a defendant for the sole and only purpose of fraudulently, improperly, and illegally defeating the removal of this case to the United States court, and defeating the jurisdiction of the United States court in this cause as aforesaid." *Dishon v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A.*, 133 Fed. 471, 473.

⁶² *Supra*, note 12; *infra*, note 76.

⁶³ *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 51 L. ed. 430; *MacKaye v. Mallory*, 6 Fed. 743 (19 Blatchf. 165); *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286; *Dishon v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A.*, 133 Fed. 471.

⁶⁴ *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co.*, 119 Fed. 209; *Shane v. Butte Electric Ry. Co.*, 150 Fed. 801.

⁶⁵ *Gustafson v. Chicago, R. I. & P. Ry. Co.*, 128 Fed. 85.

⁶⁶ *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co.*, 119 Fed. 209.

⁶⁷ *Shane v. Butte Electric Ry. Co.*, 150 Fed. 801; *Offner v. Chicago & E. R. Co., C. C. A.*, 148 Fed. 201, 203; although, if it is accompanied by separate affidavits, or supported by affidavits in support of its allegations, upon the motion to remand, it might be held that no verification was required, *Hall v. Chattanooga Agricultural Works*, 48 Fed. 599, 605.

⁶⁸ *Gold W. & W. Co. v. Keyes*, 96 U. S. 199, 204, 24 L. ed. 656, 659; *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992; *Trafton v. Nougues*, 4 Sawyer, 178; *New Castle v. Postal Telegraph Cable Co.*, 152 Fed. 572; *Hubbard v. Chicago, M. & St. P. Ry. Co.*, 176 Fed. 994; *Rural Home Tel. Co. v. Powers*, 176 Fed. 986; *Dale v. Smith*, 182 Fed. 360.

⁶⁹ *Ibid.* See also cases cited, *supra*.

defendant is a corporation incorporated by an act of Congress,⁷⁰ or that the defendant is a receiver appointed by the Federal court;⁷¹ it is the better practice to allege in the petition such fact if it exists; but the court will take judicial notice of the incorporation of a party by an act of Congress.⁷² When it is claimed that the plaintiff has fraudulently omitted, from his pleading, a material allegation, which would show that the case arose under the Constitution or a law or a treaty of the United States; that fact must be alleged in the petition for the removal.⁷³ It has been held that, where the petition was based upon a difference of citizenship, the removal would not be sustained, although the record showed that the case arose under the Constitution or laws of the United States.⁷⁴

The petition for a removal should show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of three thousand dollars;⁷⁵ unless this appears elsewhere in the record.⁷⁶ An allegation that the "amount in dispute;"⁷⁷ or the "amount involved"⁷⁸ in the suit, exceeds the jurisdictional amount, is ordinarily sufficient, unless the record shows the contrary. Where the suit is brought for an injunction, it will ordinarily be sufficient to aver, in general language in the petition, that the value of the right sought to be protected thereby exceeds the jurisdictional amount.⁷⁹ It has been held that a petition is not defective because it states the matter in controversy "is of the sum and value of over" three "thousand dollars, as pe-

⁷⁰ *Texas & P. Ry. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132.

⁷¹ *Winters v. Drake*, 102 Fed. 545.

⁷² *Matter of Dunn*, 212 U. S. 374, 53 L. ed. 558.

⁷³ *Winters v. Drake*, 102 Fed. 545. See *Washington v. Island Lime Co.*, 117 Fed. 777, 778.

⁷⁴ *Woolridge v. McKenna*, 8 Fed. 650. But see authorities cited, *supra*, § 544.

⁷⁵ *Keith v. Levi*, 2 Fed. 743 (1 McCrary, 343); *Banigan v. City of Worcester*, 30 Fed. 392. It has been said, that, unless this appears in the record, an allegation to that effect in the petition is insufficient.

Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co., 89 Fed. 113.

⁷⁶ *Chambers v. McDougal*, 42 Fed. 694.

⁷⁷ *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. ed. 276.

⁷⁸ *State v. Frost*, 89 N. W. 915, 113 Wis. 623. See *Studebaker v. Salina Waterworks Co.*, 195 Fed. 164; §§ 6, 13, 135, *supra*.

⁷⁹ *Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co.*, 67 Fed. 35, 14 C. C. A. 290; *Spaulding v. Evenson*, 149 Fed. 913; *s. c.*, *Evenson v. Spaulding*, C. C. A., 150 Fed. 517; *State v. Frost*, 89 N. W. 915, 113 Wis. 623.

tioner is informed and verily believes."⁸⁰ It is the better practice to aver, in a petition for removal, that the matter in dispute exceeded the jurisdictional amount at the time when the suit was begun, as well as at the time when the petition is filed.⁸¹

Where the relief sought was the conveyance of a tract of land, the value of which appeared to be in excess of such amount; it was held to be unnecessary to insert, in the petition, an allegation that the amount involved exceeded that sum, exclusive of interest and costs.⁸² Where a suit is brought to enjoin the collection of taxes for certain years and there is no allegation as to the amount of the tax for more than one of such years, it will not be presumed, in order to make up the jurisdictional amount, that a like tax was assessed for each of the other years.⁸³

§ 546. Amendment of petition. If the jurisdictional facts are not set forth in the petition or the accompanying papers or elsewhere on the record of the State court, an amendment stating them cannot be allowed by the Federal court.¹ Leave to amend was denied: when there had been an omission

⁸⁰ New York & T. Land Co. v. Martin (Texas Civ. App.), 25 S. W. 475. Denials of allegations in the complaint, which tend to show the propriety of the joinder, are insufficient unless the petition for removal also avers that the plaintiff knew them to be false. *Evansberg v. Insurance Stove, Range & Foundry Co.*, 168 Fed. 1001. But see *Shaver v. Pacific Coast Condensed Milk Co.*, 185 Fed. 316.

⁸¹ *Strasburger v. Beecher*, 44 Fed. 209; *Huntington v. Pinney*, 126 Fed. 237.

⁸² *Weber v. Travelers' Ins. Co.*, 45 Fed. 657.

⁸³ *Citizens' Bank of Louisiana v. Cannon*, 164 U. S. 319, 17 S. Ct. 89, 41 L. ed. 451.

§ 546. ¹ *Crehore v. Ohio & M. Ry. Co.*, 131 U. S. 240, 33 L. ed. 144; *Jackson v. Allen*, 132 U. S. 27, 33 L. ed. 249; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812; *Brig-*

ham v. C. C. Thompson Lumber Co., 55 Fed. 881; *De Loy v. Travelers' Ins. Co.*, 59 Fed. 319; *Frisbie v. Ches. & O. Ry. Co.*, 59 Fed. 369; *s. c.*, 57 Fed. 1; *Murphy v. Payette Alluvial Gold Co.*, 98 Fed. 321; *Fife v. Whittell*, 102 Fed. 537; *Dinet v. Delavan*, 117 Fed. 978; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 118 Fed. 876; *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396.

² *Crehore v. Ohio & M. Ry. Co.*, 131 U. S. 240, 33 L. ed. 144; *Jackson v. Allen*, 132 U. S. 27, 33 L. ed. 249; *McNaughton v. South Pac. Co. R. Co.*, 19 Fed. 881; *Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; *Endy v. Commercial Fire Ins. Co.*, 24 Fed. 657. It was said: that, after the time to remove has expired, the State court may allow the petition to be amended by inserting the allegation that an alien corporation, which had removed the case,

to allege diversity of citizenship,² or nonresidence,³ at the time when the action was begun; although diversity and nonresidence, when the case was removed, were properly pleaded; when there was no allegation of the nonresidence of the defendant at any time;⁴ when there was no allegation of diversity of citizenship at any time,⁵ although the nonresidence of the defendant was alleged in the petition, and the residence of the plaintiff appeared in the record;⁶ when the petition of removal originally alleged diversity of citizenship between the plaintiff and one only of two defendants, coupled with an averment that the other was fraudulently joined, and the removing defendant wished to add an averment that such other was also a citizen of a different State from that of the plaintiff;⁷ when there was no allegation of nonresidence of the defendant at any time;⁸ when the defendant, which was a corporation, alleged that it was a citizen of a certain State, but did not state that it was organized under the laws thereof.⁹ But when the jurisdictional facts are stated informally,¹⁰ or in the form of conclusions of law,¹¹ in the petition

was incorporated by the laws of the same foreign country before the suit was brought. *Roberts v. Pac. & A. Ry. & Nav. Co.*, 104 Fed. 577.

² *Freeman v. Butler*, 39 Fed. 1; *Camprelle v. Balbach*, 46 Fed. 81. But see *Kyle v. Chicago, R. I. & P. Ry. Co.*, 173 Fed. 238.

³ *Fife v. Whittell*, 102 Fed. 537.

⁵ *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. 881; *Dinet v. Delavan*, 117 Fed. 978.

⁶ *Dinet v. Delavan*, 117 Fed. 978.

⁷ *Shane v. Butte Electric Ry. Co.*, 150 Fed. 801.

⁸ *Fife v. Whittell*, 102 Fed. 537.

⁹ *Frisbie v. Chesapeake & O. Ry. Co.*, 57 Fed. 1; *s. c.*, 59 Fed. 369; *De Loy v. Travelers' Ins. Co.*, 59 Fed. 319; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 118 Fed. 876. When the original petition prayed a removal for difference of citizenship, *Thompson v. Ward*, 199 Fed. 861, or for prejudice or local influence, *Carson & Rand Lumber Co.*

v. Holtzclaw, 44 Fed. 785. See *Winnemans v. Edgington*, 27 Fed. 324. And the defendant asked leave to show the existence of a separable controversy, or, in the former case, that one of the parties was an alien, *Wallenburg v. Missouri Pac. Ry. Co.*, 159 Fed. 217.

¹⁰ *Ayres v. Watson*, 113 U. S. 594, 598, 28 L. ed. 1093, 1094; *Martin's Adm'r v. Baltimore & O. R. R. Co.*, 151 U. S. 673, 691, 38 L. ed. 311, 318; *Glover v. Shepperd*, 15 Fed. 833 (11 Biss. 572). See *Robertson v. Scottish Union & National Ins. Co.*, 68 Fed. 173, 177; *Mexican Central Ry. Co., Ltd. v. Duthie*, 189 U. S. 76, 47 L. ed. 715 (where an original declaration, filed in the Federal court, averred that the plaintiff was a resident of a specified town, county, State and district, and that defendant was a citizen of another State, without alleging the citizenship of the plaintiff); *Peoples' Tel. & Tel. Co. v.*

or in an accompanying affidavit,¹² or in the record in the State court;¹³ such an amendment may be allowed by the Federal court, even, it seems, after judgment.¹⁴ Earlier cases hold that the amendment can only be allowed by the State court.¹⁵ Amendments have been allowed: where the petition of removal stated "that the controversy in said suit is between citizens of different States" and then alleged the residence and citizenship of the defendant only;¹⁶ where it appeared by the pleadings,

East Tennessee Tel. Co. (C. C. A.), 103 Fed. 212, 215 (where the title of a bill originally filed in the Federal court described the complainant "as duly incorporated under the laws of the State of Kentucky;" but the body of the bill merely alleged that it was a non-resident of the State, of which the defendant was a citizen; and the informality was held to be immaterial, when first taken upon appeal). *Contra*, In Removal Cases, *Dinet v. Delavan*, 117 Fed. 978; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. 881.

¹¹ *Kinney v. Columbia Savings & Loan Ass'n*, 191 U. S. 78, 48 L. ed. 103; *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. 616; *Stadelmann v. White Line Towing Co.*, 92 Fed. 209. See also *Tremper v. Schwabacher*, 84 Fed. 413; following the case in which *Kinney* was plaintiff.

¹² *Hall v. Chattanooga Agricultural Works*, 48 Fed. 599, 605.

¹³ *Kinney v. Columbia Savings & Loan Ass'n*, 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; *Flynn v. Fidelity & Casualty Co.*, 145 Fed. 265. See *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92, 42 L. ed. 673, 18 S. Ct. 264; *Kaeiser v. Illinois Cent. R. Co.*, 6 Fed. 1 (2 McCrary, 187).

¹⁴ *Mexican Central Ry. Co., Ltd. v. Duthie*, 189 U. S. 76, 47 L. ed. 715 (where the suit was originally brought in the Federal court).

¹⁵ *Winnemans v. Edgington*, 27 Fed. 324; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. 577. See also *Kaeiser v. Illinois Cent. R. Co.*, 6 Fed. 1 (2 McCrary, 187); *Roberts v. Pac. A. Ry. & Nav. Co.*, 104 Fed. 577. Nor, under the former statute, where after naming the proper Court of the United States, it was conditioned that the petitioner should enter in such Court, on the first day of its session next after the granting of such petition, a copy of the record." *Ellis v. Atlantic & P. R. R. Co.*, 134 Mass. 338.

¹⁶ *Kinney v. Columbia Savings & Loan Ass'n*, 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; *Woolridge v. McKenna*, 8 Fed. 650, 680, 681; *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. 616; *Stadelmann v. White Line Towing Co.*, 92 Fed. 209. See also *Tremper v. Schwabacher*, 84 Fed. 413 (where the petition said that two of the defendants were residents of a city in a certain State, but omitted to state specifically that they were citizens of that State as well). *Contra*, *Dalton v. Milwaukee Mechanics' Ins. Co.*, 118 Fed. 876 (where leave was refused to amend the petition so as to aver the organization of the defendant corporation under the laws of a State, of which the petition averred that it was a citi-

that the husband of the plaintiff's assignor was a citizen and resident of a different State from that of the defendant's residence and citizenship, at a date a few months prior to the commencement of the action, but there was no averment as to her residence and citizenship when the suit was brought, nor when the petition for a removal was filed,¹⁷ where the petition showed a diversity of citizenship but, through misinformation, erroneously alleged the citizenship of the plaintiff as of a different State from that where the suit was brought, he in fact being a citizen of that State and the defendant a citizen of a third State.¹⁸ And where the petition averred: that two defendants, who were citizens of the same State, had been fraudulently and improperly joined as parties defendant, for the sole purpose of defeating the petitioner's right to remove the cause; that the suit as to them had been dismissed, and that it was now pending against the removing defendant alone, omitting by mistake all reference to a fourth defendant, a citizen of the same State as the plaintiff, as to whom the case had also been dismissed;¹⁹ that the case arose under the Constitution and laws of the United States, without specifying the facts showing this to be the case;²⁰ and even when there was no allegation in the petition for the removal showing that the value of the matter in dispute exceeded the jurisdictional amount, but that fact had been often stated to the court by counsel on both sides.²¹ It was held, that a petition might be amended in a Federal Circuit Court so as to correct a mistake, through which the defendant prayed a removal to the District Court of the United States,²² and also where the prayer asked for a removal only as to the petitioners, and not of the whole case.²³

An answer filed by the defendant may be treated as an amend-

zen and resident). See *Chase v. Erhardt*, 198 Fed. 305, and other authorities cited *infra*. But it was held that bonds were insufficient when conditioned simply that the petitioner shall file in the Federal court "copies of all process."

¹⁷ *Flynn v. Fidelity & Casualty Co.*, 145 Fed. 265.

¹⁸ *Wilbur v. Red Jacket Consol. Coal & Coke Co.*, 153 Fed. 662.

¹⁹ *Powers v. Chesapeake & O. Ry. Co.*, 65 Fed. 129; affirmed 169 U. S. 92, 98, 101, 42 L. ed. 673, 675, 676.

²⁰ *Walser v. Memphis, C. & N. W.* 421, 30 L. ed. 992.

²¹ *Carr v. Fife*, 45 Fed. 209; affirmed 156 U. S. 494, 39 L. ed. 508.

²² *Hadfield v. N. W. Life Assur. Co.*, 105 Fed. 530.

²³ *Northern Pac. Terminal Co. v. Lowenberg*, 118 Fed. 339, 343.

ment to the petition.²⁴ It was held, however, that a petition, subsequently presented to the State court, could not be treated as an amendment.²⁵

An amendment will not be allowed in the Supreme Court,²⁶ nor in the Circuit Court of Appeals;²⁷ except by consent, when it may be permitted.²⁸ A denial of an application for leave to amend the petition for removal, made by the State court after a remand, cannot be reviewed by the Supreme Court of the United States upon writ of error.²⁹ Where the removal was unauthorized, the Circuit Court has no power to amend the pleadings or make a change of the parties to the suit, so as to retain the jurisdiction.³⁰

§ 547. Bond. The Judicial Code requires that the party who files a petition for a removal "shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court on the first day of its then next session, a copy of the record in such suit and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that such bond was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requested therein."¹

The bond required upon a removal for prejudice or local influence is the same as that in ordinary cases of removal for difference of citizenship.² The bond must be filed at or before the time to answer expires.³ An order cannot be made thereafter,

²⁴ *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992.

²⁵ *Waite v. Phoenix Ins. Co.*, 62 Fed. 769.

²⁶ *Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 132.

²⁷ *Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; where sufficient to justify a removal appeared in the bill of exceptions and in the bond filed with the petition for the writ of error.

²⁸ *Kansas City Southern Ry. Co. v. Prunty (C. C. A.)*, 133 Fed. 13, 17.

²⁹ *Carr v. Nichols*, 157 U. S. 370,

15 Sup. Ct. 640, 39 L. ed. 736; affirming *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

³⁰ *Walser v. Memphis, C. & N. W. Ry. Co.*, 19 Fed. 152.

§ 547. 1 Jud. Code § 29, 36 St. at L., 1087, re-enacting 25 St. at L., p. 433, § 3.

² *Bates v. Baltimore & O. R. Co.*, 39 Ohio St. 157; reversing *Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 7 Sup. Ct. 205, 30 L. ed. 436; and overruling *Gutwilling v. Zuberbieber*, 28 Fed. 721.

³ *Austin v. Gagan*, 39 Fed. 626, 5 L. R. A. 467. See also *Wilcox &*

allowing the bond to be filed *nunc pro tunc* as of the date of filing the petition.⁴ It seems, that, if the bond is filed before the time to remove expires, the fact that it was filed after the petition is immaterial.⁵

A bond is sufficient which follows substantially the language of the statute.⁶ It has been held when the State statutes so provide, that the initial letters "L. S." or the word "Seal" may be a sufficient substitute for the affixture of a formal seal to a document.⁷ A bond conditioned simply that the petitioner shall file in the Circuit Court "copies of all process" is insufficient.⁸ The bond must provide for the payment of costs in case of a remand.⁹ It has been held that a bond, defective in that respect, is not cured by a provision that the removing parties shall "do such other appropriate acts as by the act of Congress in that behalf are required."¹⁰ Where special bail was not originally required in the State court, the bond need contain no condition for the entry of such bail in the Federal court.¹¹ The provision for the

Gibbs Sewing Mach. Co. v. Follett, Fed. Cas. No. 17,643, 2 Flippin, 263. But see Campbell v. Wallen's Lessee, 8 Tenn. (Mart. & Y.) 266.

⁴ Ibid.

⁵ Campbell v. Wallen's Lessee, 8 Tenn. (Mart. & Y.) 266. But see Kirkpatrick v. Hopkins (Penn.), 2 Miles, 277; Best v. New York Life Ins. Co. (Ohio), 2 Cin. Super. Ct. Rep'r, 329.

⁶ Cooke v. Seligman, 7 Fed. 263; Ellis v. Atlantic & P. R. Co., 134 Mass. 338. A bond is not fatally defective because it provides for the filing of the transcript in the wrong division of the District Court of the United States, Hodge v. Chicago & A. Ry. Co., 121 Fed. 48, 57 C. C. A. 388.

⁷ G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 33, 36 C. C. A. 663.

⁸ Burdick v. Hale, Fed. Cas. No. 5,147 (7 Biss. 96). And when it misdescribed the defendant as an individual, instead of a corpora-

tion, although his name was part of that of the company. Alexandria Nat. Bank v. Willis C. Bates Co., C. C. A. 160 Fed. 839.

⁹ Torrey v. Grant L. Works, Fed. Cas. No. 14,105, 14 Blatchf. 269; Webber v. Bishop, 13 Fed. 49; Sheldrick v. Cockcroft, 27 Fed. 579. It has been held, however, that such an omission may be cured by amendment. Dennis v. Alachua County, Fed. Cas. No. 3,791, 3 Woods, 683, 688; Deford, Hinkle & Co. v. Mehaffy, 13 Fed. 481, 487.

¹⁰ Harrold v. Arrington, 64 Tex. 233. But see Cooke v. Seligman, 7 Fed. 263 (17 Blatchf. 452). A condition for the entry of an appearance in the United States court and for the payment of such costs as might accrue in consequence of the "improper removal of said cause" was held to be sufficient. Hayes v. Todd, 34 Fla. 233, 15 So. Rep. 752.

¹¹ Burok v. Taylor, 39 Fed. 581;

special bail in the bond must be made as an undertaking for the personal appearance of a party, not as a delivery bond for property attached in the State court.¹² Where special bail is given, and the bail wish to surrender the principal after the removal, such surrender must be made in open court, and not by his summary seizure and commitment to jail, according to the State law; but when a party was so committed, the Court of the United States, upon the petition of the bail, granted a writ of *habeas corpus* to bring him into court for surrender, in discharge of his bail.¹³ It has been held that, when only one of several defendants has been served, the bond need not be conditioned for the appearance of any defendant, except the one served.¹⁴ It is the proper practice to insert in the bond, a specified sum, as the penalty for a failure to comply with the condition.¹⁵ A penalty of five hundred dollars has been held to be sufficient, when the defendant had not been held to bail.¹⁶ Where the amount of the penalty was left in blank, the bond was held to be insufficient.¹⁷ It has been held that an omission of any penalty from the bond is not a ground for a remand;¹⁸ but that the State court may, for this reason, refuse its approval of the bond.¹⁹ The bond must be conditioned, that the petitioning party will take the necessary steps to affect the removal; and a bond conditioned that one, not a party to the suit, will

judgment affirmed, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; *Preston v. McNeil Lumber Co.*, 143 Fed. 555. But see *Bell v. Bell*, 3 W. Va. 183.

¹² *Ramsey v. Coolbaugh*, 13 Iowa, 164.

¹³ *Holbrook v. Seagraves*, Fed. Cas. No. 6,593 (1 Story, 546)

¹⁴ *Vandevoort v. Palmer*, 11 N. Y. Super. Ct. (4 Duer) 677.

¹⁵ Quoted with approval in *Kentucky v. Louisville Bridge Co.*, 42 Fed. 241; *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. 616; *Groton Bridge & Mfg. Co. v. American Bridge Co.*, 137 Fed. 284, 292; *Quarrier v. Baltimore & O. R. Co.*, 20 W. Va. 424.

¹⁶ *Kentucky v. Louisville B. Co.*, 42 Fed. 241; *Groton Bridge & Mfg. Co. v. American Bridge Co.*, 137 Fed. 284, 291. In New York, a penalty of one thousand dollars was held to be sufficient, in a suit to recover damages for fourteen thousand dollars, when the defendant had not been held to bail. *Blanchard v. Dwight*, 12 Wendell (N. Y.) 192.

¹⁷ *Burdick v. Hale*, Fed. Cas. No. 2,147, 7 Biss. 96; *Austin v. Gagan*, 39 Fed. 626.

¹⁸ *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. 616.

¹⁹ *Quarrier v. Baltimore & O. R. Co.*, 20 W. Va. 424.

perform the required acts, is insufficient.²⁰ The obligee should be the plaintiff and not the people.²¹ It has been held that a formal defendant, who is a nominal party and has not joined in the petition, and whose citizenship does not affect the jurisdiction, can be a surety.²² It is the better practice to have the bond sealed by the principal and surety.²³ A scrawl seal without wax, or an impression on the paper, will be sufficient, at least in a State, by the law of which such scrawl or impression is equivalent to a seal;²⁴ and when the State statute makes a bond valid without a seal,²⁵ or provides that an omission of a seal shall not affect the validity of any document, the bond is sufficient, although no formal seal is affixed to the same.²⁶ When the petitioner is named as principal, the bond may be executed in his name by his attorney at law,²⁷ and an execution of the same by him, without his client's authority, may be ratified by the client at any time before an order for a remand.²⁸ Where

²⁰ *Clippinger v. Missouri Val. Life Ins. Co.*, 26 Ohio St. 404. N. E. 55 (affirming 68 Ill. App. 666).

²¹ *Grow v. Wiman*, 3 N. Y. St. Rep. 281. Where the name of the

obligee was misspelled and the bond contained interlineations not properly authenticated; it was held that the bond, although not void, was properly rejected by the State court.

Greacen v. Beam, 15 N. J. Law (3 J. S. Green) 460. It has been held that the bond must be joint and several. *Roberts v. Carrington*, 2 N. Y. Super. Ct. (2 Hall) 694; *Hazard v. Durant*, 9 R. I. 602; but that it need not be executed by the petitioner, provided it have a principal and a sufficient surety. *Stevens v. Richardson*, 20 Blatchf. 53; s. c., 9 Fed. 191; *Public G. & S. Exch. v. W. U. Tel. Co.*, 16 Fed. 289; s. c., 11 Biss. 568; *People's Bank of Greenville v. Aetna Ins. Co.*, 53 Fed. 161. *Contra*, *Rough v. Booth* (California); 3 Pac. 91; *Weed Sewing Mach. Co. v. Smith*, 71 Ill. 204; *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, 173 Ill. 439, 51

²² *Steiner v. Mathewson*, 77 Ga. 657.

²³ *Speer on Removal of Causes*, p. 119.

²⁴ *U. S. v. Stephenson*, Fed. Cas. No. 16,386, 1 McLean, 462; *Loop v. Winters' Estate*, 115 Fed. 362, 363.

²⁵ *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 33, 36 C. C. A. 633.

²⁶ *Loop v. Winters' Estate*, 115 Fed. 362.

²⁷ *Dennis v. Alachua County*, Fed. Cas. No. 3,791, 3 Woods, 683, 687.

²⁸ *Ashe v. Union Cent. Life Ins. Co.* 115 Fed. 234. Where the surety is a corporation, an affidavit by the subscribing witness, that he saw the corporate seal affixed to the bond, and that he saw the signer "attorney in fact of said" corporation sign the same, is sufficient proof of the authority of the attorney, although no copy of the power of attorney is annexed. *Mutual*

the petitioner is a corporation, it is the proper practice to affix the corporate seal, together with proof that the person who signs and seals the same has authority to do so.²⁹

An attorney at law is a sufficient surety, if he is accepted by the State court, although a rule of the practice of such court disqualifies him.³⁰ It is safer practice to add to the bond, an affidavit of a surety, that he has sufficient property, subject to execution in the district and over and above all other debts and liabilities, to meet the penalty of the bond.³¹ It has been held: that the objection that there is no evidence of the sufficiency of the sureties is waived if not made at the time when the bond is presented to the State court;³² and that the sureties are not bound to justify until a rule or order to that effect has been made.³³

By taking subsequent steps in the case, without moving to remand; defects in the form of the bond,³⁴ or to the sufficiency of the sureties, are waived.³⁵ It is the regular and the safer practice to procure the approval of the bond by the State court. It has been held: that the State court has the power to determine whether the bond is sufficient in substance and form;³⁶ but

Life Ins. Co. v. Langley, 145 Fed. 415, 418.

²⁹ *Alexandria Nat. Bank v. Willis C. Bates Co.*, C. C. A. 160 Fed. 839, holding that, in the absence of such proof, a bond signed and sealed by the treasurer was void. *Contra*, *Fayette Title & Tr. Co. v. Maryland, P. & W. V. T. & T. Co.*, 180 Fed. 928.

³⁰ *Probst v. Cowen*, 91 Fed. 929.

³¹ *Weed Sewing Mach. Co. v. Smith*, 71 Ill. 204; *Cleveland C. C. & St. L. Ry. Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869 (affirming 41 Ill. App. 498); *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, 173 Ill. 439, 51 N. E. 55 (affirming 68 Ill. App. 666); *Godard v. Bosson*, 21 Kansas, 139.

³² *Terre Haute & I. R. Co. v. Abend*, 9 Ill. App. (9 Bradw.) 304; *Western Union Tel. Co. v. Horack*, Id. 309; *Stone v. Sargent*, 129

Mass. 503; *Bates v. Baltimore & O. R. Co.*, 39 Ohio St. 157.

³³ *Empire Transp. Co. v. Richards*, 88 Ill. 404.

³⁴ *Hervey v. Illinois Midland Ry. Co.*, 3 Fed. 707; *Grow v. Wieman*, 3 N. Y. St. Rep. 281.

³⁵ *Probst v. Cowen*, 91 Fed. 929.

³⁶ *Mix v. Andes Ins. Co.*, 74 N. Y. 53, 56. See *State ex rel. Basket v. Woodson* (Missouri), 64 S. W. 774; *Henen v. Baltimore & O. R. Co.*, 17 W. Va. 881. It was held, upon a record showing that a petition and bond were filed in the State court, and that subsequently a motion was made to strike the petition from the files, but not showing that any action was ever had on such motion, although other entries were afterwards made in the cause; that it could not be assumed that the petition and bond were never presented to the State

that its rejection cannot be arbitrary;³⁷ that the determination of the sufficiency of the sureties is largely within the discretion of the State court, to which the bond is presented;³⁸ that the refusal to approve the bond, at least when not based upon the insufficiency of the sureties, may be reviewed by the Court of the United States, when a motion for a remand is made,³⁹ or by the Supreme Court of the United States, upon writ of error to the final judgment in the case by the State court of last resort;⁴⁰ and that the objection that the signatures to the bond were not properly acknowledged or provided, if not raised in the State court, is waived.⁴¹ Where the State court had denied and refused the petition, without assigning any reason for the same, the Federal court refused to remand the cause because there was no sufficient surety to the bond, when the principals were amply responsible.⁴² The presence of the defendant in court at the time when the bond is presented is unnecessary;⁴³ and if the surety is present, the bond itself need not be presented to the State Court, but may be filed after his acceptance.⁴⁴ Technical defects in the form of the bond may be cured by amendment, after the time for a removal has expired.⁴⁵ It has been held that the State court cannot reject a bond because of a technical objection, without affording the ap-

court for approval. *Probst v. Cowen*, 91 Fed. 929.

³⁷ *Taylor v. Shew*, 54 N. Y. 75.

³⁸ *Fitz's Syndic. v. Hayden* (Louisiana), 4 Mart. (N. S.) 653; *Bell v. Lycoming Fire Ins. Co.* (New York), 3 Hun, 409, 6 Thomp. & C. 54.

³⁹ *Fiske v. Union Pac. R. Co.* Fed. Cas. No. 4,827 (6 Blatchf. 362); *Dennis v. Alachua County*, Fed. Cas. No. 3,791 (3 Woods, 683); *Groton Bridge & Mfg. Co. v. American Bridge Co.*, 137 Fed. 284; *Mutual Life Ins. Co. v. Langley*, 145 Fed. 415.

⁴⁰ *Removal Cases*, 100 U. S. 457, 25 L. ed. 593.

⁴¹ *Cooke v. Seligman*, 7 Fed. 263, 266.

⁴² *Chambers v. McDougal*, 42 Fed. 694.

⁴³ *Brown v. Crippin* (Virginia), 4 Hen. & M. 173.

⁴⁴ *Tunstall v. Parish of Madison*, 30 La. Ann. 471.

⁴⁵ *Beede v. Cheeney*, 5 Fed. 388; *Deford v. Mehaffy*, 13 Fed. 481; *Harris v. Delaware, L. & W. R. Co.*, 18 Fed. 833; *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 577; *Loop v. Winters' Estate*, 115 Fed. 362. Such have been held to be: the omission of a seal, *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. 577; *Loop v. Winters' Estate*, 115 Fed. 362; a mistake in the name of the obligee, *Harris v. Delaware, L. & W. R. Co.*, 18 Fed. 833; an omission of a penal clause, *Johnson v.*

plicant an opportunity to correct the error;⁴⁶ but that the court need not postpone the trial in order to allow a party time to amend his bond.⁴⁷ The penal sum named in the bond is a penalty, and not liquidated damages.⁴⁸ The damages for which the sureties are liable cannot exceed the costs awarded upon the remand.⁴⁹ No suit can be brought upon the same, until after the cause has been remanded. A dismissal of the case that has been removed, upon a failure of the defendant to appear and put in special bail, will prevent a suit against the surety.⁵⁰ It has been held that, in the absence of any stipulation in the removal bond that judgment may be entered upon the same in case of a breach, without the necessity of any new action, no such judgment can be entered, and the surety is not liable until after judgment in an independent suit;⁵¹ but that the Court of the United States, upon a remand, has jurisdiction to enter judgment for costs, including the attorney's docket fee, against the plaintiff.⁵²

§ 548. Order of State court upon removal. No order of the State court is necessary upon a removal.¹ Such orders

F. C. Austin Mfg. Co., 76 Fed. 616; an error in the statement of the time when the transcript shall be filed, *Chase v. Erhardt*, 198 Fed. 305. But not where there is a penal clause, an omission of the amount of the penalty, *Burdick v. Hale*, 7 Bissell, 96, Fed. Cas. No. 2,147; *Austin v. Gagan*, 5 L.R.A. 476, 39 Fed. 626. nor an omission of a provision for the payment of costs in case of a remand. *Torrey v. Grant Locomotive Works*, Fed. Cas. No. 14,105 (14 Blatchf. 269); *Webber v. Bishop*, 13 Fed. 49. *Contra*, *DeFord v. Mehaffy*, 13 Fed. 481, 487, 492.

⁴⁶ *Taylor v. Shew*, 54 N. Y. 75; *Grow v. Wilman*, 3 N. Y. St. Rep. 281; *Chase v. Erhardt*, 198 Fed. 305.

⁴⁷ *Harrold v. Arrington*, 64 Tex. 233.

⁴⁸ *Henry v. Louisville & N. R. Co.*, 91 Ala. 585, 8 South 343.

⁴⁹ *Hale v. Fallon*, 4 N. J. L. J. 308.

⁵⁰ *Welch v. Thorn*, 16 La. 188.

⁵¹ *Colburn v. Hill*, 103 Fed. 340, 43 C. C. A. 253.

⁵² *Pellett v. Great Northern Ry. Co.*, 105 Fed. 194.

§ 548. ¹ *Insurance Co. v. Dunn*, 19 Wallace, 214, 22 L. ed. 68; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354; *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,827 (6 Blatchf. 362); *Hatch v. Chicago, R. I. & P. R. Co.*, Fed. Cas. No. 6,204 (6 Blatchf. 105); *Commercial & Sav. Bank v. Corbett*, Fed. Cas. No. 3,057 (5 Sawy. 172); *Petrie v. Pennsylvania R. Co.*, Fed. Cas. No. 11,040a; *Wilson v. Western Union Tel. Co.*, 34 Fed. 562; *La Page v. Day*, 74 Fed. 977; *Eisenmann v. Delama Gold Min. Co.*, 87 Fed. 248; *Mutual Life Ins. Co. v. Langley*, 145 Fed. 415; *Duff v. Hildreth*, 67 N. E. 356, 183 Mass. 440; *Le*

have, however, been often made. It has been held that such an order, upon a petition which set forth the jurisdictional facts, should not be subsequently set aside by the court that made it.² An order by a State court denying the prayer for a removal was said to be a breach of judicial comity.³ Such an order is always disregarded by the Federal courts, which considers the question *de novo*, upon a motion for a remand.⁴

§ 549. Removal for prejudice or local influence. The practice on the removal of cases for prejudice or local influence is prescribed by the Judicial Code, as follows: "Where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the District Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said District Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any District Court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff, that he had reason to believe and did believe that, from

Roux v. Bay Circuit Judge, 46 Mich. 189, 9 N. W. 154; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Scheffer v. National Life Ins. Co., 25 Minn. 534; Richards v. Modern Woodmen of America, 85 N. W. 999, 14 S. D. 440.

² Chamberlain v. American Nat. Life & Tr. Co., 11 Hun (N. Y.) 370.

³ Chambers v. McDougal, 42 Fed. 694, 696.

⁴ Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; and authorities cited, *infra*, § 556.

prejudice or local influence, he was unable to obtain justice in said State court, the District Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto."¹

§ 549. ¹Jud. Code § 28, 36 St. at L. 1087 re-enacting 18 St. at L. 470, § 2; as amended by 24 St. at L. 552, and 25 St. at L. 433. These acts have repealed U. S. R. S., § 639. *Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 467, 30 L. ed. 436, 438; *Re Pennsylvania Co.*, 137 U. S. 451, 34 L. ed. 738; *Fisk v. Henarie*, 142 U. S. 459, 35 L. ed. 1080; *Hanrick v. Hanrick*, 153 U. S. 192, 197, 38 L. ed. 685. See *Foster's Federal Judiciary Acts*, pp. 35, 56-58. Prejudice or local influence has been thus defined: "An opinion or decision of mind formed without due examination; prejudgment; a bias, or leaning towards one side or the other of a question from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge. It is in this general sense that the removal acts use the word 'prejudice,' and it cannot be properly applied to the solemn judgment of the highest court of a State, on the mere ground that said judgment differs from that of the Supreme Court of the United States on the same question. The term 'local influence,' if not synonymous with 'prejudice,' manifestly refers to an improper influence exerted by or existing in favor of

one side or against the other, which will prevent the latter from obtaining justice in the State courts. The 'prejudice or local influence' which the law meant to make the grounds of removal may relate to the person of the litigant, or the subject-matter of the litigation; but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice." *Jackson, J., in Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. 836, 843. "Merely because a judge is to be elected by the people is no reason why this removal act of Congress should be enlarged and extended to remedy any evil that may be thought to exist in that regard." *Hammond, J., in Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. 4, 7. "The prejudice and local influence mentioned in the statute is not merely a prejudice or influence primarily existing against the party seeking a removal. It includes as well that prejudice in favor of his adversary which may arise from the fact that he is long resident and favorably known in the community. Then, there is the element of local influence, which implies that in a controversy between a stranger and resident parties having the power through wealth, business, or social relations, or personal

popularity, or all combined, to direct or materially aid in the direction of political parties, and control the selection of public officers and the distribution of party emoluments, the former may be at a great disadvantage, if not powerless to assert his right." Deady, J., in *Neale v. Foster*, 31 Fed. 53, 55. "We think it reasonable, under a statute in terms framed to protect nonresident litigants from injustice arising from prejudice and local influence, to presume that judges, dependent for their election and continuance in office upon the suffrages of a community, are disqualified to hear and determine a legal controversy between a nonresident and that community, when it is clearly shown that the community has prejudged the case, and would be likely to visit the judges, in case of an adverse decision, with its ill will." Taft, J., in *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 19. Proceedings at a public meeting of citizens of the community, where the defendant was denounced, and its attorney interrupted and shouted down, a message of the mayor, in which he criticised the defendant, are also evidence of prejudice and local influence. *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 13, 14. The following evidence was held to be insufficient; that defendant had no acquaintance in the county in which the State court would be held, that plaintiff was well-known there as a lawyer and a politician, having lived and practiced law at the county seat for many years, and having been a candidate for the office of State Attorney General; *Short v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 114; *Dennison v. Brown*, 38 Fed. 535; *Amy v. Manning*, 38 Fed. 536; s. c.,

38 Fed. 868; *P. Schwenk & Co. v. Strang*, 59 Fed. 209; in a suit by a foreign corporation, that the defendant, who is a resident of the county, had a large and influential business acquaintance in that and the adjoining counties, and that such county and the adjoining counties had had more or less litigation in their corporate capacities, which had excited a prejudice against nonresident foreign corporations, *Carson & Rand Lumber Co. v. Holtzclaw*, 39 Fed. 885, that the county newspapers had denounced the defendant to alleged fraudulent transactions, and that the Judge of the Court of Common Pleas, when a motion was heard for the appointment of a receiver of the defendant, had said: "We will see to it that they are not allowed to carry this property out of the county;" *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. 4. Removals were allowed in the following cases: Where the affidavits averred, substantially, the existence of a widespread prejudice among the citizens of the county against the defendant, a general sympathy for the plaintiff, and particularly for his father, both of whom had many friends throughout the county, and had been well-known business men, and were generally supposed to have been ruined financially through their relations with the defendant company; that the case was frequently talked about, opinions expressed in favor of the plaintiff and against the defendant; that a desire existed that the plaintiff should win his case. And the affidavits also expressed the opinion that the defendant could not, under the circumstances, obtain a fair and impartial trial

in the county." *Smith v. Crosby Lumber Co.*, 46 Fed. 819, 820; affirmed without discussing this question, C. C. A., 51 Fed. 63. Where the affidavit stated in substance: "that the Chattanooga Agricultural Works is a corporation organized in Tennessee to purchase the property of the William Anson Wood Mower & Reaper Company of Youngstown, Ohio, and it did purchase it, and that petitioners, as trustees for citizens of Ohio, and in their individual right, own a majority of the stock in the agricultural works; that many stockholders at Chattanooga are refusing to pay for the stock subscribed, because, as they say, the property of said mower and reaper company was valued at a fraudulent and unreasonable valuation, and the Chattanooga stockholders were thus defrauded by the Youngstown people; that much talk of this kind has been indulged in by those refusing to pay, and much local prejudice has been created thereby and exists against the Youngstown, Ohio, stockholders; that some of the resident stockholders have been sued for their subscriptions, and that they make the defense of fraud and misrepresentation and over-valuation, and, unwilling to leave the controversy to the decision of the judge, demand a jury to try the issue; that these issues are prepared by one of the leading solicitors in the present bill, and affiant is informed and believes that it is intended to ask for a jury in this case; that a jury will be demanded in order to appeal to their prejudice against corporations generally, as well as to their prejudices against the non-residents in this controversy with the resident stockholders." No part of this affidavit, except that in relation to the jury that would be

called, was stated on information and belief. The record showed that the resident stockholders consisted of "a large number of leading and influential men in this locality, representing various professions and lines of trade, business and manufacture." The bill further showed "from its general scope and many of its allegations and expressions, an inclination or disposition to appeal to prejudice as against the non-resident stockholders." *Hall v. Chattanooga Agricultural Works*, 48 Fed. 599, 603. Where it appeared that a few years before, "there was a bitterly contested litigation between the city of Durham and the Richmond & Danville Railway Company, of which the Southern Railway Company is the successor; that during this litigation there was almost a riot, and several of the servants of the company were arrested in consequence of this litigation; and that litigation still exists between the Southern Railway Company and the city of Durham." *Herndon v. Southern R. Co.*, 76 Fed. 398. Where the affidavits showed that there had been public denunciation of the defendant and his associates, on account of the transactions out of which the case arose; and that there had been, and still was, in the minds of a great number of citizens of the city, a strong belief that the people of the city had been defrauded in these transactions and a disposition to hold the defendant responsible therefor; and the amount at stake in the litigation was so large, in proportion to the amount of taxes annually collected in the locality, that it was argued that every taxpayer of the city and county had a direct pecuniary interest, sufficient in amount to create a presumption of bias. *Taco-*

A suit to which an alien,² or a citizen of a Territory or of the District of Columbia,³ is a party, cannot be thus removed. A plaintiff cannot remove a case for prejudice or local influence;⁴ except, perhaps, when a counterclaim has been pleaded by the defendant, in which case, when the plaintiff was a citizen of another State and such defendant a citizen of the State where the suit was brought, it was held that the former might remove the same.⁵ Upon a taxpayer's appeal from the decision of a board, allowing a claim against a county, the claimant was considered to be the plaintiff, and was, consequently, denied the right of removal.⁶ Any one of several defendants; who is a citizen and resident of another State, may remove the case for prejudice or local influence;⁷ but only when all the parties on his side of the controversy are citizens of a different State from that of all the plaintiffs,⁸ and when all the plaintiffs are citizens of the State when the suit is brought.⁹ A defendant, who is a citizen

ma v. Wright, 84 Fed. 836. "It is a singular fact that the best of men are often unconscious of any bias or prejudice, which shapes their views, and are as sincere and conscientious in denying the existence of prejudice as men can be." Jones, J., in *Montgomery County v. Cochran*, 116 Fed. 985, 1000; reversed on another point, *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182. Cf. § 372, *supra*.

² *Cohn v. Louisville, N. O. & T. R. Co.*, 39 Fed. 227; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; *Dahlonga Co. v. Frank W. Hall Merchandise Co.*, 88 Ga. 339, 14 S. E. 473.

³ *Dahlonga Co. v. Frank W. Hall Merchandise Co.*, 88 Ga. 339, 14 S. E. 473.

⁴ *Campbell v. Collins*, 62 Fed. 849.

⁵ *Carson & Rand Lumber Co. v. Holtzclaw*, 39 Fed. 578; *Walcott v. Watson*, 46 Fed. 529. But see *supra*, § 542.

⁶ *Tullock v. Webster County*, 40

Fed. 706; *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. 551; *supra*, § 542.

⁷ *Cochran v. Montgomery County*, 199 U. S. 260, 273, 50 L. ed. 182, 188; *Parker v. Vanderbilt*, 136 Fed. 246.

⁸ *Cochran v. Montgomery County*, 199 U. S. 260, 273, 50 L. ed. 182, 188; reversing *Montgomery County v. Cochran*, 116 Fed. 985; and overruling a number of decisions of the lower courts to the contrary. *Anderson v. Bowers*, 43 Fed. 321; *Wilder v. Virginia, T. & C. Steel & Iron Co.*, 46 Fed. 676; *Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co.*, 47 Fed. 836; *Terre Haute v. Evansville & T. H. R. Co.*, 106 Fed. 545; *Campbell v. Milliken*, 119 Fed. 982; *Weldon v. Fritzlen*, 128 Fed. 608, 614 (reversed, *Boatmen's Bank v. Fritzlen*, C. C. A., 135 Fed. 650). But see *Parker v. Vandervilt*, 136 Fed. 246.

⁹ *Thouron v. East Tennessee, V. & G. Ry. Co.*, 38 Fed. 673; *Rike v. Floyd*, 42 Fed. 247; *Niblock v.*

of another State, cannot remove a cause because of prejudice or local influence, in favor of other defendants, citizens of the State where the suit is brought, with whom he has a controversy, when he and some of the plaintiffs are citizens of the same State.¹⁰ It seems, that an intervenor may remove a case for prejudice or local influence under proper circumstances;¹¹ but not unless all the parties on his side of the controversy are citizens of a different State from all those upon the other.¹² The difference of citizenship must have existed at the time of the commencement of the suit as well as when the petition is filed.¹³ It is doubtful whether the restriction as to suits by assignees applies to removals for prejudice or local influence.¹⁴ A case in which the value of the matter in dispute, exclusive of interests and costs, does not exceed three thousand dollars, cannot be removed on account of prejudice or local influence.¹⁵

It is not necessary that the Federal court should be satisfied from the evidence presented, that the judge of the court in which the case was begun, and all the other judges of the State courts, who can be called to hear and decide the case, are so far affected by prejudice and local influence as to be incapable of rendering a fair decision.¹⁶ Where the defendant has the right to move

Alexander, 44 Fed. 306; *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. 836; *Gann v. Northwestern Ry. Co.*, 57 Fed. 417.

¹⁰ *Hanrick v. Hanrick*, 153 U. S. 192, 38 L. ed. 685.

¹¹ *Re Iowa & M. Construction Co.*, 10 Fed. 401, 3 McCrary, 310 (under U. S. R. S., § 639).

¹² *Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co.*, 47 Fed. 836; *Martin v. Coons*, 24 La. Ann. 169.

¹³ *Young v. Ewart*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352; *Goodnow v. Grayson*, 15 Fed. 1 (5 McCrary, 16); *Miller v. Chicago, B. & Q. R. Co.*, 17 Fed. 97 (3 McCrary, 460); *Frelinghuysen v. Baldwin*, 19 Fed. 49; *Schnadig v. Flescher*, 29 Fed. 465; *Martin v. Coons*, 24 La. Ann. 169.

¹⁴ Under the statute of 1867, it was held that it did not. *Barclay v. Levee Com'rs*, Fed. Cas. No. 977 (1 Woods, 254). See *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81. But see *Re Pennsylvania Co.*, 137 U. S. 451, 456, 34 L. ed. 738, 741.

¹⁵ *Re Pennsylvania Co.*, 137 U. S. 451, 457, 34 L. ed. 738, 741.

¹⁶ *Tacoma v. Wright*, 84 Fed. 836. See also *Whelan v. New York, L. E. & W. R. Co.*, 35 Fed. 849, 1 L.R.A. 65; *Cooper v. Richmond & D. R. Co.*, 42 Fed. 697, 8 L.R.A. 366; *Walcott v. Watson*, 46 Fed. 529. "It seems conclusively to follow, from the reasons of the removal statute, that the local judge's fitness was never intended to be inquired into on an application of this sort, and that his uprightness, firmness, or

for a change of venue, and it does not appear that the same prejudice or local influence exists in the counties to which the change can be made,¹⁷ or that the motion for such change will be denied;¹⁸ it seems that there can be no removal.¹⁹ Where

ability, or the reverse, cannot constitute an element of the 'prejudice or local influence' against which the legislation sought to guard. The plain policy of the constitution is that, when 'prejudice or local influence' is found to exist, the local judge, whether pure and fearless or impure and weak, shall not be put to the test of breasting such obstacles to justice, if the nonresident citizen properly asks for removal of the cause from the State court. It is not for the Federal court to inquire into the actual effect of 'prejudice or local influence' upon the local judge. The nonresident litigant defendant may do that. If he is not satisfied, he has a remedy by asking for removal. When the matter is brought before the Federal court, the question is not what are the qualities of the local judge, nor how far he has been affected by 'prejudice or local influence,' but whether they exist, and he is exposed to them. If these influences exist, and he is exposed to them, and they are such as naturally might tempt or influence him to favor the resident citizen in his court, the case is made out, in the constitutional sense, where the nonresident is not 'able to obtain justice' in such State court, regardless of the ability of the local judge to surmount the 'local influences,' or how they actually affect him. 'Justice' in cases of this sort should not only be above reproach, but beyond all suspicion." Jones, J., in *Montgomery County v. Cochran*, 116 Fed.

985, 993; reversed on another point, *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182. Citing *Story on the Constitution*, Vol. II, § 1691. The fact that the decisions of the State courts upon the question in controversy differ from those of the Federal courts, does not constitute prejudice or local influence. *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. 836; *Re Breckenridge*, 31 Neb. 489, 48 N. W. 142. It was held, in Nebraska, that the decisions of the State courts, refusing to allow attorneys' fees to the plaintiff, in an action upon a mortgage or promissory note, which provided for such an allowance, did not constitute prejudice or local influence; and that an attorney, who made a general affidavit of prejudice or local influence, with no other support than this, should be disciplined by a reprimand. *Re Breckenridge*, 31 Neb. 489, 48 N. W. 142. The fact that the grand jury of a county recommended that one of the defendants make no opposition to the suit is strong evidence of local prejudice. *Montgomery County v. Cochran*, 116 Fed. 985, 998; reversed on another point, *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182.

¹⁷ *Walcott v. Watson*, 46 Fed. 529, 532.

¹⁸ *Smith v. Crosby Lumber Co.*, 46 Fed. 819, 824.

¹⁹ *Southworth v. Reid*, 36 Fed. 451; *Rike v. Floyd*, 42 Fed. 247, 248; *Board of Water Com'rs v. Robbins*, 125 Fed. 656. In *Robison v.*

the judge, who would regularly sit in the counties where the prejudice and local influence were shown to exist, was authorized to hold court in any county of the State, and might have presided at the trial, in any county to which the venue could be changed; it was held that the case could be removed to the Court of the United States.²⁰ The existence of the right of appeal upon the facts to an unprejudiced State court of review is no objection to the removal.²¹ The waiver of a jury trial, and the fact that the case will be tried before a judge alone, does not prevent a removal upon this ground;²² nor does the fact that the Federal judge, who will try the cause, is a member of the community where the prejudice or local influence exists.²³ The removal may be had at any time before the

Hardy, 38 Fed. 49; the affidavit in connection with the false imprisonment alleged: That there had been four long jury trials involving the same matters before the Circuit Court of Cook County, a hearing before a justice of the peace, the grand jury, the appellate court, and the directors of the Board of Trade; that the case involved the manner of doing business of the Board of Trade; that it had caused a great deal of talk around the courthouse, and had become widely known; that many warehousemen, elevator men, brokers, commission men, and many thousands of people in and around Cook County had discussed it; and that through the influence of plaintiff and his friends, defendants believed a prejudice had grown up against them, who were non-residents. It was held that, as the Illinois statute provides that a cause may be removed for local prejudice to some other court of competent jurisdiction in some other convenient county, to which there is no valid objection, the existence of prejudice was not sufficiently shown to justify a removal to the Federal court, since the affidavit showed

that the prejudice was confined mainly, if not entirely, to Cook County. Where the right to a change of venue was in the discretion of the State court, unless there was proof that the local judges were actually prejudiced or financially interested, a removal was ordered. *Tacoma v. Wright*, 84 Fed. 836. In *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 13, there was no right to a change of venue, but the local circuit judge had the power to invite a judge from another circuit to hear the case. This was held not to cure the local prejudice.

²⁰ *Walcott v. Watson*, 46 Fed. 529, 532.

²¹ *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 14.

²² *Montgomery County v. Cochran*, 116 Fed. 985, 993; reversed on another point, *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182.

²³ *Montgomery County v. Cochran*, 116 Fed. 985, 1001; reversed on another point, *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182. See also *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 19.

trial of the suit in the State court.²⁴ What constitutes a trial has been previously explained.²⁵ The petition and other motion papers upon a removal for prejudice or local influence must be presented to the Federal court and filed in the clerk's office of the same.²⁶ It is the better practice to file also a certified copy thereof in the office of the clerk of the State court.²⁷ The motion papers must contain, in a verified petition or an affidavit, a statement of the facts which show that the prejudice or local influence exists. A statement in the language of the statute is insufficient.²⁸ It has been held: that the petition may be verified by an agent of the petitioner; and that the petitioner's own affidavit is not required when the facts are proved by the affidavits of parties, who state that they have personal knowledge of the same;²⁹ although one contains the additional averment, "that affiant knows the facts of such prejudice and local influence and makes this affidavit from such knowledge."³⁰ "The amount and manner of proof required, in each case, must be left to the discretion of the court itself."³¹ An affidavit containing nothing but general allegations, in the language of the statute has

²⁴ 25 St. at L. 433, § 2.

²⁵ *Supra*, § 543.

²⁶ *City of Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; *Malone v. Richmond & D. R. Co.*, 35 Fed. 625, 628; *Kaitel v. Wylie*, 38 Fed. 865; *Bonner v. Meikle*, 77 Fed. 485; *Rome & C. Const. Co. v. Smith*, 84 Ga. 238, 10 S. E. 728; *Mason v. Interstate Consol. St. Ry. Co.*, 170 Massachusetts, 382, 49 N. E. 645; *Blackwell v. Lynchburg & D. R. Co.*, 107 N. C. 217, 12 S. E. 133; *Baird v. Richmond & D. R. Co.*, 113 N. C. 603, 18 S. E. 698; *Williams v. Southern Bell Telephone & Telegraph Co.*, 116 N. C. 558, 21 S. E. 298. *Contra*, *Short v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 114; *Id.*, 34 Fed. 225 (holding that the affidavit may be filed in the State court and a certified copy in the Circuit Court of the United States).

²⁷ *Short v. Chicago, M. & St. P.*

Ry. Co., 33 Fed. 114; *Baird v. Richmond & D. R. Co.*, 113 N. C. 603, 18 S. E. 698.

²⁸ *Re Pennsylvania Co.*, 137 U. S. 451, 34 L. ed. 738; *Short v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 114; *Id.*, 34 Fed. 225; *Malone v. Richmond & D. R. Co.*, 35 Fed. 625; *Goldworthy v. Chicago, M. & St. P. R. Co.*, 38 Fed. 769; *Amy v. Manning*, 38 Fed. 536; s. c., 38 Fed. 868; *Hakes v. Burns*, 40 Fed. 33; *Minnick v. Union Ins. Co.*, 40 Fed. 369; *Hall v. Chattanooga Agricultural Works*, 48 Fed. 599; *P. Schwenk & Co. v. Strang, C. C. A.*, 59 Fed. 209; *Collins v. Campbell*, 62 Fed. 850.

²⁹ *Parker v. Vanderbilt*, 136 Fed. 246.

³⁰ *Niblock v. Alexander*, 44 Fed. 306.

³¹ *Re Pennsylvania Co.*, 137 U. S. 451, 457, 34 L. ed. 738, 741.

been held to be insufficient.³² An affidavit was held to be sufficient, which averred the prejudice and local influence positively, and then alleged upon information and belief the facts which were evidence of the same.³³ The affidavit should show that the same prejudice or local influence exists in all the counties in the State to which the venue could be changed.³⁴ The papers should show that the necessary difference of citizenship existed at the time when the suit was begun;³⁵ and also at the time when the application is made.³⁶ Under the Revised Statutes, an affidavit, sworn to before a suit was brought, which correctly described the same by its title and by the number subsequently given to the same, was held to be sufficient.³⁷ The petition may be verified and an affidavit made by any person acquainted with the facts. The oath of the petitioner is not required.³⁸ If made

³² *Short v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 114; *Amy v. Manning*, 38 Fed. 536; s. c., 38 Fed. 868; *Niblock v. Alexander*, 44 Fed. 306; *P. Schwenk & Co. v. Strang*, 59 Fed. 209. See *Re Pennsylvania Co.*, 137 U. S. 451, 453, 34 L. ed. 738, 739; *Collins v. Campbell*, 62 Fed. 850. *Contra*, *Cooper v. Richmond & D. R. Co.*, 8 L.R.A. 366, 42 Fed. 697; *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. 836, 841.

³³ *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 13.

³⁴ *Southworth v. Reid*, 36 Fed. 451; *Robison v. Hardy*, 38 Fed. 49; *Board of Water Com'rs v. Robbins*, 125 Fed. 656; *Parker v. Vanderbilt*, 136 Fed. 246.

³⁵ *Young v. Ewart*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352; *Miller v. Chicago, B. & Q. R. Co.*, 17 Fed. 97 (3 McCrary, 460); *Frelinghuysen v. Baldwin*, 19 Fed. 49; *Schnadig v. Flescher*, 29 Fed. 465; *Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co.*, 47 Fed. 836; *Martin v. Coons*, 24 La. Ann. 169.

³⁶ *Cochran v. Montgomery County*, 199 U. S. 260, 273, 50 L. ed. 182, 188; reversing *Montgomery County v. Cochran*, 116 Fed. 985; and overruling a number of decisions of the lower courts to the contrary. *Rike v. Floyd*, 42 Fed. 247; *Anderson v. Bowers*, 43 Fed. 321; *Wilder v. Virginia, T. & C. Steel & Iron Co.*, 46 Fed. 676; *Terre Haute v. Evansville & T. H. R. Co.*, 106 Fed. 545; *Campbell v. Milliken*, 119 Fed. 982; *Weldon v. Fritzlen*, 128 Fed. 608, 614 (reversed *Boatmen's Bank v. Fritzlen*, C. C. A., 135 Fed. 650).

³⁷ *Canal & C. Sts. R. Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226. When the date of the affidavit was more than a year prior to its presentation to the court; it was held that it would not be presumed that the local prejudice still existed. *Metropolitan Life Ins. Co. v. Ethier*, 44 Mich. 144, 6 N. W. 201, 369.

³⁸ *Dennis v. Alachua County*, 3 Woods, 683, Fed. Cas. No. 3791; *Bonner v. Meikle*, 77 Fed. 485.

without the State, it is the proper practice to have the proof of the authority of the officer taking the same authenticated, in the manner that is required by the State statutes.³⁹ If made within the State, it has been held that the State statute, concerning the form of the certificate to the jurat by the officer, must be followed.⁴⁰ Notice of the application must be given to the plaintiff.⁴¹ It is the usual and the better practice, to allow a hearing to both sides, upon the application for the removal for prejudice or local influence.⁴² It has been held that the court may, in its discretion, refuse to allow the affidavit of the defendant to be controverted.⁴³ When the original application was *ex parte*, the court may, in its discretion, allow a rehearing on affidavits by the plaintiff; but, it has been said, that it ordinarily will refuse a rehearing; ⁴⁴ "unless it is clearly made to appear that the court has been imposed upon or misled."⁴⁵ It has

³⁹ Bowen v. Chase, Fed. Cas. No. 1,720 (7 Blatchf. 255).

⁴⁰ Sutherland v. Jersey City & B. R. Co., 22 Fed. 356; Jud. Code, § 29, 36 Stat. at L. 1087.

⁴¹ P. Schwenk & Co. v. Strang, 59 Fed. 209, 8 C. C. A. 92; Herndon v. Southern Ry. Co., 73 Fed. 307; Bonner v. Meikle, 77 Fed. 485; Reeves v. Corning, 51 Fed. 774, 776; Malone v. Richmond & D. R. Co., 35 Fed. 625, 629, per Harlan, J. *Contra*, Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849, 1 L.R.A. 65; Amy v. Manning, 38 Fed. 868, 869; Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. 535; Reeves v. Corning, 51 Fed. 774; Crofts v. Southern Ry. Co., 90 Fed. 1; Montgomery County v. Cochran, 116 Fed. 985, 990; reversed on another point, 199 U. S. 260, 50 L. ed. 182. Where a notice was served three days before the appointed time, two weeks additional time was given to the party opposing the removal. Carson & Rand Lumber Co. v. Holtzelaw, 39 Fed. 578.

⁴² Reeves v. Corning, 51 Fed. 774, 776; P. Schwenk & Co. v. Strang, C. C. A., 59 Fed. 209.

⁴³ Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849, 1 L.R.A. 65; Huskins v. Cincinnati, N. O. & T. P. R. Co., 37 Fed. 504, 3 L.R.A. 545; Cooper v. Richmond & D. R. Co., 42 Fed. 697, 8 L.R.A. 366; Brodhead v. Shoemaker, 44 Fed. 518, 11 L.R.A. 567; Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. 535; Reeves v. Corning, 51 Fed. 774. *Contra*, P. Schwenk & Co. v. Strang, C. C. A., 59 Fed. 209; Maher v. Tower Hotel Co., 94 Fed. 225; Ellison v. Louisville & N. R. Co., 112 Fed. 805, 50 C. C. A. 530.

⁴⁴ Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. 535; Reeves v. Corning, 51 Fed. 774. *Contra*, Short v. Chicago, M. & St. P. Ry. Co., 34 Fed. 225, 227; Ellison v. Louisville & N. R. Co., C. C. A., 112 Fed. 805.

⁴⁵ Reeves v. Corning, 51 Fed. 774.

been held that leave to move for a rehearing must be obtained, even though the first application was *ex parte*.⁴⁶ A plea in abatement is not indispensable to raise an issue upon the allegations in the petition.⁴⁷ It was held that a plea to the petition, which simply denied the allegations as to the petitioner's belief, but not the allegations as to the existence of prejudice or local influence, did not raise an issue.⁴⁸ An order of the Federal court, granting or denying the application, must be obtained and filed in the State court.⁴⁹ The State court does not lose jurisdiction until this is done.⁵⁰ An entry of a finding of the jurisdictional facts, in the record or docket or journal of the District Court, is not sufficient.⁵¹

The transcript, including a copy of the order, must be subsequently filed in the Federal court.⁵² When there are two separable controversies in the case, the District court may remand, to the State court, such one of them as does not affect the defendant who procured the removal. Otherwise, the whole case remains in the Federal court.⁵³

§ 550. Removal of suits between citizens of the same State claiming land under grants of different States. The statute regulating the removals of suits in which there is a controversy between citizens of the same State claiming land under grants of different States, is as follows: "If in any action commenced in a State court the title of land be concerned, and

⁴⁶ *Carpenter v. Chicago, M. & St. P. Ry. Co.*, 47 Fed. 535.

⁴⁷ *Short v. Chicago, M. & St. P. Ry. Co.*, 34 Fed. 225.

⁴⁸ *County Court of Taylor County v. Baltimore & O. R. Co.*, 35 Fed. 161.

⁴⁹ *Pennsylvania Co. v. Bender*, 148 U. S. 255, 257, 258, 13 S. Ct. 591, 37 L. ed. 441, 442; *Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. 143, 12 C. C. A. 521.

⁵⁰ *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; *Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. 145, 12 C. C. A. 521; *Sparkman v. Supreme Council American Legion of Honor*, 35 S. E. 391, 57 S. C. 16.

⁵¹ *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; *Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. 145; 12 C. C. A. 521.

⁵² *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; *Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. 145, 12 C. C. A. 521.

⁵³ 18 St. at L. 470, § 2, as amended by 24 St. at L. 552 and 25 St. at L. 433. See *Whelan v. N. Y., L. E. & W. R. Co.*, 35 Fed. 849; *Haïre v. Rome R. Co.*, 57 Fed. 321, 323.

the parties are citizens of the same State, and the matter in dispute exceed the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.”¹

§ 551. Removal of proceedings against revenue officers, House officers, and persons having defenses under the revenue laws. Where any civil suit or criminal prosecution is commenced in “any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, or when any suit is commenced against any person for an account of anything done by him while an officer of either House of Congress in the discharge

§ 550. ¹ Jud. Code, § 30, re-enacting 18 St. at L. 470, § 33, as amended by 25 St. at L. 45.

of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the District Court next to be holden in the district where the same is pending, upon the petition of such defendant to said District Court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said District Court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the District Court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or another process except *capias*, the clerk of the District Court shall issue a writ of *certiorari* to the State court, requiring it to send to the District Court the record and proceedings in the cause. When it is commenced by *capias*, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the District Court, and any further proceedings, trial, or judgment therein in the State court shall be void. And if the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the

order of the District Court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the District Court that no copy of the record and proceedings therein in the State court can be obtained, the District Court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said District Court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant.”¹ It has been held: that a petition by revenue officer is sufficient, if it avers, in general language, that the suit or prosecution in the State court, which it describes, was brought against him for and on account of an act done by him under a revenue law of the United States, without specifying the facts.² Where, however, the petitioner, in addition to the general averment in the statutory language, sets forth the specific facts of the case, and it appears that they do not fall within the statute, the case will be remanded.³ The petition need not contain allegations of local prejudice.⁴ It has been held that the removal may be had when the complaint or information has been filed with a State justice of the peace, and a warrant issued by him in a prosecution for a misdemeanor,

§ 551. ¹Jud. Code, § 33, 36 St. at L. 1087, re-enacting in substance U. S. R. S., § 643, as amended 28 St. at L. 36, 18 St. at L. 371. The Reclamation Act of June 17, 1902 (ch. 1093, 32 St. at L. 388, Comp. St. Supp. 1909, p. 596), is not a revenue law within the meaning of the statute; and a suit against a Federal officer in charge of reclamation work to determine the water rights to a stream, *Twin Falls Canal Co. v. Foote*, 192 Fed. 583, or to enjoin the operation of a canal from which the water percolates on to private property, *City of Stanfield v. Umatilla River Water Users' Ass'n.*, 192 Fed. 596, cannot be removed under this section. An action of libel against individu-

als cannot be removed by them because they claim that they are revenue officers and made the statements in such capacity. *People's U. S. Bank v. Goodwin*, 160 Fed. 727. Cf. § 537, *supra*.

²To a similar effect are *dicta* in *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *Abranches v. Schell*, Fed. Cas. No. 21 (4 Blatchf. 256); *Illinois v. Fletcher*, 22 Fed. 776, 778. See also *Kain v. Texas Pac. R. Co.*, Fed. Cas. No. 7,596; *Redding v. Texas & P. R. Co.*, Fed. Cas. No. 11,630a, *Contra*, *Salem & L. R. Co. v. Boston & L. R. Co.*, Fed. Cas. No. 12,249; *Skeen v. Huntington*, 25 Ind. 510.

³*Illinois v. Fletcher*, 22 Fed. 776.

⁴*Virginia v. Felts*, 133 Fed. 85.

which is not the subject of indictment;⁵ but otherwise, the removal cannot be had before an indictment or an information in the State court.⁶ The State court does not lose jurisdiction until after service upon it, or its clerk, of the writ of *certiorari* or *habeas corpus cum causa*.⁷ An order of the Federal court directing a removal cannot be substituted for these writs, which are specified in the statute.⁸ It has been held: that when the petition is filed during vacation, and the clerk is absent, his deputy may issue the proper writ;⁹ and that the address of the writ of *certiorari* to the United States marshal of the district, commanding him to make known to the clerk of the State court the removal of the cause, and that such court is required to send a transcript of the record to the Court of the United States, is equivalent to the address of the writ to the State court.¹⁰ When the officer or other person is under arrest, the writ of *habeas corpus cum causa* should issue.¹¹ It has been held: that, when the defendant has been arrested and has given bail, the writ of *habeas corpus cum causa* may be addressed to the marshal, with a direction that a duplicate be served upon the clerk of the State court;¹² but there is a decision to the effect that, in such a case, when no application for the writ of *habeas corpus cum causa* has been made, the writ of *certiorari* may be issued.¹³ It has been held: that where there are several clerk's offices in the district, the petition should regularly be filed at the place where the next session of the Court of the United States is to be held; but that the filing of the petition in another clerk's office is not a ground for remanding the cause;¹⁴ that the truth of the allegations in the petition may be put in issue by any appropriate pleading; the filing of a plea to the jurisdiction being the better practice; and that the issue thus raised should be

⁵ Virginia v. Bingham, 88 Fed. 561.

⁶ Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. ed. 386.

⁷ Virginia v. Paul, 148 U. S. 107, 176, 13 Sup. Ct. 536, 37 L. ed. 386.

⁸ Virginia v. Paul, 148 U. S. 107, 117, 13 Sup. Ct. 536, 37 L. ed. 386.

⁹ North Carolina v. Sullivan, 50 Fed. 593. *Contra*, State v. Sullivan, 110 N. C. 513, 14 S. E. 796.

¹⁰ North Carolina v. Sullivan, 50 Fed. 593. *Contra*, State v. Sullivan, 110 N. C. 513, 14 S. E. 796.

¹¹ Virginia v. Felts, 133 Fed. 85.

¹² Virginia v. Felts, 133 Fed. 85.

¹³ North Carolina v. Sullivan, 50 Fed. 593.

¹⁴ Virginia v. Felts, 133 Fed. 85.

tried by a jury, subject to the right of the court to direct a verdict, when proper; the burden of proof on the issue resting upon the petitioner.¹⁵ The State court loses all jurisdiction of the case as soon as compliance has been made with the statutory requirements and the writ of *certiorari* or *habeas corpus cum causa* duly served.¹⁶ "Any further proceedings, trial, or judgment therein in the State court shall be void."¹⁷ The writ need not in all respects conform to the writ of *certiorari* at common law. It is sufficient if it informs the State court of proper grounds upon which the Federal District Court assumes jurisdiction and notifies the State court to make return of the record. It need not show that the clerk of the Federal court has adjudged the petition sufficient, nor need it state the grounds of the authority of the Federal court, nor the purpose of the writ.¹⁸ No order of the State or of the Federal court is necessary for a removal under this statute.¹⁹ After the removal, it is the duty of the State prosecuting attorney to continue the prosecution, and the duty of the United States District Attorney to defend the suit.²⁰ It seems that the indictment is the only record, the procurement of which is necessary, and that it is immaterial whether the original or a certified copy is transmitted.²¹ It has been suggested that, if the petitioner is unable to pay the fees of the clerk of the State court, the best course would be to supply the contents of the indictment by affidavit.²² The accused is called upon to answer to the offense as defined by the laws of the State; not to the crime as defined by a Federal statute.²³ Since the Federal court has no express statutory power to order the payment of witness fees, except in cases to which the United States is a party, special authority to the marshal to pay the fees

¹⁵ *Virginia v. Felts*, 133 Fed. 85.

¹⁶ *Virginia v. Paul*, 148 U. S. 107, 116, 13 Sup. Ct. 536, 37 L. ed. 386; *State v. Davis*, 12 S. C. 528. *Contra*, *State v. Circuit Judge*, 33 Wis. 127 (holding that the State court has jurisdiction to determine whether the case falls within the statute).

¹⁷ U. S. R. S., § 643; *North Carolina v. Kirkpatrick*, 42 Fed. 689; *State v. Davis*, 12 S. C. 528.

¹⁸ *North Carolina v. Sullivan*, 50 Fed. 593.

¹⁹ *Virginia v. Paul*, 148 U. S. 107, 117, 13 Sup. Ct. 536, 37 L. ed. 386.

²⁰ *Delaware v. Emerson*, 8 Fed. 411.

²¹ *Virginia v. Felts*, 133 Fed. 85, 89.

²² *Virginia v. Felts*, 133 Fed. 85, 89.

²³ *Georgia v. O'Grady*, 3 Woods, 496, Fed. Cas. No. 5,352; *North Carolina v. Gosnell*, 74 Fed. 734.

of defendant's witnesses should be asked from the Department of Justice, if he desires that they be paid by the Government.²⁴ It has been said that, since no procedure is prescribed by the statute, and the offense as charged is against the State law and prosecuted by the State, the State practice should be followed, at least in prosecutions for felony, in all substantive matters, such as the impaneling and charging of the jury, the number of challenges allowed, ruling upon the competency of witnesses, and the confinement of the jurors during the trial.²⁵ Where the State fails or refuses to prosecute in such a case, after its removal; it has been said that the proper course is for the Federal court to impanel a jury and direct a verdict of not guilty.²⁶ It has been said: "Inasmuch as the defendant is prosecuted for an offense against the State law, it follows, in cases of conviction, that the State should execute the sentence. If the verdict and sentence be that the defendant be hanged, the order should direct that he be delivered to the sheriff of the county from which the case came for execution of sentence. If the sentence be imprisonment, the order should direct the marshal to deliver the defendant to the sheriff for transportation to jail or the State penitentiary, as the case may be. If the State authorities decline to receive the convict, an order should be made directing the marshal to liberate him. I perceive no reason why the Federal Government should execute such sentences. If the jury merely imposes a fine on the defendant, and it is not paid, he should, I think, be delivered to the sheriff of the proper county. If the fine should be forthwith paid by the defendant, I think the clerk of this court should receive it, and pay the sum to the clerk of the court from which the prosecution was removed; reserving, however, so much of the sum as represents the costs in the Federal court, if the costs be adjudged against the defendant."²⁷ If the indictment is for any reason dismissed after the removal, the Federal court has no jurisdiction to find a new indictment for the offense against the State law.²⁸

§ 552. Removal of cases where the defense depends upon the civil rights laws. "When any civil suit or criminal

²⁴ *Virginia v. Felts*, 133 Fed. 85, 95.

²⁵ *Virginia v. Felts*, 133 Fed. 85.

²⁶ *Virginia v. Felts*, 133 Fed. 85.

²⁷ *Virginia v. Felts*, 133 Fed. 85, 95, 96, *Cf.* §§ 340, 343, 523, *supra*.

²⁸ *Bush v. Kentucky*, 107 U. S. 110, 115, 27 L. ed. 354, 356.

prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleading, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the District Court as herein provided, a certificate, under the seal of the district court, stating such failure, shall be

given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed.”¹ “When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is an actual custody on process issued by said State court, it shall be the duty of the clerk of said District Court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said District Court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.”² A suit cannot be removed under the civil rights laws, where the Constitution and laws of the State do not discriminate against the accused; and the only grievance is against wrongs committed by the State judicial tribunals in the administration of a constitutional law.³ A criminal prosecution cannot be removed because of an unjust discrimination against the defendant before the trial⁴ or upon the trial.⁵ A civil action by a State against one of its own citizens cannot be removed under the civil rights laws.⁶ It has been held that the mere presentation of a petition for a removal; under color of the statute, is not sufficient to arrest the jurisdiction of the State court when the petitioner states no valid ground for the removal.⁷ But, the Federal has the right to re-examine the petition, and if found sufficient, to issue a writ of *certiorari*

§ 552. ¹ Jud. Code, § 33, re-enacting U. S. R. S., § 641.

² U. S. R. S., § 642.

³ *Virginia v. Rives*, 100 U. S. 313, 320, 25 L. ed. 667, 670; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; (1896) *Gibson v. Mississippi*, 16 U. S. 565, 40 L. ed. 1075; (1906) *Kentucky v. Powers*, 01 U. S. 1, 50 L. ed. 633; (1890) *California v. Chue Fan* (C. C.), 42 Fed. 865; (1905) *Scott v. R. D. Kinney & Co.* (C. C.), 137 Fed. 1009. As to the right of an alien to a jury *de medietate linguæ*, see *Common-*

wealth of Kentucky v. Wendling, 182 Fed. 140.

⁴ (1896) *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075; (1890) *California v. Chue Fan* (C. C.), 42 Fed. 865.

⁵ (1896) *Murray v. Louisiana*, 163 U. S. 101, 41 L. ed. 87.

⁶ (1883) *Alabama v. Wolfe* (C. C.), 18 Fed. 836.

⁷ *Ex parte Wells*, 3 Woods, 128, Fed. Cas. No. 17,386; *Ex parte State*, 71 Alabama, 363. See *Stommel v. Timbrel*, 84 Iowa. 336. 51 N. W. 159.

or other proper writ to remove the cause.⁸ It seems that the proper practice is for the State court to order all proceedings suspended, except those which support the removal, until the Federal court has passed upon the question.⁹ After the District Court of the United States has quashed an indictment in such a cause, it has no jurisdiction to find a new indictment; but it may remand the prisoner to the custody of the State court, which may then find a new indictment.¹⁰ In case of an erroneous removal, under color of this statute, the remedy of the State is an application to the Supreme Court of the United States for the writ of mandamus, to compel the remand of the prosecution and the restoration of the custody of the accused to the State court;¹¹ and also an appeal to the same court from the order of the District Court granting the writ of *habeas corpus cum causa*, which appeal is founded upon a want of jurisdiction.¹²

§ 553. Filing of record. "In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court."¹ "In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or per-

⁸ *Ex parte* Wells, 3 Woods, 128, Fed. Cas. No. 17,386; *Ex parte* State, 71 Alabama, 363.

⁹ *State v. Dunlap*, 65 N. C. 491, 6 Am. Rep. 746.

¹⁰ *Bush v. Kentucky*, 107 U. S. 110.

¹¹ *Virginia v. Rives*, 100 U. S.

313, 25 L. ed. 667; *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. ed. 386; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633.

¹² *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633.

§ 553. ¹ Jud. Code § 35, 36 St. at L. 1087,

sons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. And the district court to which any cause shall be removable under this chapter shall have power to issue a writ of *certiorari* to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding. But if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.”^{1a} In cases where the defense depends upon the civil rights laws, “it shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon

^{1a} Ibid.; § 39, re-enacting 18 St. at L. 470.

docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for removal had been filed.”²

In proceedings against revenue officers or persons having defenses under the revenue laws, or persons who are or have been, officers of either House of Congress, the Revised Statutes provide: “When the suit is commenced in the State court by summons, subpoena, petition, or another process except *capias*, the clerk of the district court shall issue a writ of *certiorari* to the State court, requiring it to send to the district court the record and proceedings in the cause. When it is commenced by *capias* or by any other similar for mor proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. And if the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the

² Jud. Code, § 31, re-enacting U.S. R. S., § 641.

district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant."³ It has been held that an order of a State court, directing its clerk to certify the record after a removal, is not appealable.⁴ A formal motion to docket the cause, after the transcript has been filed, is not necessary.⁵ The transcript should regularly be filed by the petitioner for the removal;⁶ even when he is a revenue officer.⁷ Any party may, however, file the transcript by leave from the District Court of the United States,⁸ or even without such leave,⁹ at least when immediate action in the case, to protect his interests, is required. It is not the duty of the clerk of the State court to file the transcript.¹⁰ The transcript must contain copies of the pleadings in the cause;¹¹ of all depositions on file in the State court;¹² of all ancillary proceedings, such as garnishee proceedings in another county in the State;¹³ and also, it has been held, of all entries in the journals of the State courts.¹⁴ An omission of a small part of the record is not a ground for a remand; but may be cured upon a suggestion of a diminution of the record.¹⁵ It has been said that, where the Federal Court

³ Jud. Code, § 33, re-enacting U. S. R. S., § 643.

⁴ Mayo v. Dockery, 37 S. E. 62, 127 N. C. 1.

⁵ Glover v. Shepperd, 15 Fed. 833 (11 Biss. 572).

⁶ Hatcher's Adm'x v. Wadley, 84 Fed. 913.

⁷ Virginia v. Felts, 133 Fed. 85.

⁸ Mahoney M. Co. v. Bennett, 5 Sawy. 141; Commercial & S. Bank v. Corbett, 5 Saw. 172; Hartford & C. W. R. Co. v. Montague, 94 Fed. 227. *Contra*, K. C. & T. R. Co. v. Interstate Lumber Co., 36 Fed. 9; Hamilton v. Fowler, 83 Fed. 321.

⁹ Anderson v. Appleton, 32 Fed.

855; Mills v. Newell, 41 Fed. 529; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Coeur d'Alene Ry. & Nav. Co. v. Spalding, C. C. A., 93 Fed. 280. See Delbanco v. Singletary, 40 Fed. 177.

¹⁰ Hatcher's Adm'x v. Wadley, 84 Fed. 913.

¹¹ McBratney v. Usher, 1 Dill. 367.

¹² Miller v. Tobin, 18 Fed. 609.

¹³ Woodward Lumber Co. v. Vizard, 144 Fed. 982.

¹⁴ Probst v. Cowen, 91 Fed. 929, 931.

¹⁵ Probst v. Cowen, 91 Fed. 929.

has sessions in different places in the district, the record should be filed in the clerk's office at that place where the suit was pending in the State court, or in the nearest and most convenient place thereto.¹⁶ But it seems that the filing of the record in another office of the clerk of the Federal Court, if made in due time, is not a ground for a remand.¹⁷ If the Federal court has terms at different places within the district, it is the safer practice to file the transcript before the first, wherever the same may be held.¹⁸ It has been held that the defendant is not in default, because he postpones filing his transcript while he is awaiting the action of the State court upon his petition; although, in consequence, the filing is not made until after the statutory time.²⁰ If a reasonable excuse for the delay exists, leave is usually given to file a transcript after the statutory time.²¹ Under a previous statute, it was said that the question whether the defendant had a reasonable excuse for his delay in filing the transcript rested in the discretion of the Federal Court and would not be reviewed by appeal or writ of error.²² Misinformation from the clerk of the Federal Court as to the time when the record should be filed was held to be a

¹⁶ *Cobb v. Globe Mutual Life Ins. Co.*, Fed. Cas. No. 2,921 (3 Hughes, 452). *Contra*, *Hatcher's Adm'x v. Wadley*, 84 Fed. 913, 916 (holding that it should be filed at the place where the first session is held). See *Henderson v. Cabell*, 43 Fed. 257.

¹⁷ *Henderson v. Cabell*, 43 Fed. 257.

¹⁹ *Hatcher's Adm'x v. Wadley*, 84 Fed. 913. *Cf.* *Goldberg, Bowen & Co. v. German Ins. Co.*, 152 Fed. 831. *Contra*, *Cobb v. Globe Mutual Life Ins. Co.*, 3 Hughes, 452, Fed. Cas. No. 2,921 (holding that it is sufficient, if the record is filed before the first term held in that place in the district nearest to the clerk's office of the State court).

²⁰ *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286. See *Railroad Co. v. Koontz*, 104 U. S. 5, 16, 26 L. ed.

643, 646. *Contra*, *Cobb v. Globe Mutual Life Ins. Co.*, 3 Hughes, 452, Fed. Cas. No. 2,921.

²¹ *Bright v. Milwaukee & St. P. R. Co.*, 14 Blatchf. 214; *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *St. Paul & C. Ry. Co. v. McLean*, 108 U. S. 212, 216, 27 L. ed. 703, 704; *Kidder v. Featteau*, 2 Fed. 616 (1 McCrary, 323); *Woolridge v. McKenna*, 8 Fed. 650; *Hall v. Brooks*, 14 Fed. 113 (21 Blatchf. 167); *Winchell v. Coney*, 27 Fed. 482; *Rowell v. Hill*, 28 Fed. 433; *McGregor v. McGillis*, 30 Fed. 388; *Lueker v. Phoenix Assur. Co.*, 66 Fed. 161; *Chase v. Erhardt*, 198 Fed. 305.

²² *McLean v. St. Paul & C. Ry. Co.*, Fed. Cas. No. 8,892 (16 Blatchf. 309); affirmed *St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703.

sufficient excuse.²³ If the removing party is forced by his adversary to remain in the State court, such adversary waives the statutory requirement as to the time of filing the record, until the State court lets go of its jurisdiction.²⁴ Where but two terms of the Federal court had elapsed subsequent to the removal, and the only excuse for the delay was an affidavit by the defendants' counsel that they and the defendants had paid the clerk for the record and understood that it was the clerk's duty to transmit the same; it was held that the laches was inexcusable, and that the cause must be remanded.²⁵

§ 554. Proceedings in the State courts after the removal. The State court has the power to examine the petition and bond, in order to ascertain whether they are sufficient. If they are insufficient, it may disregard them and proceed with the suit.¹ Where the question is doubtful, it seems to be the better practice for the State court to take no action until the Federal court has passed upon a motion to remand the cause.² But its decision is subject to the review of the Federal

²³ *Burgunder v. Browne*, 59 Fed. 497.

²⁴ *Railroad Co. v. Koontz*, 104 U. S. 5, 16, 26 L. ed. 643, 646; *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286. *Contra*, *Hatcher's Adm'x v. Wadley*, 84 Fed. 913.

²⁵ *Hatchers Adm'x v. Wadley*, 84 Fed. 913.

§ 554. ¹ *Amory v. Amory*, 95 U. S. 186, 24 L. ed. 428; *Yulee v. Vose*, 99 U. S. 539, 545, 25 L. ed. 355; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 185, 24 L. ed. 427; affirming *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195.

² *Stuart v. Bank of Staplehurst*, 57 Neb. 569, 575; *Kamenicky v. Catteral Printing Co.*, N. Y. Sup. Ct. Sp. Tm., per Brady, J., N. Y. L. J. August 5 and 16, 1911. Removal Cases, 100 U. S. 457, 474, 25 L. ed. 593, 599; *Gregory v. Hartley*, 113 U. S. 742, 5 Sup. Ct. 743, 28 L. ed. 1150; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799,

29 L. ed. 962; *Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511; *Ex parte Grimball*, 61 Ala. 598; *Ex parte Mobile & O. R. Co.*, 63 Ala. 349; *Colorado Fuel & Iron Co. v. Four Mile Ry. Co.*, 29 Colo. 90, 66 Pac. 902; *Carswell v. Schiley*, 59 Ga. 17; *Indianapolis, B. & W. Ry. Co. v. Risley*, 50 Ind. 60; *McWhinney v. Brinker*, 64 Ind. 360; *State ex rel. Jumel v. Johnson*, 29 La. Ann. 399; *State v. Murray*, 47 La. Ann. 1424, 17 South. 832; *Jackson v. Alabama Great Southern R. Co.*, 58 Miss. 648; *Hickman v. Missouri, K. & T. Ry. Co.*, 151 Mo. 644, 52 S. W. 351; *Blair v. West Point Mfg. Co.*, 7 Neb. 146; *Trester v. Missouri Pac. Ry. Co.*, 23 Neb. 242, 36 N. W. 502; *Stuart v. Bank of Staplehurst*, 57 Neb. 569, 78 N. W. 298; *National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. (7 Dick.) 58, 28 Atl. 71; *Lawson v. Richmond & D. R. Co.*, 112

court.³ If the petition and bond are sufficient, it is divested of jurisdiction over the case. The State court has no power to try questions of fact arising upon the petition; but must accept the facts therein alleged as true.⁴ As soon as a sufficient

N. C. 390, 17 S. E. 169; *Bradley v. Railroad Co.*, 119 N. C. 744; *Howard v. Railway Co.*, 122 N. C. 944, 953, 954, 29 S. E. 778; *Debnam v. Southern Bell Tel. Co.*, 126 N. C. 831, 65 L.R.A. 915, 36 S. E. 269; *State v. Southern Pac. Co.*, 23 Or. 424; *Williams v. Adkins*, 46 Tenn. (6 Coldw.) 615; *Texas & P. Ry. Co. v. McAllister*, 59 Tex. 349. But see *Brodhead v. Shoemaker*, 85 Ga. 728, 11 S. E. 845; *Robertson v. Kettell*, 64 N. H. 430, 14 Atl. 78. It has been held: that it is the duty of the court, and not of the clerk, to determine the sufficiency of the bond *Southern Pac. Co. v. Harrison*, 73 Tex. 103, 11 S. W. 168; and that an acceptance and approval of the bond and petition cannot be reviewed by another judge, except upon a motion to set the same aside. *Occum Co. v. A. & W. Sprague Mfg. Co.*, 35 Conn. 496.

³ *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354; *Field v. Lownsdale*, Fed. Cas. No. 4,769 (Deady, 288); *United States v. Judges*, Fed. Cas. No. 15,501; *Taylor v. Rockefeller*, Fed. Cas. No. 13,802; *Traders' Bank v. Tallmadge*, 9 Fed. 363 (20 Blatchf. 39); *Walker v. O'Neill*, 38 Fed. 374; *Postal Tel. Cable Co. v. Southern Ry. Co.*, 88 Fed. 803; *Broadhead v. Shoemaker*, 85 Ga. 728, 11 S. E. 845; *Louisiana State Bank v. Morgan* (Louisiana), 4 Mart. (N. S.) 344; *Fornecrook Mfg. Co. v. Barnum Wire & I. Works*, 54 Mich. 552, 20 N. W. 582; *Jackson v. Alabama Great Southern R. Co.*, 58 Miss. 648; *National Union Bank v. Dodge*, 42 N. J. Law (13

Vroom.) 316; *Bell v. Dix*, 49 N. Y. 232; *Chamberlain v. American Nat. Life & Trust Co.* (New York), 11 Hun, 370; *Northern Pac. R. Co. v. McMullen*, 86 Wis. 501, 56 N. W. 629.

⁴ *Burlington, C. R. & N. Ry. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. ed. 1159; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. ed. 963; affirming 88 Tenn. (4 Pickle) 721, 13 S. W. 698; *Sinclair v. Pierce*, 50 Fed. 851; *Powers v. Chesapeake & O. R. Co.*, 65 Fed. 129; judgment affirmed, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. ed. 673; *Fidelity Trust & Safety-Vault Co. v. Newport News & M. V. Co.*, 70 Fed. 403; *Shane v. Butte Electric Ry. Co.*, 150 Fed. 801; *Stix v. Keith*, 90 Ala. 121, 7 South. 423; *Horan v. Strachan*, 82 Ga. 566, 9 S. E. 429; *Southern Ry. Co. v. Hudgins*, 107 Ga. 334, 33 S. E. 442; *Western Union Tel. Co. v. Horack*, 9 Ill. App. 309; *Van Horn v. Litchfield*, 70 Iowa, 11, 29 N. W. 783; *Byson v. McPherson*, 71 Iowa, 437, 32 N. W. 418; *Hardwick v. Kean*, 95 Ky. 563, 26 S. W. 589; *Guinault v. Louisville & N. R. Co.*, 42 La. Ann. 52, 7 South. 62; *Craven v. Turner*, 82 Maine, 383, 19 Atl. 864; *Roberts v. Chicago, St. P., M. & O. Ry. Co.*, 48 Minn. 521, 51 N. W. 478; *Town of Monroe v. Connecticut River Lumber Co.*, 66 N. H. 628, 32 Atl. 152. *Contra*, *Orosco v. Gagliardo*, 22 Cal. 83; *Delaware R. Const. Co. v. Davenport & St. P. Ry. Co.*, 46 Iowa, 406; *Burch v. Davenport & St. P. R. Co.*, 46 Iowa,

bond and petition are filed and presented, all subsequent action by the State court is void.⁵

449; *Dunne v. Burlington, C. R. & N. R. Co.*, 35 Minn. 73, 27 N. W. 448; *Disbrow v. Driggs*, 16 How. Pr. (N. Y.) 346; 8 Abb. Pr. (N. Y.) 305, note; *Miller v. Kent*, 60 How. Pr. (N. Y.) 451; *Levy v. O'Neil* (New York), 14 Abb. Prac. (N. S.) 63; *Clark v. Opdyke* (New York), 10 Hun; 383; *Southern Pac. Co. v. Harrison*, 73 Tex. 103, 11 S. W. 168.

⁵ *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354; *National S. S. Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. ed. 536; *Matthews v. Lyall*, Fed. Cas. No. 9,285 (6 McLean, 13); *U. S. v. Judges*, Fed. Cas. No. 15,501; *State v. Tiedermann*, 10 Fed. 20 (3 McCrary, 399); *Wellman v. Howland Coal & Iron Works*, 19 Fed. 51; *McCullough v. Large*, 20 Fed. 309; *North Carolina v. Sullivan*, 50 Fed. 593; *Shepherd v. Bradstreet Co.*, 65 Fed. 142; *Wills v. Baltimore & O. R. Co.*, 65 Fed. 532; *Monroe v. Williamson*, 81 Fed. 977; *Postal Tel. Cable Co. v. Southern Ry. Co.*, 88 Fed. 803; *Anderson v. United Realty Co.*, 222 U. S. 164, 56 L. ed. 144, a separable controversy; *Indianapolis, B. & W. Ry. Co. v. Riskey* (Indiana), 50 Ind. 60, Wilson, 572; *Rosenfield v. Adams Exp. Co.*, 21 La. Ann. 233; *Stanley v. Chicago, R. I. & P. R. Co.*, 62 Mo. 508; *Beery v. Chicago, R. I. & P. R. Co.*, 64 Mo. 533; *Powell v. Chicago, R. I. & P. R. Co.*, 64 Mo. 544; *Winslow v. Collins*, 110 N. C. 119, 14 S. E. 512; *Blair v. West Point Mfg. Co.*, 7 Neb. 146; *National Union Bank*

v. Dodge, 42 N. J. Law (13 Vroom.) 316; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Bell v. Dix*, 49 N. Y. 232; *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138; *Benedict v. Dixon*, 47 N. Y. Super. Ct. (15 J. & S.) 477; *Erisman v. Pidcock*, 62 How. Pr. (N. Y.) 327; *Bushnell v. Parker Bros. & Co.*, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 695; *State v. Dunlap*, 65 N. C. 491, 6 Am. Rep. 746 (after removal under the civil rights law); *Shelby v. Hoffman*, 7 Ohio St. 450; *Richardson v. Jenks* (Ohio), 47 N. E. 49; *Hall v. Stevenson*, 19 Oregon, 153, 23 Pac. 887; *Pelzer Mfg. Co. v. Sun Fire Office of London*, 36 S. C. 213, 15 S. E. 562; *Williams v. Adkins*, 46 Tenn. (6 Coldw.) 615; *Southern Pac. Ry. Co. v. Harrison*, 73 Tex. 103, 11 S. W. 168; *City of Ashland v. Whitcomb*, 121 Wis. 646, 98 N. W. 531. It has been held: that an amendment reducing the same claim below the jurisdictional amount may be allowed in the State court, after the defendant's counsel has stated to the court that he had a petition for a removal, but the paper has not been formally presented nor filed. *Mullin v. Blumenthal* (Delaware), 39 Atl. 991. It has been held: that the State court cannot set aside its order of removal after it has been made. *Livermore v. Jenks*, 11 How. Pr. (N. Y.) 479; *Chamberlain v. American Nat. Life & Trust Co.*, 11 Hun (N. Y.) 370. See *Occum Co. v. A. & W. Sprague Mfg. Co.*, 35 Conn. 496; *Winchell v. Coney*, 54 Conn. 24, 5 Atl. 354; *Thatcher v. Rankin* (New York), 2 How. Pr. (N. S.) 459. *Contra*, *Larson v. Cox*, 39 Kansas, 631, 18

It is usually held that a State court cannot review, by appeal or writ of error, an order granting a removal.⁶ No State court

Pac. 892; *Lamblin v. Cox*, 40 Kansas, 311, 19 Pac. 709; *Seth v. Chamberlaine*, 41 Md. 186; *Lalor v. Dunning*, 56 How. Pr. (N. Y.) 209; *Henderson v. Cabell*, 83 Tex. 541, 19 S. W. 287. It has been held: that, after a removal, the State court may allow the substitution of a new delivery bond for that formerly filed, and the withdrawal of the former bond (*Ramsey v. Coolbaugh*, 13 Iowa, 164); that it may modify its former order of discontinuance as to part of the defendants, so as to preserve their rights upon an injunction bond given by the plaintiff (*Benedict v. Dixon*, 47 N. Y. Super. Ct. (15 J. & S.) 379); and that, after removal, an appeal will lie from a prior order discharging a sheriff as defendant and substituting a creditor in his place. *Sunberg v. Babcock*, 61 Iowa, 601, 16 N. W. 716; *Flint v. Coffin*, C. C. A., 176 Fed. 872; *Stevenson v. Illinois Cent. R. Co.*, 192 Fed. 956. It cannot take a default, *Mattoon v. Hinkley*, 33 Ill. 208; *Stoker v. Leavenworth*, 7 La. 390; nor decide a motion to dismiss, which is already pending, *Chambers v. Illinois Cent. R. Co.*, 104 Iowa, 238, 73 N. W. 593. *Contra*, *Edgerton v. Webb*, 41 Ga. 417 (holding that a motion to dismiss a writ of error takes precedence over an application for a removal); nor appoint a receiver, *Fayette Title & Tr. Co. v. Maryland*; *P. & W. V. T. & T. Co.*, 180 Fed. 928; nor assess the damages upon an injunction bond, *Byrne v. Lathrop*, *Shea & Henwood Co.*, 60 Misc. (N. Y.) 350; nor, it has been held, grant a stay of proceedings. *Bell v. Dix*, 49 N. Y. 232. See *Vose v. Yu-*

lee, 64 N. Y. 449; affirming 4 Hun, 628; reversed 99 U. S. 539, 25 L. ed 355. But after the settlement and discontinuance of the suit in the Federal court, the State court enforced the attorney's lien, *Oishei v. Met. St. Ry. Co.*, 117 App. Div. (N. Y.) 110. It has been held: that proceedings in a State court, under an order for removal, are stayed by an appeal therefrom to a State court of review and the taking of such steps as would procure a stay of proceedings upon other appeals. *Bragg v. Tibbs*, 44 Ga. 294; *Burson v. National Park Bank*, 40 Ind. 173, 13 Am. Rep. 285. *Contra*, *Ellerman v. New Orleans, M. & T. R. Co.*, Fed. Cas. No. 4,382 (2 Woods, 120). It was held, that a defendant may raise, by answer, the question of a loss of jurisdiction by a State court, by reason of proceedings taken under the laws of the United States for a removal of the cause to the Federal courts; and upon proof of proceedings, taken regularly and in strict accordance with said laws, he is entitled to judgment adjudging all subsequent proceedings in the State court void. *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138. It has been held that the State court has not even the power to enter judgment for the costs of an appeal to the State appellate courts, and of a writ of error from the Supreme Court of the United States, which resulted in a reversal of its order denying the removal. *National S. S. Co. v. Tugman*, 82 Fed. 246, 27 C. C. A. 116.

⁶ *Akerly v. Vilas*, Fed. Cas. No. 119, 1 Abb. (U. S.) 284, (2 Biss. 110); *Ellerman v. New Orleans, M.*

has power, by appeal or otherwise, to review an order of the Federal court granting⁷ or denying a motion to remand.⁸ A refusal by a State court to allow a cause to be removed can, when the Federal court has not remanded the same, usually be reviewed by such State court of appeal as has jurisdiction over the other questions in the cause, upon an appeal from the final decree; but not by a direct appeal from such interlocutory order.⁹

If the State court continues to act in a case that has been properly removed, its final judgment may be reversed by a writ of error from the Supreme Court of the United States, after it has been affirmed by the highest court of the State in which a decision in the suit can be had;¹⁰ or the proceedings may be

& T. R. Co., Fed. Cas. No. 4,382 (2 Woods, 120); *Sunberg v. Babcock*, 61 Iowa, 601, 16 N. W. 716; *Forn-crook Mfg. Co. v. Barnum Wire & I. Works*, 54 Mich. 552, 20 N. W. 582; *Fargo v. McVicker*, 55 Barbour, 437, 38 How. Pr. (N. Y.) 1; *Kendrick's Lessee v. McQuary*, 3 Tenn. (Cooke) 479; *Durham v. Southern Life Ins. Co.*, 46 Tex. 182. *Contra*, *State ex rel. Coons v. Judge*, 23 La. Ann. 29; *Stone v. Sargent*, 129 Mass. 503; *Nevada v. Curler*, 4 Nev. 445.

⁷ *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 582, 40 L. ed. 536, 542; *May v. State Nat. Bank*, 59 Ark. 614, 28 S. W. 431; *Couer D'Alene Ry. & Nav. Co. v. Spalding*, 6 Idaho, 97, 53 Pac. 107; *Lewis v. Weidenfeld (Michigan)*, 72 N. W. 604; *Smithson v. Chicago G. W. Ry. Co.*, 71 Minn. 216, 73 N. W. 853; *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 44 Neb. 463, 82 N. W. 899; *Jifkins v. Sweetzer (Pennsylvania)*, 33 Leg. Int. 282, 2 Wkly. Notes Cas. 591; *Pioneer Sav. & Loan Co. v. Peck (Texas)*, 49 S. W. 160; *Talbott & Sons v. Planters' Oil Co.*, 12 Tex. Civ. App. 49, 33 S. W. 745; *Rio Grande W. Ry. Co. v.*

Telluride Power Transmission Co., 23 Utah, 22, 63 Pac. 995.

⁸ *Ryan v. Mathews*, 64 Iowa, 250, 20 N. W. 174.

⁹ *Western Union Tel. Co. v. Griffith*, 104 Ga. 56, 30 S. E. 420; *Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152 (holding that the removal papers must be embodied in the bill of exceptions with an exception to the decision of the court refusing the removal, or else the objection will not be considered); *Peirce v. Walters*, 164 Ill. 560, 45 N. E. 1068; *Nevada v. Curler*, 4 Nev. 445; *Shelby v. Hoffman*, 7 Ohio St. 451; *Campbell v. Wallen's Lessee*, 8 Tenn. 585; *Martin & Yerger*, 266; *Texas & P. Ry. Co. v. Davis (Texas)*, 54 S. W. 381, 55 S. W. 562 (holding that the fact that the defendant, after the denial of his petition for a removal, had successfully defended the case and insisted upon an affirmance of the judgment, did not prevent a reversal).

¹⁰ U. S. R. S., § 709; *Gordon v. Longest*, 16 Peters, 97, 10 L. ed. 900; *Kanouse v. Martin*, 14 How. 23, 14 L. ed. 310; *Kanouse v. Mar-*

stayed by an injunction of the District Court of the United States;¹¹ even, it has been held, when the State is the plain-

tin, 15 How. 198, 14 L. ed. 660; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; *Oakley v. Goodnew*, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. ed. 61; *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 582, 40 L. ed. 536, 542; *Missouri, K. & T. Ry. Co. v. Missouri R. R. & Warehouse Com'rs*, 183 U. S. 53, 46 L. ed. 78; *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078; *Cincinnati & T. Ry. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448; *State ex rel. Jumel v. Johnson*, 29 La. Ann. 399. Where the petition for the removal was reserved for the decision of the State Supreme Court, which dismissed the same and remanded the cause to the inferior court for further proceedings according to law, it was held that the Supreme Court of the United States could not review this decision until the termination of the proceedings. *Kimball v. Evans*, 93 U. S. 320, 23 L. ed. 920. Where a State court had refused to allow the removal of a cause, on the ground that the defendant has failed to prove the diverse citizenship of the parties, and has proceeded with it to a final decision; on writ of error to the State court, held, that, although the case was not within the letter of Rule 32, which provides that, where a writ of error or an appeal is brought under the act of March 3, 1875, it might be advanced on motion and heard under the rules applicable to motions to dismiss. *Burlington, C. R. & N. Ry. Co. v. Dunn*, 121 U. S. 182, 7 Sup. Ct. 1114, 30 L. ed. 885. In the absence, from the transcript, of the petition for the removal, it will be pre-

sumed that it was defective. *Bush v. Kentucky*, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. ed. 354. A defendant who makes no application for a removal cannot assign for error the refusal of the State court to permit a removal on the application of other defendants. *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; *Danville Banking & Trust Co. v. Parks*, 88 Ill. 170. Where, in a suit pending before it, a State court dissolved an injunction against proceedings to sell mortgaged premises under a foreclosure already had, and after such dissolution, the effect of which was to leave in force a final decree of sale, an alien defendant petitioned for removal into the United States Circuit Court, under the act of July 27, 1866, and the State court refused to grant that petition, the defendant not excepting, and the case was afterwards taken to the State Supreme Court upon an appeal from such decree of dissolution; held that the Supreme Court of the United States had no jurisdiction to review such decree under U. S. R. S., § 709. *Fashnacht v. Frank*, 23 Wall. 416, 23 L. ed. 81.

¹¹ *French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. ed. 497; *Warren v. Ives*, Fed. Cas. No. 17,197 (1 Flap. 356); *Wagner v. Drake*, 31 Fed. 849; *Baltimore & O. R. Co. v. Ford*, 35 Fed. 170; *Abel v. Culbertson*, 56 Fed. 329. *Contra*, *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,827 (6 Blatchf. 362); *Penrose v. Penrose*, Fed. Cas. No. 10,958 (17 Blatchf. 332); *Atlantic Coast Line*

tiff;¹² but such a motion will not ordinarily be granted before a motion to remand the cause has been decided, unless the right of removal is beyond dispute.¹³ The Supreme Court of the United States will not grant a writ of prohibition to prevent a State court from proceeding in a suit after its removal.¹⁴ It has been held that no State court will issue a writ of mandamus to compel the State court of first instance to proceed in a cause, which it has unlawfully ordered to be removed;¹⁵ or to allow the removal of a cause, the removal of which it has improperly denied.¹⁶

Accordance to the preponderance of authority, if the State court proceeds in a cause, notwithstanding an attempted removal, and the case is subsequently remanded because of want of jurisdiction, the intervening proceedings in the State court are valid.¹⁷ The defendant's time to plead is not suspended by

R. Co. v. Daniels, 175 Fed. 302, where it was claimed that there were sham defendants fraudulently joined for the purpose of defeating the jurisdiction. In Illinois Cent. R. R. Co. v. Sheegog, 217 U. S. 599, where, after a motion to remand had been denied, judgment was entered in the State court in favor of the plaintiff and in the Federal court in favor of the defendant, it was held that the Federal court had no power to enjoin the enforcement of the State judgment. Where, after the removal to a Federal court of an action for malicious prosecution on a charge of larceny, the plaintiff instituted in the State court a second action for malicious prosecution on a charge of forgery connected with the same transaction, the State statutes not permitting the consolidation of the two prosecutions; it was held that the Federal court should not grant an injunction against the prosecution of the second suit. Western Union Tel. Co. v. Cooper, 182 Fed. 710.

¹² Abeel v. Culbertson, 56 Fed. 329.

¹³ Frishman v. Insurance Cos., 41 Fed. 449; Sinclair v. Pierce, 50 Fed. 851.

¹⁴ Chesapeake & O. R. Co. v. White, 111 U. S. 134, 28 L. ed. 378.

¹⁵ Francisco v. Manhattan Ins. Co., 36 Cal. 283. *Contra*, White v. Holt, 20 W. Va. 792; Kleiber v. McManus, 66 Tex. 48, 17 S. W. 249.

¹⁶ People v. Judges of New York Common Pleas, 2 Denio (N. Y.) 197; People v. Judge, 21 Mich. 577; Nevada v. Curler, 4 Nev. 445; Shelby v. Hoffman, 7 Ohio St. 450. See *Ex parte* State Ins. Co., 50 Ala. 464. *Contra*, Brown v. Crippin (Virginia), 4 Hen. & Munf. 173.

¹⁷ First Nat. Bank of Manhattan v. King Wrought Iron Bridge Co., Fed. Cas. No. 4,803; Johnson v. Wells, Fargo & Co., 91 Fed. 1; Winchell v. Coney, 54 Conn. 24, 5 Atl. 354; Darton v. Sperry, 71 Conn. 339, 11 Atl. 1052; Edgerton v. Webb, 41 Ga. 417; Hunter v. Colquitt, 73 Ga. 44; Dahlonga Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 S. E. 473; Roberts v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 521, 51 N. W. 478; Johnson

the petition for removal if the same is defective; and upon a remand, made after the statutory time has expired, judgment by default may be entered against him.¹⁸ If a judgment by default has been thereafter entered before the remand, it will not be set aside for want of jurisdiction or irregularity;¹⁹ although, in a proper case, it may be opened on terms.²⁰ It has been said by a State court concerning the action of the Federal court upon an attempt to remove the cause: "If it shall take cognizance of the cause, no view which we might take of the impropriety of its action would affect it; and if it shall decline to take cognizance of the cause, it will thereby revive from its dormancy in the court of the State and be proceeded with as having been pending there all the time."²¹

The defendant does not waive his right to a removal by making a motion for a continuance or adjournment in the State court, when such court has claimed still to retain its jurisdiction;²² nor by then filing an answer in the State court;²³ nor by then consenting to plead and try the case at the next term of such court;²⁴ nor by consenting to try the case before a

v. Gelston, 3 N. J. Law (2 Penning.) 668; National Union Bank v. Dodge, 42 N. J. Law (13 Vroom.) 316; Hadley v. Dunlap, 10 Ohio St. 1; State v. Port Royal & A. Ry. Co., 45 S. C. 413, 23 S. E. 363; Greenlaw v. Williams, 70 Tenn. (2 Lea) 533; White v. Holt, 20 W. Va. 792. But see Tucker v. Interstate Life Ass'n, 112 N. C. 796, 17 S. E. 532; Bruce v. Gibson, 8 Ohio Dec. 319, 7 Weekly Law Bull. 94; Seeligson's Ex'rs v. Texas Transp. Co., 70 Tex. 198, 7 S. W. 708. *Contra*, Parker's Adm'r v. Clarkson, 39 W. Va. 184, 19 S. E. 431; Texas & P. Ry. Co. v. Davis (Texas), 55 S. W. 562; Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60, 63; Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446. See also Pechner v. Phoenix Ins. Co., 65 N. Y. 195; *aff'd.* as Phoenix Ins. Co. v. Pechner, 95 U. S. 185, 24 L. ed. 427.

¹⁸ Kamenicky v. Catteral Printing Fed. Prac. Vol. II.—119.

Co., N. Y. Sup. Ct. Sp. Tm., Bischoff, J., N. Y. L. J. November 22, 1911; in which the writer was counsel.

¹⁹ Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446.

²⁰ Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446, 450; Kamenicky v. Catteral Printing Co., N. Y. Sup. Ct. Sp. Tm., Bischoff, J., N. Y. L. J. Nov. 22, 1911.

²¹ Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60, 63. See also Carswell v. Schley, 59 Ga. 17, 22.

²² Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Southern Pac. Co. v. Harrison, 73 Tex. 103, 11 S. W. 168.

²³ Avent v. Deep River Lumber Co., 174 Fed. 298.

²⁴ Waite v. Phoenix Ins. Co., 62 Fed. 769 (where the stipulation was made after the State court had, subsequent to the removal, allowed an amendment of the summons, so as

referee;²⁵ nor by defending upon a subsequent trial;²⁶ nor by argument in opposition to an appeal from an order of removal by the State court which was reversed.²⁷ But where the defendant had applied to the judge of the State court for an order of removal, which was denied, and had appealed from such denial to the State Supreme Court, which affirmed the same; it was said that that decision must stand until it was reversed by the Supreme Court of the United States.²⁸ Where, after the petition and bond had been filed, a motion was made in the State court for a removal, which was denied as premature, and the defendant's counsel then asked leave to withdraw his motion for the time being, which was granted; it was held that the removal did not take effect, and that the State court retained jurisdiction, until a subsequent motion was made and granted.²⁹ It was held that the right to a removal was waived when, contemporaneously with his petition, the party obtained from the State Supreme Court a *certiorari* to remove the record thereto for review.³⁰

to reduce the sum claimed below the jurisdictional amount).

²⁵ National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87.

²⁶ Insurance Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Richards v. Incorporated Town of Rock Rapids, 31 Fed. 505; State v. Sullivan, 50 Fed. 592; McMullen v. Northern Pac. R. Co., 57 Fed. 16; Kirby v. Chicago & N. W. R. Co., 106 Fed. 551; Stix v. Keith, 90 Ala. 121, 7 South. 423; Upham v. Scoville, 40 Ark. 170; Little Rock, M. R. & T. Ry. Co. v. Iredell, 50 Ark. 388, 8 S. W. 21; Herryford v. Aetna Ins. Co., 42 Mo. 148; Erie Ry. Co. v. Stringer, 32 Ohio St. 468; Northern Pac. R. Co. v. McMullen, 86 Wis. 501, 56 N. W. 629. *Contra*, Home Ins. Co. v. Curtis, 32 Mich. 402 (where the defendant failed to call the attention of the court to

the filing of the petition and bond); Marekwald v. Oceanic Steam Nav. Co. (New York), 11 Hun, 462; First Nat. Bank of Wausau v. Conway, 67 Wis. 210, 30 N. W. 215 (where the defendant, after the denial by the State court of his petition for removal, obtained a change of venue). It has been held that, unless a copy of the petition to the trial court, or the order of removal is presented, which shows a ground therefore, the State court will proceed to trial. Auglo-American Provision Co. v. Evans, 34 Neb. 44, 51 N. W. 310.

²⁷ Mecke v. Valley T. M. Co., 89 Fed. 209, 211; Garrett v. Bonner, 30 La. Ann. 1305.

²⁸ Springer v. Howes, 69 Fed. 849, 851; approving 115 N. C. 370, 20 S. E. 469.

²⁹ Mays v. Newlin, 143 Fed. 574.

³⁰ Hudson River R. R. & T. Co. v. Day, 54 Fed. 545.

When a case, subsequent to its removal, has been discontinued or dismissed by the plaintiff,³¹ or dismissed without prejudice, or some other final disposition thereof made, which is not upon the merits;³² a new suit may be brought in the State court upon the same cause of action for the same amount,³³ or for a less sum, which is below the jurisdictional amount,³⁴ but the same case cannot be prosecuted in the State court.³⁵

It has been held: that, when a criminal prosecution has after its removal been dismissed by the Federal court for want of jurisdiction, the State court has power to declare a forfeiture of a recognizance;³⁷ but that, when a receiver was appointed by the Federal court after a removal and the case subsequently dismissed for want of jurisdiction, his bond could not be enforced in the State court.³⁸

Upon the remand of a case, the State court takes complete jurisdiction of the same.³⁹ The better practice is to present,

³¹ *Southern Ry. Co. v. Miller*, 217 U. S. 209, 54 L. ed. 732; affirming 59 S. E. 1115; *Gassman v. Jarvis*, 100 Fed. 146; *McIver v. Florida Cent. & P. R. Co.*, 110 Ga. 223, 36 S. E. 775; *Cleveland, C., C. & St. L. Ry. Co. v. Reese*, 93 Ill. App. 657; *Stephenson's Adm'r v. Illinois Cent. R. Co.*, 75 S. W. 260, 25 Ky. Law Rep. 442; *Krueger v. Chicago & A. Ry. Co.*, 84 Mo. App. 358; *Texas & P. Ry. Co. v. Maddox* (Texas), 63 S. W. 134. *Contra*, *Baltimore & O. R. Co. v. Fulton*, 53 N. E. 265, 59 Ohio St. 575.

³² *Swift & Co. v. Hoblawetz* (Kansas), 61 Pac. 969. *Contra*, *Baltimore & O. R. Co. v. Fulton*, 53 N. E. 265, 59 Ohio St. 575.

³³ *Southern Ry. Co. v. Miller*, 217 U. S. 309; affirming 59 S. E. 1115; *Gassman v. Jarvis*, 100 Fed. 146. *Contra*; *Cox v. Railroad Co.*, 68 Ga. 446; *Railroad Co. v. Fulton*, 59 Ohio St. 575, 53 N. E. 265.

³⁴ *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183; affirmed, C.

C. A., 133 Fed. 1022; *Young v. So. Bell Tel. & Tel. Co.*, 75 S. C. 326; *Hooper v. Atlanta, K. & N. Ry. Co.*, 106 Tenn. 28, 60 S. W. 607.

³⁵ *Stephenson's Adm'r v. Illinois Cent. R. Co.*, 75 S. W. 260, 25 Ky. Law Rep. 442; *Texas & P. Ry. Co. v. Huber* (Texas), 95 S. W. 568. *Contra*, *Seeligson's Ex'rs v. Texas Transp. Co.*, 70 Tex. 198, 7 S. W. 708. Where a new suit for the same cause of action was begun in the State court after the removal and before the disposition of the former case; it was held that a plea of *lis pendens* should be sustained.

³⁶ *Hollingsworth v. Southern Ry. Co.*, 57 S. C. 453, 35 S. E. 739.

³⁷ *Hunter v. Colquitt*, 73 Ga. 44.

³⁸ *Early v. Beecher*, 75 Tenn. (7 Lea) 256. See *Doane v. Corbin*, 44 Ill. App. 463.

³⁹ *Birdseye v. Shaeffer*, 37 Fed. 821; writ of error dismissed, *Birdseye v. Nickerson*, 140 U. S. 672, 11 Sup. Ct. 1017, 35 L. ed. 403; *Thacher v. McWilliams*, 47 Ga. 306;

to the State court, a certified copy of the order of the Federal court remanding the cause.⁴⁰ The fact that an appeal, which is not accompanied by a *supersedeas*, has been taken from the order of remand, does not prevent the State court from assuming jurisdiction.⁴¹ It has been held that a subsequent order of the Federal court revoking the remand does not divest the State court of jurisdiction.⁴²

After a remand, a second removal upon the same ground has been denied, although defects in the petition had been corrected so as to show the jurisdiction.⁴³

The State court has power to determine: whether to recognize pleadings that are filed in the Federal court,⁴⁴ or testimony,⁴⁵ or other proceedings there taken before the remand.⁴⁶

Germania Fire Ins. Co. v. Francis, 52 Miss. 457, 24 Am. Rep. 674; *Jackson v. Alabama Great Southern R. Co.*, 58 Miss. 648; *Johnson v. Gelston*, 3 N. J. Law (2 Penning.) 668; *Knahtla v. Oregon Short Line & U. N. Ry. Co.*, 21 Or. 136, 27 Pac. 91; *Kleiber v. McManus*, 66 Tex. 48, 17 S. W. 249.

⁴⁰ *Seeligson's Ex'rs v. Texas Transp. Co.*, 70 Tex. 198, 7 S. W. 708.

⁴¹ *Stommel v. Timbrel*, 84 Iowa, 336, 51 N. W. 159.

⁴² *Chisholm v. Propeller Tow-Boat Co. of Savannah (South Carolina)*, 38 S. E. 156. When the Federal court had set aside its order of remand at the term when the same was made, and meanwhile plaintiff had filed a copy of the first order with the State court and obtained a judgment there, which was affirmed on appeal by the Supreme Court of the State; it was held that a motion by the plaintiff, in the Federal court, to strike the cause from its docket would not be decided until the defendant had an opportunity to bring the judgment of the State court before the Supreme Court of the United States

for review. *Empire Min. Co. v. Propeller Tow-Boat Co.*, 108 Fed. 900.

⁴³ *St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703; affirming *McLean v. St. Paul & C. Ry. Co.*, Fed. Cas. No. 8,893 (17 Blatchf. 363); *Johnston v. Donovan*, 30 Fed. 395; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. 881; *Frisbie v. Chesapeake & O. R. Co.*, 59 Fed. 369; *Smith v. Travelers' Ins. Co.*, 73 Fed. 513; *Bodley v. Emporia Nat. Bank*, 38 Kan. 59, 16 Pac. 88; *Nichols v. Stevens*, 123 Mo. 96, 27 S. W. 613, 45 Am. St. Rep. 514; affirming 123 Mo. 96, 25 S. W. 578, 45 Am. St. Rep. 514. See *Gerner v. Mosher (Nebraska)*, 78 N. W. 384; *Michigan Stove Co. v. Waco Hardware Co.*, 54 S. W. 357, 22 Tex. Civ. App. 293. *Contra*, *Freeman v. Butler*, 39 Fed. 1.

⁴⁴ *Ayres v. Wiswall*, 112 U. S. 187, 193, 28 L. ed. 693, 695.

⁴⁵ *Ayres v. Wiswall*, 112 U. S. 187, 193, 28 L. ed. 693, 695; *Broadway Ins. Co. v. Chicago G. W. Ry. Co.*, 101 Fed. 507, 510.

⁴⁶ *Doane v. Corbin*, 44 Ill. App. 463.

§ 555. Proceedings in Federal court after removal.

"The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause shall then proceed in the same manner as if it had been originally commenced in the said district court."¹

"When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."² Except, in cases arising under the Constitution or laws or a treaty of the United States,³ the Federal court only acquires such jurisdiction over the parties as the State court had.⁴ After the removal, the case can be dismissed for a defect in the service of process;⁵ although the time allowed by the

§ 555. ¹Jud. Code § 29, 36 St. at L. 1087, re-enacting, 18 St. at L. 470, § 6; 25 St. at L. ch. 433.

²Ibid. § 36, re-enacting, 18 St. at L. 470, § 4. Dwyer, J.: "The provisions of sections 4 and 6 of the act of March 3, 1875, point to all such proceedings and orders as have relation to the prosecution and defense of the suit in due course and the ultimate results aimed at in the litigation." *Kirk v. Milwaukee Dust-Collector Mfg. Co.*, 26 Fed. 501, 507.

³*Kelly v. Virginia Protection Ins. Co.*, Fed. Cas. No. 7,677 (3 Hughes, 449); *Goldstein v. City of New Orleans*, 38 Fed. 626. It has been held that the Federal court can take no

jurisdiction in a suit brought in a State court under the Federal Interstate Commerce law, which has been removed because of a difference of citizenship. *Swift v. Philadelphia & R. R. Co.*, 58 Fed. 858.

⁴*Simpkins v. Lake Shore & M. S. R. R.*, 19 Fed. 802, 21 Blatchf. 554 (holding that, where the non-residence of the plaintiff was disputed, that question should not be disputed by a motion upon affidavits, but should be reserved until the trial of the action); *Goldstein v. City of New Orleans*, 38 Fed. 626.

⁵*Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517; *Wabash W. R. v. Brow*, 164 U. S. 271, 41 L. ed.

State practice for such objection has expired.⁶ State decisions in other cases upon the validity of service of process do not bind the Federal courts.⁷ Where a motion to set aside the service of process had been previously made and denied in the State court, it was held that the Federal court must follow such decision.⁸ A removal is a waiver of the objection that the suit was brought in the wrong county of the State.⁹ A general appearance and the filing of an answer, subsequent to the removal, waives an objection to the service of process,¹⁰ unless that objection has been previously raised and decided against the defendant;¹¹ but it has been held that a motion, after the removal, to require plaintiff to give security for costs does not;¹² and that a defendant, after removal, can plead a defense based upon a Federal statute, which the State court could not have entertained.¹³ It has been said: that the jurisdiction of the Federal court, after a removal, dates back to the time of the original service of process;¹⁴ and that the objection that a defendant, who was properly served with process within the State, was not served within the Federal district cannot be sustained.¹⁵ The practice after the removal must be substantially in accordance with the modes of procedure followed in the Federal courts in original cases.¹⁶ If the action is at common law, the practice in the State courts will be followed as near as may be, except in cases regulated by a Federal statute.¹⁷ If in equity, the practice will be in accordance with the Federal statutes and

431; *Nat. Acc. Ass'n v. Spiro*, 164 U. S. 281, 41 L. ed. 435; *Remington v. Central Pac. R. R. Co.*, 198 U. S. 95, 49 L. ed. 959; *Mecke v. Valley Town Mineral Co.*, 81 Fed. 114.

⁶ *Greenleaf v. National Ass'n*, 130 Fed. 209.

⁷ *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272. See § 164, *supra*.

⁸ *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889. See note 63, 64, *infra*.

⁹ *Hinds v. Keith*, 57 Fed. 10, 6 C. C. A. 231, 13 U. S. App. 222, 314.

¹⁰ *Callahan v. Hicks*, 90 Fed. 539.

¹¹ *Mecke v. Valley Town Mineral Co.*, 89 Fed. 114; *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889.

¹² *Peterson v. Morris*, 98 Fed. 48.

¹³ *Lehigh Val. R. Co. v. Rainey*, 99 Fed. 596.

¹⁴ *Owens v. Ohio Cent. R. Co.*, 20 Fed. 10.

¹⁵ *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. 349.

¹⁶ *Toucey v. Bowen*, Fed. Cas. No. 14,107 (1 Biss. 81); *Henning v. Western Union Tel. Co.*, 40 Fed. 658.

¹⁷ U. S. R. S., § 914; *supra*, § 453.

equity rules.¹⁸ A removal is analogous to a change of venue; not to an appeal.¹⁹ Since the statute says, that the copy of the record in the State court "being entered as aforesaid in said District Court of the United States, the case shall then proceed in the same manner as if it had been originally commenced in the said District Court;"²⁰ it is doubtful whether any proceeding can be taken in the Federal court until the transcript has been filed.²¹

¹⁸ Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105; Lewis v. Shainwald, 7 Sawyer, 403; Boatmen's Sav. Bank v. Wagenspack, 12 Fed. 66 (4 Woods, 130); Taylor v. Life Ass'n of America, 13 Fed. 493.

¹⁹ Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786, 787; per Mr. Justice Brewer.

²⁰ 25 St. at L. 433; § 3.

²¹ Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co., 40 Fed. 185, 186. But see Champlain Const. Co. v. O'Brien, 104 Fed. 930. Where a motion was made before the transcript was filed, it was sustained after such filing was duly made. Frank v. Leopold & Feron Co., 169 Fed. 922. See Mahoney M. Co. v. Bennett, 5 Sawyer, 141; Commercial & S. Bank v. Corbett, 5 Sawyer, 172; Hartford & C. W. R. Co. v. Montague, 94 Fed. 227. *Contra*, K. C. & T. R. Co. v. Interstate Lumber Co., 36 Fed. 9; Hamilton v. Fowler, 83 Fed. 321. See also Anderson v. Appleton, 32 Fed. 855; Mills v. Newell, 41 Fed. 529; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Coeur D'Alene Ry. & Nav. Co. v. Spalding, C. C. A., 93 Fed. 280; Delbanco v. Singletary, 40 Fed. 177; Anderson v. Appleton, 32 Fed. 855; Delbanco v. Singletary, 40 Fed. 177; Mills v. Newell, 41 Fed. 529; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Ryder v. Bate-

man, 93 Fed. 16. But see Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Kansas City & T. R. Co. v. Interstate Lumber Co., 36 Fed. 9. Mahoney M. Co. v. Bennett, 5 Sawyer, 141; C. & S. Bank v. Corbett, 5 Sawyer, 172; Kansas City & T. Ry. Co. v. Interstate L. Co., 36 Fed. 9. North American Transportation & Trading Co. v. Howells, 121 Fed. 694, 58 C. C. A. 442. *Contra*, an unreported case by Judge Dillon in the Eighth Circuit, cited in Kansas City & T. Ry. Co. v. Interstate L. Co., 36 Fed. 9, 11, holding that depositions *de bene esse* may be taken under the statutes of the United States, immediately after the removal and before the transcript is filed. Matter of Barnesville & M. R. Co., 2 McCrary, 216; Kansas City & T. Ry. Co. v. Interstate Lumber Co., 36 Fed. 9; Heidecker v. Red. Star L. S. S. Co., 32 Fed. 706; Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co., 40 Fed. 185, 186; Bryce v. Southern Ry. Co., 129 Fed. 966. *Contra*, Wilcox & Gibbs Guano Co. v. Phoenix Lns. Co. of Brooklyn, 60 Fed. 929; Phenix Ins. Co. v. Charleston B. Co., 65 Fed. 628; Torrent v. S. K. Martin L. Co., 37 Fed. 727; Dunn v. Duncan, Fed. Cas. No. 4,175, 2 W. N. Cas. (Pa.) 480, 1 Law & Eq. Rep. 402; Amsden v. Norwich U. F. Ins. Soc., 44 Fed. 515; Webster v. Crothers, 1 Dillon, 301; Kansas City & T. Ry. Co. v. Interstate Lumber Co.,

If the plaintiff refuses to plead in the Federal court when a pleading is required,²² or to comply with the rules concerning bringing the case on for trial; his case may be dismissed.²³ When the plaintiff proceeds after the removal upon the wrong side of the court, the proper practice is to sustain a demurrer

36 Fed. 9; *Judge v. Anderson*, 19 Fed. 885; *Knoblock v. Southern Ry. Co.*, 112 Fed. 926.

²² *Abranches v. Schell*, Fed. Cas. No. 21 (4 Blatchf. 256).

²³ *McMullen v. Northern Pac. R. Co.*, 57 Fed. 16. In *Dawson v. Kinney*, 144 Fed. 710, it was held that, where plaintiff refused to proceed, the Federal court could only dismiss the proceedings and remand the cause, and had no power to enter a judgment of a nonsuit and dismissal with costs to the defendant. If the suit in the State court is in its nature an action at common law, and a pleading was duly served or filed before the removal, no repleader is necessary thereafter. *Dart v. McKinney*, Fed. Cas. No. 3,583 (9 Blatchf. 359); *Merchant's & Manufacturers' Nat. Bank v. Wheeler*, Fed. Cas. No. 9,439 (13 Blatchf. 218); *Bills v. New Orleans, St. L. & C. R. Co.*, Fed. Cas. No. 1,409 (13 Blatchf. 227); *Contra*, *Martin v. Kanouse*, Fed. Cas. No. 9,162 (1 Blatchf. 149); *Brownell v. Gordon*, Fed. Cas. No. 2,039 (1 McAll. 207); *Whittenton Mfg. Co. v. Memphis & O. R. P. Co.*, 19 Fed. 273. It has been held that, whether or not a new declaration should be filed, is a question of practice and not a subject for error. *Aetna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810. When the suit is in its nature equitable, but the complaint follows the practice authorized by a State statute, it is the better practice for the plaintiff to replead in accordance

with the Federal equity rules; although, if his pleading follows the usual form of a bill in equity, that will not be required. *Gridley v. Westbrook*, 23 How. 503, 16 L. ed. 412; *Toucey v. Bowen*, Fed. Cas. No. 14,107 (1 Biss 81); *Akerly v. Vilas*, Fed. Cas. No. 120 (3 Biss. 332); *Leo v. Union Pac. Ry. Co.*, 17 Fed. 273; *Phelps v. Elliott*, 26 Fed. 881; 883; *Durgan v. Redding*, 103 Fed. 914; *Dancel v. United Shoe Machinery Co.*, 120 Fed. 839; *Dillon on Removal of Causes*, Fourth Edition, § 47, p. 76. *Contra*, *Boston Belting Co. v. Judson*, Fed. Cas. No. 1,674. But see *Hodder v. Kentucky & G. E. Ry. Co.*, 7 Fed. 793; *Thornton N. Motley Co. v. Detroit Steel & S. Co.*, 130 Fed. 396. When, however, it does not, and the relief cannot be afforded, except on the equity side of the court, a repleader will be ordered. *Whittenton Mfg. Co. v. Memphis & O. R. P. Co.*, 19 Fed. 273; *Perkins v. Hendryx*, 23 Fed. 418; *Fletcher v. Burt, C. C. A.*, 126 Fed. 619; *Thornton N. Motley Co. v. Detroit Steel & S. Co.*, 130 Fed. 396. It has been held: that Equity Rule concerning a stockholder's bill does not apply to a suit brought in a State court and subsequently removed; *Earle v. Seattle L. S. & E. Ry. Co.*, 56 Fed. 909; *Evans v. Union Pac. Ry. Co.*, 58 Fed. 497. But see *Venner v. Great Northern Ry. Co.*, 153 Fed. 408, affirmed on question of jurisdiction, 209 U. S. 24, 52 L. ed. 666; *Hitchings v. Cobalt Central Mines Co.*, 189 Fed. 241; that,

where the State practice permits affirmative relief by an answer without a cross-bill, an answer seeking affirmative relief, filed before a removal, will be sufficient, and a cross-bill need not be filed in the Federal court; *Detroit v. Detroit City Ry. Co.*, 55 Fed. 569, 575, and that, in an action at law, a legal counterclaim, which might have been interposed in the State court, may be pleaded in the Court of the United States after the removal. *Frank v. Chetwood*, Fed. Cas. No. 5,051. See *Partridge v. Phoenix Life Ins. Co.*, 15 Wall. 573, 21 L. ed. 229 (a case of set-off). When the suit in the State court unites legal and equitable grounds of relief, *Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. ed. 569; *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,829 (8 Blatchf. 299); *La Mothe Mfg. Co. v. National T. Works Co.*, 15 Blatchf. 432; *Whittenton Mfg. Co. v. Memphis & O. R. Packet Co.*, 19 Fed. 273; *Perkins v. Hendryx*, 23 Fed. 418; *Pilla v. German School Ass'n*, 23 Fed. 700; appeal dismissed, 131 U. S. 443, 9 Sup. Ct. 801, 33 L. ed. 216; *Phelps v. Elliott*, 26 Fed. 881 (23 Blatchf. 470); *Lacroix v. Lyons*, 27 Fed. 403; *Schneider v. Foote*, 27 Fed. 581 (23 Blatchf. 511), or defense, *Northern Pac. R. Co. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. ed. 513; *Hodder v. Kentucky & G. E. Ry. Co.*, 7 Fed. 593; affirming decree, *Wright v. Kentucky & G. E. Ry. Co.*, 117 U. S. 72, 6 Sup. Ct. 697, 29 L. ed. 821; *Re Foley*, 76 Fed. 390; *Pettus v. Smith*, 117 Fed. 967, as authorized by the State statute; it should be recast into two cases after the removal: In such a case a repleader is necessary. *Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. ed. 569; *La Mothe Mfg. Co. v. National Tube Works Co.*, Fed. Cas. No. 8,033;

Lacroix v. Lyons, 27 Fed. 403; *Pettus v. Smith*, 117 Fed. 967. Where, after the removal of a bill in equity, a declaration was filed in the Federal court asking relief at law against some, but not all, of the defendants, which was within the allegations of the original complaint; it was held that it should not be stricken from the files, nor should the complainants be compelled to elect whether to proceed at law or in equity. *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,829 8 Blatchf. 299. *Of. § 368, supra.* A failure to replead, however, does not make the judgment or decree void. *Hatcher v. Hendrie & B. Mfg. & Supply Co., C. O. A.*, 133 Fed. 267, 272. When, by the repleader, the case is thus divided into an action at law and a suit in equity, neither of them is considered to constitute a new suit; but each is treated as a continuation of that which was removed; and, for a defect in jurisdiction, the whole cause will be remanded instead of dismissed. *Utah-Nevada Co. v. De Lamar*, 145 Fed. 505. Where, after the removal of an action at law upon an insurance policy, the Federal court sustained a demurrer and granted leave to the plaintiffs to file a bill in equity for a reformation of the contract and continued the action at law pending the proceedings in equity; it was held that this order, although made six months after the loss occurred, was not contrary to the provision of the policy, that no action could be maintained unless brought within such period. *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. 7, 3 L.R.A. 189. Where, after the removal of a case with a complaint praying both damages and equitable relief, a bill in equity was filed therein for the equitable relief and

to his pleading, without prejudice to his right to replead on the other side.²⁴ Where the plaintiff has erroneously elected to proceed in the cause at common law, or in equity, and his only remedy was on the other side of the court, the Circuit Court of Appeals, when reversing for that reason a judgment in

tried; it was held that the action at law was not abandoned by the repleader, but remained on the common-law side of the court. *Schneider v. Foote*, 27 Fed. 581 (23 Blatchf. 511). The necessity of a repleader may be raised by a motion for a repleader, *Whittenton Mfg. Co. v. Memphis & O. R. P. Co.*, 19 Fed. 273, or by a demurrer. *Benedict v. Williams*, 11 Fed. 547; *Perkins v. Hendryx*, 23 Fed. 418. But, if these grounds of objection are not specified, a demurrer to a complaint, which follows the State practice, will, after a removal, be overruled, when the complaint states in substance facts which entitle the complainant to relief in equity; although it omits the statement of citizenship, and the prayer for relief, which are required by the Federal equity rules. *Dancel v. United Shoe Machinery Co.*, 120 Fed. 839. If no repleader is had, so much of the pleadings as present matters not cognizable on that side of the court to which the case is removed will be stricken out or disregarded, without prejudice to its presentation in a new suit. *No. Pac. R. Co. v. Paine*, 119 U. S. 561, 563, 30 L. ed. 513, *La Mothe Mfg. Co. v. Nat. T. Works Co.*, 15 Blatchf. 432; *Perkins v. Hendryx*, 23 Fed. 418; *Phelps v. Elliott*, 26 Fed. 881; *Lacroix v. Lyons*, 27 Fed. 403.

²⁴ *Perkins v. Hendryx*, 23 Fed. 418, 419; *Pilla v. German School Ass'n*, 23 Fed. 700; appeal dismissed, 131 U. S. 443, 9 Sup. Ct.

801, 33 L. ed. 216; *Bacon v. Felt*, 38 Fed. 870. But where, after the final hearing of a suit prosecuted in equity after the removal, the bill was dismissed "without prejudice to any other appropriate remedy for relief, which complainant might be advised to pursue," the decree was affirmed. *Union Stock Yards Co. v. Nashville Packing Co.*, 140 Fed. 701, 702, 706, 72 C. C. A. 195. It has been held; that a suit to enforce a mechanic's lien must, after removal, be tried upon the equity side of the court, although the State practice permitted it to be maintained as an action at law; *Hooven, Owens & Rentschler Co. v. Featherstone*, 99 Fed. 180; that a suit upon a contract, to pay only royalties for the use of a patent, must, when brought against the assignee of the patent, who has assumed the contract, be continued upon the equity side; *Goodyear Shoe Machinery Co. v. Dancel*, C. C. A., 119 Fed. 692; but that an action by a payee of notes upon a covenant of a vendee of the land, for which they were given in payment made with the vendor to pay the same, must be continued at common law; *North Alabama Development Co. v. Orman*, 55 Fed. 18, 5 C. C. A. 22; affirming judgment, *Orman v. North Alabama Development Co.*, 53 Fed. 469; and that a suit upon a chose in action by an assignee must, after removal, be continued upon the equity side; *Benedict v. Williams*, 10 Fed. 208, 20 Blatchf. 276. But

his favor, may give him leave to apply below for permission to amend and to proceed in equity,²⁵ or at common law,²⁶ as the case may be; provided, at least, that the objection was not taken below; but when such objection was duly taken in the court of first instance and there sustained, and the plaintiff refused to amend, it has been held that this could be done.²⁷ No stipulation of the parties can make a case cognizable on either side of the court, to which it does not properly belong.²⁸ Where a claim for damages was blended with one for equitable relief, and the latter was not removable because ancillary to a previous proceeding in the State court; it was held that, on a motion to remand the whole case must be remanded, and that the Federal court could not upon such motion order a repleader and compel the claim for damages to be separately stated, so that it might retain jurisdiction thereof on its common-law side.²⁹

see *Thompson v. Central Ohio R. R. Co.*, 6 Wall. 134, 18 L. ed. 765.

²⁵ *Dancel v. Goodyear Shoe Machinery Co.*, 137 Fed. 157; C. C. A., 119 Fed. 692; *certiorari* denied, 202 U. S. 619, 50 L. ed. 1174.

²⁶ *Bacon v. Felt*, 38 Fed. 870; *McConnell v. Provident Life Assur. Soc.*, 69 Fed. 113; 16 C. C. A. 172 (where the lower court was directed to permit the plaintiff thus to reframe his pleading).

²⁷ *Fletcher v. Burt*, C. C. A., 126 Fed. 619.

²⁸ *North Alabama Development Co. v. Orman*, 55 Fed. 18, 5 C. C. A. 22; affirming judgment, *Orman v. North Alabama Development Co.*, 53 Fed. 469.

²⁹ *Ladd v. West*, 55 Fed. 353. It has been held: that, after removal, plaintiff may amend his declaration by inserting new counts, for the same cause of action as that contained in the original counts; *West v. Smith*, 101 U. S. 263, 25 L. ed. 809, that he may change the original cause of action into another; such as one assigned by a citizen of the same State as the plaintiff, which

could not have been originally brought in the Federal court; *Green v. Custard*, 23 How. 484, 16 L. ed. 471, that, where the bill as originally filed did not state a case within the jurisdictions of the State court, it could not, subsequent to its removal, be amended; *Adams v. Heckscher*, 80 Fed. 742, but that, where the plaintiff's original pleading stated a case within the jurisdiction of the State court, and failed to allege facts sufficient to constitute a cause of action, and after a removal the service of the summons was set aside, the Federal court might permit the plaintiff to file an amended petition; and that a new summons might issue under the same. *United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County*, C. C. A., 145 Fed. 144. It has been held: that a plaintiff cannot, after a removal, so amend his pleading as to change a suit in equity for the cancellation of a contract into an action at law for deceit in procuring such a contract; *Blalock v. Equitable Life Assur. Soc'y*, 73 Fed. 655. But that an action at law to recov-

After a petition for a removal has been duly presented, an amendment bringing in new parties,³⁰ or the intervention of new parties, whose citizenship is the same as that of the plaintiffs,³¹ or whose claims are less than the jurisdictional amount;³² whether such new parties are made plaintiffs,³³ or defendants,³⁴ or altering the original writ in a proper case,³⁵ will not defeat the jurisdiction; even though such new parties file cross-bills against others of the defendants and strangers to the suit, whom it is then also necessary to make defendants.³⁶ It has been held that, after removal, a cross-bill may be filed setting up matter ancillary to the original suit; although, because the defendant's assignor is a citizen of the same State as complainant, such cross-bill could not have been begun in the Federal court as an original suit.³⁷

If, however, the parties added subsequent to the removal were indispensable to the maintenance of the original suit, the

er the arrears of an annuity that had previously accrued may be changed by amendment into a suit in equity to compel specific performance by one who has assumed a contract to pay such annuity, with a decree for the payment of the arrears that accrued prior to its entry, and a direction that the installments subsequently accruing shall also be paid and enforced by periodical judgments at the foot of such decree. *Dancel v. Goodyear Shoe Machinery Co.*, 137 Fed. 157, C. C. A., 119 Fed. 692; *certiorari* denied, 202 U. S. 619, 50 L. ed. 1174.

³⁰ *Stewart v. Dunham*, 115 U. S. 61, 64, 29 L. ed. 329, 330; *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. ed. 888; *Probst v. Cowen*, 91 Fed. 929. *Contra*, *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,829 (8 Blatchf. 299).

³¹ *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. ed. 329; *Graham v. Boston, H. & E. R. Co.*, 14 Fed. 753; *Clarke v. Eureka County Bank*, 116 Fed. 534. But

see *Ward v. Arredondo*, Fed. Cas. No. 17,148 (1 Paine, 410).

³² *Handley v. Stutz*, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. ed. 706; *New York Silk Mfg. Co. v. Second Nat. Bank*, 10 Fed. 204; *National Bank of Commerce v. Allen*, 90 Fed. 545; *Bidwell v. Huff*, 103 Fed. 362; *Clarke v. Eureka County Bank*, 116 Fed. 534.

³³ *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. ed. 329; *Graham v. Boston, H. & E. R. Co.*, 14 Fed. 753. But see *Forest Oil Co. v. Crawford*, 101 Fed. 849, 42 C. C. A. 54.

³⁴ *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. ed. 888.

³⁵ *Stone v. Speare*, 175 Fed. 584.

³⁶ *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 8 Fed. 97 (3 McCrary, 95); *Lilienthal v. McCormick*, 117 Fed. 89, 54 C. C. A. 475. See *Jackson & Sharp Co. v. Pearson*, 60 Fed. 113.

³⁷ *Brooks v. Laurent*, 98 Fed. 647, 39 C. C. A. 201.

case should be remanded after they have been brought in by amendment.³⁸ Where omitted parties, who were entitled to be heard, applied for leave to intervene, the court made an order requiring the plaintiff to amend his bill and make them defendants on pain of remanding the cause to the State court or dismissing it, as the defendants might elect.³⁹

Where the removal was made by one only of the defendants, because of a separable controversy; it was held that, after an amendment dismissing him,⁴⁰ or a discontinuance as to him,⁴¹ or an amendment which left nothing in the case that affected his rights;⁴² there should be a remand, even though he had previously been allowed by the State court to intervene.⁴³ A plaintiff, who is a receiver of a State court, is not required to show its authority for such dismissal, before the Federal courts will entertain his motion;⁴⁴ nor can the dismissal be prevented by a motion made by the defendant, while it is pending, for leave to file an amended answer pleading a set-off.⁴⁵ A reduction of the amount claimed, when made subsequent to the removal, will not justify a remand,⁴⁶ unless it is clearly proved that the

³⁸ *Perry v. Clift*, 32 Fed. 801.

³⁹ *Hunt v. Fisher*, 29 Fed. 801, 805.

⁴⁰ *Texas Transportation Co. v. Seeligson*, 122 U. S. 519, 30 L. ed. 1150; *Youtsey v. Hoffman*, 108 Fed. 699; *Anderson v. United Realty Co.*, 222 U. S. 164, 56 L. ed. 144.

⁴¹ *Texas Transp. Co. v. Seeligson*, 122 U. S. 519, 7 Sup. Ct. 1261, 30 L. ed. 1150; *Ryan v. Young*, Fed. Cas. No. 12,188 (9 Biss. 63); *Bacon v. Felt*, 38 Fed. 870; *Bane v. Keefer*, 66 Fed. 610.

⁴² *Iowa Homestead Co. v. Des Moines Nav. & R. R. Co.*, 8 Fed. 97.

⁴³ *Iowa Homestead Co. v. Des Moines Nav. & R. R. Co.*, 8 Fed. 97.

⁴⁴ *Youtsey v. Hoffman*, 108 Fed. 699.

⁴⁵ *Youtsey v. Hoffman*, 108 Fed. 699.

⁴⁶ *Kanouse v. Martin*, 15 How.

198, 14 L. ed. 660; *Wright v. Wells*, Fed. Cas. No. 18, 101 (Pet. C. C. 220); *Ladd v. Tudor*, Fed. Cas. No. 7,975 (3 Woodb. & M. 325); *Roberts v. Nelson*, Fed. Cas. No. 11,907, 8 Blatchf. 74 (40 How. Prac. 387); *McGinnity v. White*, Fed. Cas. No. 8,802 (3 Dill. 350); *Zinkeisen v. Hufschmidt*, Fed. Cas. No. 18,214; *Maine v. Gilman*, 11 Fed. 214; *Waite v. Phoenix Ins. Co.*, 62 Fed. 769; *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, 29 C. C. A. 438; *Peterson v. Chicago, M. & St. P. Ry. Co.*, 108 Fed. 561; *Cumberland Gap Building & Loan Ass'n v. Wells* (Georgia), 25 S. E. 246; *Louisville & N. R. Co. v. Roehling*, 11 Ill. App. (11 Bradw.) 264; *Chicago, R. I. & P. Ry. Co. v. Stone & Bronnenberg* (Kansas), 79 Pac. 655; *Geiger v. Union Mut. Life Ins. Co.* (New York), 1 City Ct. R. 237. *Contra*, *Spiers v. Halsted*, 74 N. C. 620.

original sum was by mistake excessive.⁴⁷ When the permanent residence and citizenship of a party, at a date shortly before the beginning of the suit, is proved; the presumption is that the same continue until there is proof of a change.⁴⁸ It has been held: that, when a case involving several questions has been removed, because one of them arises under the Constitution or laws of the United States, after a decision of the court disposing of the Federal question, there should be a remand;⁴⁹ but that a Federal question, which is not frivolous, cannot be decided upon a motion to remand.⁵⁰ A subsequent change of citizenship,⁵¹ or the consolidation of a foreign with a domestic corporation, will not defeat the jurisdiction.⁵² All orders, attachments, sequestrations, bonds, undertakings, security, and other proceedings, given or taken in the State court before the removal remain in force until they are set aside, dissolved or modified by the Federal court.⁵³ An attachment levied upon the property of a non-resident under process of the State court, in accordance with the statutes of the State, will be upheld and enforced by the Federal court after removal, although the Federal court had no jurisdiction to levy such an attachment originally.⁵⁴ In such a case the Federal court may serve process upon the non-resident by publication, in accordance with the

⁴⁷ *W. T. Hughes & Co. v. Peper Tobacco Warehouse Co.*, 126 Fed. 687.

⁴⁸ *Heath v. Austin*, Fed. Cas. No. 6,305 (1 Blatchf. 320); *Collins v. City of Ashland*, 112 Fed. 175.

⁴⁹ *Hamblin v. Chicago, B. & Q. R. Co.*, 43 Fed. 401.

⁵⁰ *Lowry v. Chicago, B. & Q. R. Co.*, 46 Fed. 83.

⁵¹ *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. ed. 1081, 19 S. Ct. 817, 75 Fed. 433, 22 C. C. A. 378; *Tug River Coal & Salt Co. v. Brigel*, 86 Fed. 818; *Haracovic v. Standard Oil Co.*, 105 Fed. 785; *Collins v. Ashland*, 112 Fed. 175.

⁵² *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. ed. 1081, 19 S. Ct. 817,

75 Fed. 433, 22 C. C. A. 378; *Chicago, I & N. P. R. Co. v. Minnesota & N. W. R. Co.*, 29 Fed. 337.

⁵³ *New England Screw Co. v. Bliven*, Fed. Cas. No. 10,156 (3 Blatchf. 240); *Clarke v. Chase*, Fed. Cas. No. 2,845 (Brunner Col. Cas. 638); *Barney v. Globe Bank*, Fed. Cas. No. 1,031 (15 Blatchf. 107); 18 St. at L., ch. 137, p. 470; quoted *supra*; *Carpenter v. New York & N. H. R. Co.* (New York), 11 How. Prac. 481; *Martin v. Thompson* (South Carolina), 3 McCord, 167.

⁵⁴ *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138; *Crocker Nat. Bank v. Pengerstecher*, 44 Fed. 705; *Vermilya v. Brown*, 65 Fed. 149; *supra*, § 369. See *Purdy v. Wallace Muller & Co.*, 81 Fed. 513.

State statute. In case of his failure to appear, however, no personal judgment can be entered against him; but the judgment entered can be enforced only against the property attached.⁵⁵ Where a suit in equity had been begun by a writ of foreign attachment in a State court; it was held, after a removal, that the State practice should be followed, which authorized a rule directing the plaintiffs to show cause of action and why the attachment should not be dissolved.⁵⁶ The Federal court may authorize its marshal to take, into his custody, property held by the sheriff under a writ of the State court issued before the removal.⁵⁷ But where the removed cause was a suit in equity to enjoin the enforcement of, and to set aside, a judgment in a suit in the State court that had not been removed, in which the sheriff held the proceeds of attached property; it was held that the Federal court had no jurisdiction over the fund in the hands of the sheriff.⁵⁸ It has been held that, after removal, the Federal court may set aside an attachment upon the ground that the State court had no power to grant the same.⁵⁹ But when the State court had, upon a hearing, sustained the validity of the attachment or garnishment of a judgment of a Federal court; the Court to which the case was removed, declined to review the propriety of such order; but suggested that the Federal court, whose judgment was thus garnished, might properly disregard the writ.⁶⁰ Where the State attachment law provided that, before the defendant's appearance, all creditors who applied to be made parties should share *pro rata* in the fund, and that, after such appearance, all other creditors should be deprived of a share in the fund; it was held that, after the removal of the attachment suit to the Federal court, the latter

⁵⁵ Clark v. Wells, 203 U. S. 164.

⁵⁶ Commonwealth Trust Co. v. Frick, 120 Fed. 688.

⁵⁷ Friedman v. Israel, 26 Fed. 801. In a replevin suit, Mr. Justice Nelson suggested that the property held by the State sheriff might be sold under the direction of the Federal court and the proceeds deposited in its registry. Dennistown v. Draper, 5 Blatchf. 336, Fed. Cas. No. 3,804. It has been held that where the

plaintiff succeeds in such a case, the fees for the attachment should be equally divided between the sheriff and the marshal. Duryee v. International Mach. & Eng. Co., D. C., S. D. N. Y., January 1912.

⁵⁸ Smith v. Schwed, 9 Fed. 483.

⁵⁹ Corbitt v. Farmers' Bank, 114 Fed. 602.

⁶⁰ Loomis v. Carrington, 18 Fed. 97.

had no power to strike out the defendant's appearance in order to let in the other creditors.⁶¹ The sureties upon a delivery bond or a forthcoming bond remain liable, notwithstanding the removal.⁶² After removal, the Federal court may hear and decide a motion that was pending undecided in the State court before the petition was filed.⁶³

An injunction granted by the State court before the removal remains in force thereafter, until it has been dissolved.⁶⁴ It

⁶¹ *Second Nat. Bank v. New York Silk Mfg. Co.*, Fed. Cas. No. 12,601a.

⁶² *Ramsey v. Coolbaugh*, 13 Iowa, 164; *State v. Peck*, 32 W. Va. 606, 9 S. E. 919.

⁶³ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, holding that an oral opinion of a State judge sustaining a motion, when no order had been entered upon the same, was not an adjudication which bound the Federal court.

⁶⁴ *Smith v. Schwed*, 6 Fed. 455 (2 McCrary, 441); *Fogg v. Fisk*, 19 Fed. 235. Where a motion to continue the injunction or to make the same perpetual has been granted by the State court before the removal, the Federal court will ordinarily follow that decision. The Federal court after removal may continue an injunction previously granted by a State court, which a court of the United States could not have previously granted. *Perry v. Sharpe*, 8 Fed. 15; *Hunt v. Fischer*, 29 Fed. 801; *Eureka & K. R. Co. v. California & N. Ry. Co.*, 103 Fed. 897. A Federal court may make an order continuing an injunction granted by a State court before the removal, although the State court had no power to make the same. *Hower v. Weiss M. & El. Co.*, 56 Fed. 356. The Federal court may dissolve an injunction granted by a State court in a case which has since been removed. *Sharp v. Whiteside*, 19 Fed.

156; *State of Arkansas v. Kansas & T. Coal Co.*, 96 Fed. 353. It will not do so because the will was not verified according to the practice in the Federal court; *Smith v. Schwed*, 6 Fed. 455 (2 McCrary, 441); nor because the plaintiff, after the removal, fails to prosecute the application to continue the injunction upon the day fixed by the State court, which occurs before the transcript is filed in the District Court of the United States. *Hamilton v. Fowler*, 83 Fed. 321. Where a motion to continue the injunction or to make the same perpetual has been granted by the State court before the removal, the Federal court will ordinarily follow that decision. *Carrington v. Florida R. Co.*, Fed. Cas. No. 2,448 (9 Blatchf. 468); *New Orleans, M. & C. R. Co. v. New Orleans*, 14 Fed. 373. A motion to dissolve the injunction may be made and heard upon due notice to the plaintiff at any time after the record has been filed in the Federal court; *Texas & St. L. Ry. Co. v. Rust*, 17 Fed. 275 (5 McCrary, 348), and even, it seems to have been held, before that time. *Champlain Const. Co. v. O'Brien*, 104 Fed. 930. It has been held that the hearing of a motion to dissolve such an injunction should not be postponed because of a motion to remand, based upon a defect in the form or amount of the removal bond. *Coburn v. Cedar Val. Land & Cat-*

has been held: that the Federal court cannot punish a party for his previous violation of an order of the State court;⁶⁵ that where an order had been made directing the defendant to show cause why he should not be punished for a disobedience to an order of the State court, the proceedings thereupon should be remanded, although jurisdiction of the original suit was maintained;⁶⁶ and that where an order in contempt proceedings had been appealed to the State Supreme Court before the removal, the Federal court would hold proceedings for the enforcement of such order in abeyance, until the disposition of such appeal.⁶⁷ It has been held that the Federal court cannot compel a witness to sign a deposition, which has been taken from his testimony in shorthand previous to the removal;⁶⁸ nor compel the defendant to file answers to interrogatories annexed to the petition, in accordance with the Iowa statute.⁶⁹ It seems that an order of the State court for the examination of a party under

the Co., 25 Fed. 791. An original motion for an injunction on the face of the bill may be heard in the Federal court when noticed after the removal; although the papers are not in accordance with the State practice. *McLeod v. Duncan*, Fed. Cas. No. 8,898 (5 McLean, 342). A receiver appointed before the removal of the case remains in possession until himself removed, and he may be required to account in the Federal court. *Hinckley v. Railroad Co.*, 100 U. S. 153, 25 L. ed. 591; *Mack v. Jones*, 31 Fed. 189, 196. The Federal court may remove or discharge a receiver appointed by the State court before the removal. *Texas & St. L. Ry. Co. v. Rust*, 17 Fed. 275. It has been held that, where a motion to discharge a receiver has been denied by the State court, the Federal court will not review the same. *Bryant v. Thompson*, 27 Fed. 881. Where a receiver appointed by a Federal court removed a suit brought against him in the State court; it was held that the plaintiff was entitled to a trial by jury, if he would

have been so entitled in the State court. *Bryant v. Thompson*, 27 Fed. 881; *Vany v. Receiver of Toledo*, St. L. & K. C. Ry. Co., 67 Fed. 379. It has been held at Circuit, that, after a removal; a sheriff cannot amend his return, previously made to the State court; *Tallman v. Baltimore & O. R. Co.*, 45 Fed. 156. *Contra*, *Richmond v. Brookings*, 48 Fed. 241; but that the record of the State court showing the time of filing the petition and bond may be proved, by the testimony of witnesses, to be erroneous. *Stephens v. St. Louis & S. F. R. Co.*, 47 Fed. 530.

⁶⁵ *Kirk v. Milwaukee D. C. Mfg. Co.*, 26 Fed. 501. But see *Williams M. & R. Co. v. Raynor*, 7 Biss. 245, Fed. Cas. No. 17,748.

⁶⁶ *Voorhees v. Albright*, Fed. Cas. No. 16,999.

⁶⁷ *Williams Mower & Reaper Co. v. Raynor*, Fed. Cas. No. 17,748 (7 Biss. 245).

⁶⁸ *Arnold v. Kearney*, 29 Fed. 820.

⁶⁹ *Pierce v. Union Pac. Ry. Co.*, 47 Fed. 709.

section 870 of the New York Code of Civil Procedure, after issue and before trial, must be vacated by the Federal court after removal.⁷⁰ Where depositions taken to be used in an action in a State court that had been dismissed were admissible as evidence under the statute of the State in another suit subsequently brought, and such second suit was removed; it was held that such depositions were admissible in the Federal court.⁷¹ Depositions taken subsequent to the removal before a referee previously appointed are no part of the record in the Federal court.⁷² A removal operates as an abandonment of an appeal from an interlocutory order not appealable in the Federal courts.⁷³

Where a motion is pending at the time of the removal, it is transferred with the record to the Federal court to be there determined.⁷⁴ Where, before a petition and bond for the removal of a cause from a State court was passed upon by that court, a motion was made therein by defendant, which was brought on for hearing in the Federal court; it was held that, by seeking an adjournment of the hearing in the latter court without objecting to the irregularity of the hearing, plaintiff waived such irregularity.⁷⁵ When a motion has been denied by the State court, leave to renew the same should be obtained before making it in the Federal court.⁷⁶ Ordinarily, when the State

⁷⁰ *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117. Where, before the removal of a cause from the State to the Federal court, a reference was made to take the deposition of a witness according to the State practice, to be used on a motion in the suit, it was held that the plaintiff must proceed with such reference after the removal of the cause. *Bills v. New Orleans, St. L. & C. R. Co.*, Fed. Cas. No. 1,409 (13 Blatchf. 227).

⁷¹ *Graveville v. Minneapolis & St. L. R. Co.*, 16 Fed. 435 (3 McCrary, 385).

⁷² *Miller v. Tobin*, 18 Fed. 609 (9 Sawy. 401).

⁷³ *Freeman v. Butler*, 39 Fed. 1. *Contra*, *Williams Mower & Reaper*

Co. v. Raynor, Fed. Cas. No. 17,748 (7 Biss. 245).

⁷⁴ *Bryce v. Southern Ry. Co.*, 129 Fed. 966.

⁷⁵ *Kinne v. Taint*, 68 Fed. 436.

⁷⁶ *Carrington v. Florida R. Co.*, Fed. Cas. No. 2,448 (9 Blatchf. 468); *New Orleans, M. & C. R. Co. v. New Orleans*, 14 Fed. 373; *Loomis v. Carrington*, 18 Fed. 97; *Bryant v. Thompson*, 27 Fed. 881; *Allmark v. Platte S. S. Co.*, 76 Fed. 615; *Denison v. Shawmut Min. Co.*, 124 Fed. 860; *Guernsey v. Cross*, 153 Fed. 827. See *Remington v. Central Pac. R. R. Co.*, 198 U. S. 95, 99, 49 L. ed. 959, 963; *Carrington v. Florida R. Co.*, 9 Blatchf. 468.

court has acted within its jurisdiction, such leave will not be granted unless such a showing is made as would justify an appeal or a rehearing under the State practice.⁷⁷ When, at the time of a removal, a motion was pending to resettle an order previously made, the Federal court entertained the application but refused to review the decision upon which that order had been entered.⁷⁸ Upon a motion to dismiss, made before the removal, when the defendant had acquired the right to a dismissal under the State practice; it was held that the motion should be granted, although the practice of the Federal court would not have justified the dismissal.⁷⁹ The decisions of the State court on a demurrer, or otherwise, made in the case before its removal, will ordinarily be followed by the Federal Court;⁸⁰ not, however, upon the validity of the service of process upon a nonresident defendant.⁸¹ Where a suit had been removed because of a separable controversy; it was held that the Federal court had no jurisdiction to set aside a previous judgment of the State court against a defendant who was a citizen of the same State as the plaintiff.⁸² Whether after

⁷⁷ *Allmark v. Platte S. S. Co.*, 76 Fed. 615; *Denison v. Shawmut Min. Co.*, 124 Fed. 860.

⁷⁸ *Milligan v. Lalance & G. Mfg. Co.*, 17 Fed. 465, 21 Blatchf. 407 (an order of a general term of the State court upon an appeal).

⁷⁹ *Sutro v. Simpson*, 14 Fed. 370, 4 McCrary, 276 (for failure to give security for costs). The Federal court may vacate an order, previously made by the State court, denying a motion to set aside service of process. *Remington v. Central Pac. R. R. Co.*, 198 U. S. 95, 49 L. ed. 959. *Contra*, *Brooks v. Farwell*, 4 Fed. 166 (2 McCrary, 220); *Allmark v. Platte S. S. Co.*, 76 Fed. 615; *Guernsey v. Cross*, 153 Fed. 827.

⁸⁰ *Duncan v. Gegan*, 101 U. S. 810, 25 L. ed. 875; *Milligan v. Lalance & G. Mfg. Co.*, 21 Blatchf. 407;

Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 736; *Loomis v. Carrington*, 18 Fed. 97; *Phelps v. Canada Cent. R. Co.*, 19 Fed. 801 (20 Blatchf. 450); *Davis v. St. Louis & S. F. R. Co.*, 25 Fed. 786; *Bryant v. Thompson*, 27 Fed. 881; *Cleaver v. Traders' Ins. Co.*, 40 Fed. 711; *Lookout Mountain R. Co. v. Houston*, 44 Fed. 449; *Denison v. Shawmut Min. Co.*, 124 Fed. 860; *Dodd v. Louisville Bridge Co.*, 130 Fed. 186. See *Wilson v. Smith*, 117 Fed. 707, 709. But see *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347.

⁸¹ *Remington v. Central Pac. R. R. Co.*, 198 U. S. 95, 49 L. ed. 959; *Allmark v. Platte S. S. Co.*, 76 Fed. 615. *Contra*, *Bragdon v. Perkins, Campbell Co.*, 82 Fed. 338.

⁸² *Youtsey v. Hoffman*, 108 Fed. 699, 701.

removal a plea of *lis pendens*, based upon a former suit in the Federal court, should be sustained, was left undecided.⁸³

In an action at common law, a defendant is not obliged to reserve or refile any notice, which has been duly served or filed by him, as the case may be, in the State court before the removal.⁸⁴ After removal, the Federal court may consolidate the removed cause with one originally brought within its jurisdiction.⁸⁵ The consolidation of a case does not prevent its remand.⁸⁶

If the State court refuses to relinquish jurisdiction after the papers essential to a removal have been duly presented and filed, subsequent proceedings in such State court may be enjoined by the District Court of the United States;⁸⁷ even, it has been held, when the State is the plaintiff;⁸⁸ but such a motion will not ordinarily be granted before a motion to remand the cause has been decided, unless the right of removal is beyond dispute.⁸⁹

⁸³ Ahlhauser v. Butler, 50 Fed. 705.

⁸⁴ Waldman v. Pennsylvania R. Co., 13 Fed. 801; Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 125 Fed. 631; Waldman v. Pennsylvania R. Co. (New York), 64 How. Prac. 198.

⁸⁵ Wabash, St. L. & P. Ry. Co. v. Central Trust Co., 23 Fed. 513; *supra*, § 472.

⁸⁶ Colburn v. Hill, C. C. A., 101 Fed. 500.

⁸⁷ French v. Hay, 22 Wall. 250, 22 L. ed. 857; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497; Warren v. Ives, Fed. Cas. No. 17,197 (1 Flip. 356); Wagner v. Drake, 31 Fed. 849; Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Abeel v. Culbertson, 56 Fed. 329; *supra*, § 554. *Contra*, Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,827 (6 Blatchf. 362); Penrose v. Penrose, Fed. Cas. No. 10,958 (17 Blatchf. 332). See Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. 908.

⁸⁸ Abeel v. Culbertson, 56 Fed. 329. When the removed case was brought at common law, the injunction is usually granted upon an original bill, which is considered to be ancillary in its nature, and which is filed in the District Court of the United States. Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. ed. 462; Mutual Life Ins. Co. v. Langley, 145 Fed. 415; Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. 908. It has been held that a Court of the United States may compel, by a mandamus, a State court to allow a removal. Spraggins v. County Court of Humphries, 1 Cooke (Tenn.) 160, Fed. Cas. No. 13,246. But see § 457, *supra*.

⁸⁹ Frishman v. Insurance Cos., 41 Fed. 449; Sinclair v. Pierce, 50 Fed. 851. Such an injunction was denied when the petition had been filed with the clerk of the State court in vacation, but not presented to that

and this decision is contrary to the current of authority.⁹⁰ It has been held that a failure, within the time required by the State statute, to demand a jury trial before the removal, which delay by the State law amounts to a waiver of the right to trial by jury, does not affect the right to trial by jury in the Federal court.⁹¹ Where a receiver, appointed by a Federal court, removed a suit brought against him in the State court; it was held that the plaintiff was entitled to a trial by jury, if he would have been so entitled in the State court.⁹² After the removal of a criminal prosecution against an officer of the United States, the State prosecuting officer is the proper person to try the case for the plaintiff and the District Attorney of the United States usually appears for the defendant.⁹³ The costs allowed in a removal case are those awarded by the statutes of the United States, and not those allowed by the State law.⁹⁴ The time in which an execution can issue, on a judgment in a case brought

court. *Coker v. Monaghan Mills*, 110 Fed. 803.

⁹⁰ *Supra*, § 670.

⁹¹ *Montgomery County v. Cochran*, 116 Fed. 985, 1002.

⁹² *Bryant v. Thompson*, 27 Fed. 881; *Vany v. Receiver of Toledo*, St. L. & K. C. Ry. Co., 67 Fed. 379.

⁹³ *Delaware v. Emerson*, 8 Fed. 411.

⁹⁴ *Penrose v. Penrose*, 1 Fed. 479; *Chadbourn v. German-American Ins. Co.*, 31 Fed. 625 (24 Blatchf. 539); *Richter v. Magone*, 47 Fed. 192. *Contra*, *The Garden City*, 27 Fed. 234; *Cleaver v. Traders' Ins. Co.*, 40 Fed. 863. Where, after a removal, the plaintiff recovers less than five hundred dollars, he will be entitled to costs, if that amount would have entitled him to costs in the State court; although if the suit had been originally brought in the Federal court, no costs would have been allowed. *Kreager v. Judd*, 5 Fed. 27. *Contra*, *Richter v. Magone*, 47 Fed. 192 (a suit against a collector). Interest on the judgment, ac-

cruing during a stay pending a motion for a new trial, may be included in the costs and will be calculated at the same rate of interest as judgments in the courts of the State. *Gunter v. Liverpool, L. & G. Ins. Co.*, 10 Fed. 830 (20 Blatchf. 390). The fees of witnesses, where depositions were taken in the State court before the removal, were taxed; although such depositions were not offered in evidence upon the trial. *Young v. Merchants' Ins. Co.*, 29 Fed. 273; but the fees of those served with subpoenas subsequent to the removal were not. *Young v. Merchants' Ins. Co.*, 29 Fed. 273. Where, after the removal, the plaintiff amended his complaint; it was held that he could then be compelled, under the rules of the Federal court to file security for costs; although, by the State practice, the defendant had lost the right to demand security. *Henning v. Western Union Tel. Co.*, 40 Fed. 658. No stay of proceedings will be granted because of the failure of a party to pay costs

in a State court and removed to a Federal court, depends on the laws of the United States and not on the State laws.⁹⁵

§ 556. Remand. "If, in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."¹ The suit may be remanded at the motion of the plaintiff when neither he nor the defendant resides in the district.² A case which was properly removed cannot be remanded by consent.³ A remand for want of jurisdiction, whether because there is a want of the requisite difference of citizenship,⁴ or because no Federal

awarded in the State court subsequent to the removal. *Penrose v. Penrose*, 1 Fed. 479; *Tugman v. National S. S. Co.*, 30 Fed. 802; judgment affirmed, *National S. S. Co. v. Tugman*, 143 U. S. 28, 12 Sup. Ct. 361, 27 L. ed. 87. Where, subsequent to the reversal by the Supreme Court of the United States of a judgment of the State court "with costs to the defendant to be taxed," because the case had previously been removed, the latter court awarded the defendant the taxable costs of all the proceedings in the State court, including an extra allowance; it was held that the proceedings in the Federal court would not be stayed after the plaintiff paid the costs in the Supreme Court of the United States alone, and that the collection of the costs and allowance in the State court could not be thus

enforced. *Tugman v. National S. S. Co.*, 30 Fed. 802; affirmed, *National S. S. Co. v. Tugman*, 143 U. S. 28, 12 Sup. Ct. 361, 27 L. ed. 87.

⁹⁵ *Nims v. Spurr*, 138 Mass. 209.

§ 556. ¹ *Jud. Code*, § 36, re-enacting, 18 St. at L. 472, ch. 137, § 5.

² *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264.

³ *Lawton v. Blitch*, 30 Fed. 641.

⁴ *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462. *Contra*, *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736; *Davies v. Lathrop*, 13 Fed. 565 (21 Blatchf. 164); *Tootle v. Coleman*, 57 L.R.A. 120, 107 Fed. 41, 45, 46 C. C. A. 132. It was held that a defendant, who had removed the case because of difference of citizenship between the plaintiff and all of the defendants but one, whom he alleged to be a nominal party, could not oppose a

question is involved,⁵ or because the value of the matter in dispute is less than two thousand dollars,⁶ may be made at the motion of either party; even by the party who removed the case. The objection that the case was not removed within the statutory time cannot be raised by the party who made the removal.⁷ The court of first instance,⁸ or the court of review,⁹ may remand a cause of its own motion for want of jurisdiction. It has been held that the court of first instance may, of its own motion, remand a case because it was removed too late.¹⁰ It is doubtful whether a motion to remand a cause can be made until the transcript has been filed.¹¹ Thereafter, a motion to remand a cause for want of jurisdiction may be made at any time.¹² A suit may be remanded after it has been consolidated

motion to remand by contending that it was the real party plaintiff and that the only actual controversy was between himself and the other defendants, who are citizens of different States. *Mayer v. Denver, T. & Ft. W. R. Co.*, 41 Fed. 723.

⁵ *Ferguson v. Ross*, 38 Fed. 161, 3 L.R.A. 322; *Wabash Railroad Co. v. Barbour*, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102.

⁶ *Lazensky v. Supreme Lodge Knights of Honor*, 32 Fed. 417. It was held that, where a party had procured a removal upon an averment that the amount in controversy was over \$2,000, exclusive of interests and costs, he could not suggest to the Circuit Court of Appeals that there was no jurisdiction below, because the judgment finally rendered was less than the jurisdictional amount. *Eustis v. Henrietta*, 74 Fed. 577, 20 C. C. A., 537, 41 U. S. App. 182.

⁷ *Ayres v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. ed. 1093.

⁸ *Johnson v. Johnson*, 13 Fed. 193; *Teas v. Allbright*, 13 Fed. 406; *Indiana v. Tolleston Club of Chicago*, 53 Fed. 18.

⁹ *Barth v. Coler*, 60 Fed. 466, 9

C. C. A. 81, 19 U. S. App. 646; *Yellow Aster Min. & Mill. Co. v. Crane Co.*, C. C. A., 150 Fed. 580 (there being a difference of citizenship, but neither party being a resident of the district).

¹⁰ *Keeney v. Roberts*, 39 Fed. 629 (12 Sawy. 39).

¹¹ *Supra*, § 542. When the transcript is filed before the return day, a motion to remand may be made immediately. *Anderson v. Appleton*, 32 Fed. 855; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. 773. *Contra*, *Kansas City & T. Ry. Co. v. Interstate Lumber Co.*, 36 Fed. 9. Where the term was changed by statute, too late to permit the holding of a term at the substituted time, it was held that the motion to remand might be made at a special term after the transcript was filed. *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. 3.

¹² *Jackson v. Allen*, 132 U. S. 27, 33 L. ed. 249; *Kain v. Texas Pac. R. Co.*, Fed. Cas. No. 7,596; *Lazensky v. Knights of Honor*, 32 Fed. 417; *Bronson v. St. Croix L. Co.*, 35 Fed. 634; *Southworth v. Reid*, 36 Fed. 451; *Ferguson v. Ross*, 3 L.R.A. 322,

with another, of which the court has jurisdiction.¹³ A motion to remand for want of jurisdiction may be made after verdict,¹⁴ or after judgment;¹⁵ or the judgment may be reversed and a remand ordered upon an appeal or writ of error by the party who removed the cause.¹⁶ A motion to remand because the petition for the removal was filed too late is waived by laches;¹⁷ such as the delay of a year without excuse;¹⁸ and probably by taking any subsequent proceeding in the cause after the filing of the transcript, such as a consent to a transfer of the cause to the equity docket and its reference to a special master to be considered as an intervention in a previous suit in equity;¹⁹ or a demand for trial;²⁰ or a trial.²¹ Such an objection cannot be taken by either

38 Fed. 161; *Wabash R. Co. v. Barbour*, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102; *Indiana v. Lake Erie & W. Ry. Co.*, 85 Fed. 1; *Broadway Ins. Co. v. Chicago G. W. Ry. Co.*, 101 Fed. 507; *Parkinson v. Barr*, 105 Fed. 81. But see *Hervey v. Illinois Midland Ry. Co.*, 3 Fed. 707.

¹³ *Colburn v. Hill*, C. C. A., 101 Fed. 500.

¹⁴ *Ferguson v. Ross*, 3 L.R.A. 322, 38 Fed. 161; *Mulcahey v. Lake Erie & W. R. Co.*, 69 Fed. 172.

¹⁵ *Lazensky v. Knights of Honor*, 52 Fed. 417; *Wabash R. Co. v. Barbour*, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102. But see *Mastin v. Chicago, R. I. & P. Ry. Co.*, 123 Fed. 827.

¹⁶ *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462; *Wabash R. Co. v. Barbour*, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102.

¹⁷ *French v. Hay*, 22 Wall. 238, 22 L. ed. 854; *Miller v. Kent*, 18 Fed. 561 (20 Blatchf. 508); *Baltimore & O. R. Co. v. Ford*, 35 Fed. 170; *Wylly v. Richmond & D. R. Co.*, 63 Fed. 487; *Guarantee Co. of North Dakota v. Hanway*, 104 Fed. 369,

44 C. C. A. 312. See *Hervey v. Illinois Midland Ry. Co.*, 3 Fed. 707. Where the plaintiff, in ignorance of his right to remand the case because the petition for a removal was made too late, filed an answer in the Federal court; he was permitted to withdraw the same and move to remand, it appearing that he had acted in good faith. *Collins v. Stott*, 76 Fed. 613.

¹⁸ *Miller v. Kent*, 18 Fed. 561 (20 Blatchf. 508); *Baltimore & O. R. Co. v. Ford*, 35 Fed. 170; *Wylly v. Richmond & D. R. Co.*, 63 Fed. 487. It was held that a delay of fifteen months by the plaintiff did not waive his right to remand a cause because of the defendant's failure to file the transcript, although the plaintiff himself produced the same for filing at the time that he made such motion. *McGregor v. McGillis*, 30 Fed. 388.

¹⁹ *Wylly v. Richmond & D. R. Co.*, 63 Fed. 487.

²⁰ *Baltimore & O. R. Co. v. Ford*, 35 Fed. 170.

²¹ *Guarantee Co. of North Dakota v. Hanway*, 104 Fed. 369, 44 C. C. A. 312.

party for the first time upon an appeal.²² Where the record showed a difference of citizenship; it was held that the objection that there was no sufficient proof of prejudice or local influence could not be made after testimony upon the issues had been taken.²³ It has been held that the objection to the jurisdiction, because neither party is a resident of the district, is waived by a general appearance by the plaintiff in the Federal court before his motion to remand.²⁴ The service of a subsequent pleading,²⁵ or any other proceeding taken by him,²⁶ is such a waiver. The waiver may be made by an infant through his guardian *ad litem*.²⁷ The removal of the case waives any objection by the defendant that he was sued in the improper district,²⁸ provided that service of the summons was properly made upon him.²⁹ He cannot, by filing a general appearance, improve his posi-

²² Knight v. International & G. N. Ry. Co., C. C. A., 61 Fed. 87.

²³ Neale v. Foster, 31 Fed. 53 (12 Sawy. 424).

²⁴ Philadelphia & Boston Face Brick Co. v. Warford, 123 Fed. 843; Corwin Mfg. Co. v. Henrici Washer Co., 151 Fed. 938; *supra*, § 61.

²⁵ Matter of Moore, 209 U. S. 490, 52 Fed. 904; Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. ed. 984; Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 158 Fed. 211; Hagerla v. Mississippi River Power Co., 202 Fed. 776.

²⁶ Matter of Moore, 209 U. S. 490, 52 L. ed. 904, stipulating for a continuance; Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. ed. 984, making up the issues; Clark v. Southern Pac. Co., 175 Fed. 122, taking out a commission; Enders v. Supreme Lodge, 176 Fed. 832, noticing a demurrer for argument; Hagerla v. Mississippi River Power Co., 202 Fed. 776, setting case down for hearing; Moyer v. Chicago, M. & St. P. Ry. Co., 168 Fed. 105, consenting to the filing of a pleading by the defendant out of time. It has been held that the en-

try of a special appearance for the purpose of moving to retire a case from the docket, does not waive the plaintiff's right to a remand for any cause. Higson v. North River Ins. Co., 184 Fed. 165. Where one of two defendants sued upon a joint and several obligation, removed the case, and the plaintiff, without protest, proceeded to trial and took judgment against him; it was held that this was a consent to a severance of the joint, into two several actions, and that a remand should not be ordered. Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co., C. C. A., 80 Fed. 766.

²⁷ Matter of Moore, 209 U. S. 490, 52 L. ed. 904. But see Woolridge v. McKenna, 8 Fed. 650.

²⁸ De Valle Da Costa v. Southern Pac. Co., 160 Fed. 216; Clark v. Southern Pac. Co., 175 Fed. 122; Sagara v. Chicago, R. I. & P. Ry. Co., 189 Fed. 220; H. J. Decker, Jr., & Co. v. Southern Ry. Co., 189 Fed. 224.

²⁹ Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517. See §§ 169, 554, 555, *supra*.

tion.³⁰ After abatement, a suit cannot be remanded until it is revived.³¹ After a motion to remand has been once denied, a second motion may be granted, when founded upon facts which have since occurred.³² Thus, a second motion duly made may be granted, when the first was denied as premature.³³ Where, after overruling a motion to remand a cause removed because it arose under the laws of the United States, the question arising under those laws had been disposed of by demurrer; it was held that there was no longer any Federal question in the case, and a second motion to remand was granted.³⁴ After a motion to remand based upon the face of the record had been denied, a second motion because of the alleged collusive joinder of a party was entertained.³⁵ An order denying a motion to remand may grant leave to renew the same, when the facts are more fully presented.³⁶ It has been held that the court, of its own motion, may remand a case, although a previous motion to remand upon the same ground has been denied.³⁷ It has been held that, since the court's jurisdiction is always open to consideration after a motion to remand a case has been denied, it may be granted upon the same facts by the same or another judge.³⁸ After a motion to remand has been granted, when cases subsequently arise that justify the removal, which is again made; the second motion to remand will be denied.³⁹

³⁰ *Tierney v. Helvetia Swiss Fire Ins. Co.*, 163 Fed. 82.

³¹ *Wright v. Phipps*, 58 Fed. 552.

³² *Kansas City & T. Ry. Co. v. Interstate Lumber Co.*, 37 Fed. 3; *Hamblin v. Chicago, B. & Q. R. Co.*, 43 Fed. 401.

³³ *Kansas City & T. Ry. Co. v. Interstate Lumber Co.*, 37 Fed. 3.

³⁴ *Hamblin v. Chicago, B. & Q. R. Co.*, 43 Fed. 401.

³⁵ *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 25 Fed. 113.

³⁶ *New York v. New Jersey Steamboat Transp. Co.*, 24 Fed. 817; *Goodnow v. Litchfield*, 47 Fed. 753.

³⁷ *Weldon v. Fritzlen*, 128 Fed.

608, 611; reversed upon another point, *C. C. A.*, 135 Fed. 650; reversal affirmed without passing on this point, *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 366, 53 L. ed. 551, 554.

³⁸ *Weldon v. Fritzlen*, 128 Fed. 608, 611; reversed on another point, *C. C. A.*, 135 Fed. 650; reversal affirmed without passing on this point, *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 366, 52 L. ed. 551, 554; *Gaugler v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79, where the second judge granted leave to renew the motion. *Phillips v. Western Terra Cotta Co.*, 174 Fed. 873.

³⁹ *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 53 L. ed. 551.

It has been held that the allegations in a petition for a removal cannot be disputed, unless a plea in abatement is filed,⁴⁰ which should be supported by the oath of the defendant or his agent;⁴¹ and that is the safer practice.⁴² But such a plea will not be decided by technical rules, and is sufficient if it sets out fairly and with sufficient certainty matters of fact, which, if true, negative the jurisdiction of the Federal court.⁴³ A denial in the plaintiff's petition to remand has been held to be a sufficient traverse of an allegation in the defendant's petition for removal.⁴⁴ It is the custom in some districts to raise the issue

⁴⁰ *Filer v. Levy*, 17 Fed. 609.

⁴¹ *Filer v. Levy*, 17 Fed. 609; *Lacroix v. Lyons*, 27 Fed. 403.

⁴² *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992; *Clarkhuff v. Wisconsin, I. & N. R. Co.*, 26 Fed. 465; *Lacroix v. Lyons*, 27 Fed. 403; *Rumsey v. Call*, 28 Fed. 769; *McDonald v. Salem C. F. M. Co.*, 31 Fed. 577; *Johnson v. Accident Ins. Co. of N. A.*, 35 Fed. 374; *Imperial Refining Co. v. Wyman*, 3 L.R.A. 503, 38 Fed. 574; *Southern Pac. Co. v. Harrison*, 73 Tex. 103, 11 S. W. 168. Where more than five months after a motion to remand had been overruled and the case was at issue and ready for trial on the merits, it was held that a motion for leave to plead to the petition for removal was properly overruled. *Hunter v. Illinois Cent. R. Co., C. C. A.*, 188 Fed. 645.

⁴³ *Johnson v. Accident Ins. Co.*, 35 Fed. 374. A plea alleging that the court had no jurisdiction, or, if it had, that it ought not to exercise it, for the reason that the cause could be tried with greater convenience in the State court, was held to be insufficient. *Spies v. Chicago & E. I. R. Co.*, 32 Fed. 713. So was a plea denying defendant's belief in the existence of the prejudice or local influence set forth in the petition. *County Court v. Baltimore & O. R. Co.*, 35 Fed. 161.

An averment in a plea, that a party was a citizen of a specified State, was not neutralized by an admission therein that such party resided abroad. *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992; *Hoyt v. Wright*, 4 Fed. 168 (2 McCrary, 222); *Filer v. Levy*, 17 Fed. 609; *Clarkhuff v. Wisconsin, I. & N. R. Co.*, 26 Fed. 465; *Lacroix v. Lyons*, 27 Fed. 403; *Rumsey v. Call*, 28 Fed. 769; *McDonald v. Salem Capital Flour Mills Co.*, 31 Fed. 577 (12 Sawyer, 492); *First Nat. Bank v. Salem Capital Flour Mills Co.*, 31 Fed. 580 (12 Sawyer, 485, 496); *Johnson v. Accident Ins. Co. of N. A.*, 35 Fed. 374; *Imperial Refining Co. v. Wyman*, 3 L.R.A. 503, 38 Fed. 574; *Weaver v. Northern Pac. Ry. Co.*, 125 Fed. 155. It has been held that a formal plea is not indispensable, provided a traverse in some form is made. *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690; *Beadleston v. Harpending*, 32 Fed. 644; *Anderson v. Appleton*, 32 Fed. 855; *Curnow v. Phoenix Ins. Co.*, 44 Fed. 305.

⁴⁴ *Curnow v. Phoenix Ins. Co.*, 44 Fed. 305. It is the practice in the Western District of Kentucky to treat as traversed, without an express denial, allegations in a petition for removal that defendants were joined in fraud of the jurisdiction of the court for the sole pur-

by affidavits.⁴⁵ In the Northern District of Iowa, it is the practice to treat, as a plea to the jurisdiction, denials of allegations of the defendant's petition which are made in a motion to remand; ⁴⁶ but, ordinarily, such a motion unaccompanied by a plea or affidavits is treated as a demurrer to the petition.⁴⁷ Allegations of conclusions of law, such as that a specified defendant is only a nominal party, need not, it seems, be specifically denied.⁴⁸ If the court has reason to doubt the existence of the jurisdictional facts, it has the right to examine the parties upon that question or to direct a plea in abatement to be filed and heard,⁴⁹ or that testimony be taken upon the point,⁵⁰ or that depositions be taken upon the point.⁵¹ When any allegation in the petition is denied, the burden or proof rests on the petitioner.⁵² If the issue is not tried upon oral testimony, affidavits,⁵³ or depositions,⁵⁴ by both parties may then be considered; and a verified petition of removal will prevail against an unverified denial.⁵⁵ When the right to a removal depends upon the contention that one of the defendants is a formal, or is not

pose of preventing the removal. *Boatner v. American Exp. Co.*, 122 Fed. 714.

⁴⁵ *Lewis v. Cincinnati, N. O. & T. P. Ry. Co.*, 192 Fed. 654.

⁴⁶ *McGuire v. Great Northern Ry. Co.*, 153 Fed. 434, 435; *Harrington v. Great Northern Ry. Co.*, 169 Fed. 714, 716.

⁴⁷ *Phillips v. Western Terra Cotta Co.*, 174 Fed. 873; *Armstrong v. Kansas City Southern Ry. Co.*, 192 Fed. 608.

⁴⁸ *Mayer v. Denver, T. & Ft. W. R. Co.*, 41 Fed. 723.

⁴⁹ *Gribble v. Pioneer Press Co.*, 15 Fed. 689.

⁵⁰ *Harrington v. Great Northern Ry. Co.*, 169 Fed. 714, 716.

⁵¹ *McGuire v. Great Northern Ry. Co.*, 153 Fed. 434, 435; *Harrington v. Great Northern Ry. Co.*, 169 Fed. 714, 716.

⁵² *Carson v. Dunham*, 121 U. S.

421, 7 Sup. Ct. 1030, 30 L. ed. 992; *Health v. Austin*, Fed. Cas. No. 6,305 (12 Blatchf. 320); *Copeland v. Memphis & C. R. Co.*, Fed. Cas. No. 3,209 (3 Woods, 651); *Davies v. Wells*, 134 Fed. 139; *New Castle v. Western Union Tel. Co.*, 152 Fed. 569. This rule applies where the removal is based upon the ground of a fraudulent joinder of defendants. *Welch v. Cincinnati, N. O. & T. P. Ry. Co.*, 177 Fed. 760; *Jacobson v. Chicago, R. I. & P. Ry. Co.*, 176 Fed. 1004; *Foster v. Coos Bay Gas & El. Co.*, 185 Fed. 979.

⁵³ *Smith v. Crosby Lumber Co.*, 46 Fed. 819; *Lewis v. Cincinnati, N. O. & T. P. Ry. Co.*, 192 Fed. 654.

⁵⁴ *McGuire v. Great Northern Ry. Co.*, 153 Fed. 434, 435; *Harrington v. Great Northern Ry. Co.*, 169 Fed. 714, 716.

⁵⁵ *Heath v. Austin*, Fed. Cas. No. 6,305 (12 Blatchf. 320).

a necessary party,⁵⁶ or that there is a separable controversy,⁵⁷ or that the suit arises under the Constitution or laws or a treaty of the United States,⁵⁸ or the right depends upon the nature of the suit;⁵⁹ the allegations in the complaint are conclusive, unless subsequent proceedings in the Federal court show that the removal was improper.⁶⁰ When the petition charges that parties have been fraudulently joined, for the purpose of preventing a removal; if that petition is verified and states facts which show the misjoinder, it seems that the motion to remand will be denied, unless the plaintiff traverses the same under oath or offers evidence to the contrary.⁶¹ Where there is a proper tra-

⁵⁶ *Mayer v. Denver, T. & Ft. W. R. Co.*, 41 Fed. 723; *Bryce v. Southern Ry. Co.*, 122 Fed. 709; *Duncan v. St. Louis, I. M. & S. Ry. Co.*, 22 So. 924, 49 La. Ann. 1700. See *Plymouth Mining Co. v. Amador Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232. Where the averments of the complaint were so ambiguous as to make it doubtful whether certain defendants were necessary parties, and there were indications of a design to obstruct a removal by their joinder; such averments were rigidly scrutinized; the whole record, including the plaintiff's affidavits therein, were examined; and it appearing probable that these defendants were not necessary parties, the motion for a remand was denied, without prejudice to its subsequent renewal should it afterwards appear to be necessary. *New York v. New Jersey Transportation Co.*, 24 Fed. 817.

⁵⁷ *Long v. Buford*, 24 Fed. 241. See *Iowa Lilloet Gold Min. Co. v. Bliss*, 144 Fed. 446; *Cella v. Brown*, C. C. A., 144 Fed. 742.

⁵⁸ *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. ed. 656; *Jones v. Oceanic Steam Nav. Co.*, Fed. Cas. No. 7,485 (11 Blatchf. 406); *Arkan-*

sas v. Choctaw & M. R. Co., 134 Fed. 106; *supra*, § 24. See *New Castle v. Postal Telegraph-Cable Co.*, 152 Fed. 572; *Echols v. Smith* (Kentucky), 42 S. W. 538. But see *State ex rel. Tillman v. Coosaw Min. Co.*, 45 Fed. 804, 808, 809.

⁵⁹ *Anderson v. Appleton*, 32 Fed. 855.

⁶⁰ See §§ 540, 543, *supra*.

⁶¹ *Goodnow v. Litchfield*, 47 Fed. 753; *Durkee v. Illinois Cent. R. Co.*, 81 Fed. 1; *Free v. Western Union Tel. Co.*, 122 Fed. 309; *Bryce v. Southern Ry. Co.*, 122 Fed. 709; *Weaver v. Northern Pac. Ry. Co.*, 125 Fed. 155 (where an affidavit of the plaintiff's counsel contradicting some of the facts in the petition was held to be insufficient); *Dishon v. Cincinnati, N. O. & T. P. Ry. Co.*, C. C. A., 133 Fed. 471; *Chicago, R. I. & P. Ry. Co. v. Stepp*, 151 Fed. 908; *Atlanta, K. & N. Ry. Co. v. Southern Ry. Co.*, C. C. A., 153 Fed. 122. See *Plymouth Mining Co. v. Amador Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232; *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; *Hunter v. Illinois Cent. R. Co.*, C. C. A., 188 Fed. 645.

verse by the plaintiff, the burden of proof is upon the defendant to establish the fraud.⁶² The issue will be tried in the Federal court;⁶³ but the inquiry into that question will not go to the extent of a trial of the whole case upon the merits.⁶⁴ Where the complaint shows the value of the matter in dispute, it ordinarily cannot be contradicted,⁶⁵ unless the petition charges a fraudulent understatement, which is conclusively proved by the defendant;⁶⁶ but where the recovery of a specific thing, as in ejectment or replevin, is sought,⁶⁷ or an injunction is prayed;⁶⁸ it seems that the question depends upon the evidence submitted,

⁶² *Armstrong v. Kansas City Southern Ry. Co.*, 192 Fed. 608; *Stevenson v. Illinois Cent. R. Co.*, 192 Fed. 956; *Clark v. Chicago, R. I. & P. Ry. Co.*, 194 Fed. 505; *Jacobson v. Chicago, R. I. & P. Ry. Co.*, 176 Fed. 1004; *Welch v. Cincinnati, N. O. & F. P. Ry. Co.*, 177 Fed. 760; *Foster v. Coos Bay Gas & El. Co.*, 185 Fed. 979.

⁶³ *Ibid.*; *Lewis v. Cincinnati, N. O. & T. P. Ry. Co.*, 192 Fed. 654.

⁶⁴ *Clark v. Chicago, R. I. & P. Ry. Co.*, 194 Fed. 505, *supra*, § 545. It has been held that a denial, in the petition for a removal, of the joint negligence alleged in the complaint, raises no issue of fraudulent joinder; although the petition contains the further allegation that the plaintiff knew that the two defendants were not jointly operating the car, upon which the plaintiff received the injury for which he sued. There, the plaintiff filed affidavits denying these allegations in the petition. *Shane v. Butte Electric Ry. Co.*, 150 Fed. 801. A decision similar in many respects is *Thresher v. Western Union Tel. Co.*, 148 Fed. 649. *Contra*, *Landers v. Felton*, 73 Fed. 311. It has been held that allegations of conclusions of law, upon that subject, do not render the peti-

tion of removal sufficient, either as a pleading or as evidence. *Offner v. Chicago & E. R. Co.*, C. C. A., 148 Fed. 201. See *supra*, § 540.

⁶⁵ *Smith v. Western Union Tel. Co.*, 79 Fed. 132. But see *Building & Loan Ass'n of Dakota v. Cunningham (Texas)*, 47 S. W. 714. Upon a proceeding to condemn a right of way, where the party seeking the condemnation alleged that the interest of the removing party in the land was of merely nominal value, and the owner, in his petition for a removal, averred that the matter in controversy far exceeded \$2,000 in value; it was held that the averments in the petition or the removal should control. *Postal Tel. Cable Co. v. Southern Ry. Co.*, 88 Fed. 803.

⁶⁶ *Swann v. Mutual Reserve Fund Life Ass'n*, 116 Fed. 232 (where the fact that plaintiff claimed less than the amount, to which he was entitled, was, in the absence of a fraud, held insufficient to justify a removal); *Martin v. City Water Co.*, 197 Fed. 462.

⁶⁷ *Corbin v. Pike*, 37 Iowa, 637.

⁶⁸ *Langdon v. Hillside Coal & Iron Co.*, 41 Fed. 609; *New Castle v. Western Union Telegraph Co.*, 152 Fed. 569.

irrespective of fraud;⁶⁹ the burden of proof being upon the defendant.⁷⁰ The quality of the testimony offered, and not merely the number of the witnesses, will determine the decision.⁷¹ Where the complaint does not show the value of the matter in dispute, an averment concerning the same in the petition for removal will, unless contradicted, be conclusive upon a motion to remand.⁷² Where the right of removal depends upon a difference of citizenship and the residence of the parties, the allegations in the complaint concerning citizenship and residence are not conclusive;⁷³ even if they relate to the sovereignty under which a party was incorporated.⁷⁴ Statements in affidavits or other papers, or proceedings by either party, may be offered in evidence by the other, as admissions for or against the motion to remand.⁷⁵ An erroneous description of the plaintiff's citizenship, in a pleading or other proceeding in the State court, will not estop him from proving the truth in support of a motion to remand.⁷⁶ When the time of the proceedings for the removal is in question, pleadings in the State court, although they have been taken out of the record by stipulation, may be used upon a motion to remand, in order to show what had been done in the State court before the application for removal and to prove that such application was made too late.⁷⁷ An answer filed in the State court after the petition and bond had been presented was disregarded.⁷⁸ It has been held that a positive averment on oath, by the counsel for the removing party, that the State judge, under a rule providing that the special term is always open when the judge is present, was holding a special term of his court when the petition was presented to him, is

⁶⁹ *Corbin v. Pike*, 37 Iowa, 637.

⁷⁰ *Davies v. Wells*, 134 Fed. 139; *New Castle v. Western Union Tel. Co.*, 152 Fed. 569.

⁷¹ *Corbin v. Pike*, 37 Iowa, 637.

⁷² *Langdon v. Hillside Coal & Iron Co.*, 41 Fed. 609.

⁷³ *Rumsey v. Call*, 28 Fed. 769; *Egerton v. Starin*, 91 Fed. 932. But see *Stephenson's Adm'r v. Illinois Cent. R. Co.*, 75 S. W. 260, 25 Ky. Law Rep. 442.

⁷⁴ *Greer v. Texas & P. Ry. Co. (Texas)*, 42 S. W. 1038.

⁷⁵ *Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123, 6 Sup. Ct. 632, 29 L. ed. 837. See *Reynolds v. Adden*, 136 U. S. 348, 10 Sup. Ct. 843, 34 L. ed. 360.

⁷⁶ *Egerton v. Starin*, 91 Fed. 932. See *Reynolds v. Adden*, 136 U. S. 348, 10 Sup. Ct. 843, 34 L. ed. 360.

⁷⁷ *Wilkinson v. Delaware, L. & W. R. Co.*, 23 Fed. 562.

⁷⁸ *Phillips v. Western Terra Cotta Co.*, 174 Fed. 873.

sufficient to show that the court was then in session, although such judge, on the presentation of the papers, made an order to show cause, which was in form an order of the court.⁸⁰ It was held, where the defendant admitted upon the trial the falsity of an allegation in his petition, that the petition should be treated as if amended accordingly.⁸¹ It has been said: that the court will take judicial notice of the fact that one of the parties is a receiver appointed by it;⁸² that it will take judicial notice of the State statutes, but not of the rules of the State courts;⁸³ and that, when the allegations of the complaint do not clearly show that the cause arises under the constitution or laws of the United States, the court may take judicial notice of a State statute, which is not therein mentioned, to which reference is made in the petition for removal.⁸⁴ Proof of residence in a place is presumptive evidence of citizenship there,⁸⁵ and will counter-vail a denial of such citizenship made for want of knowledge, information or belief.⁸⁶ It seems that where defendant alleges a change of complainant's citizenship or residence, he must show both residence in the new locality and the intention to remain there.⁸⁷ An official passport, certifying to the naturalization of the defendant as a citizen of a certain country, when accompanied by his affidavit, is *prima facie* evidence that he has complied with the statutes regulating naturalization there.⁸⁸ Evidence upon prejudice and local influence, and the rules of decision upon the same, have been previously discussed.⁸⁹

On a motion to remand, the court will not inquire as to the truth of allegations of facts other than citizenship or residence, which are contained in the pleadings;⁹⁰ nor into the sufficiency

⁸⁰ La Page v. Day, 74 Fed. 977.

⁸¹ Koshland v. Home Mut. Ins. Co., 31 Or. 321, 49 Pac. 864.

⁸² Pitkin v. Cowen, 91 Fed. 599, 600.

⁸³ Randall v. New England Order of Protection, 118 Fed. 782. See § 329, *supra*.

⁸⁴ State v. Coosaw Min. Co., 45 Fed. 804; decree affirmed, Coosaw Min. Co. v. State, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. ed. 537.

⁸⁵ Blair v. Silver Peak Mines, 93 Fed. 332; denying rehearing, 84

Fed. 737; Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76; Collins v. City of Ashland, 112 Fed. 175.

⁸⁶ Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76.

⁸⁷ Gaddie v. Mann, 147 Fed. 955.

⁸⁸ Maloy v. Duden, 25 Fed. 673.

⁸⁹ *Supra*, § 549.

⁹⁰ Marshall v. Holmes, 141 U. S. 589, 591, 35 L. ed. 870, 871; Hax v. Caspar, 31 Fed. 499; Carlisle v. Sunset Tel. & Tel. Co., 116 Fed. 896; Shane v. Butte Electric Ry. Co., 150 Fed. 801 (where the court refused

of the allegations therein, so as to decide whether the plaintiff's pleading contains a good cause of action, or the answer a good defense,⁹¹ except when it is claimed that a Federal question is involved, when the court will determine whether a Federal question, which is not frivolous, is actually raised.⁹² It has been held that the question whether there is a misjoinder of causes of action in the complaint is not one for consideration upon a motion for remand.⁹³ The authorities are not harmonious as to whether a motion to remand should be denied when the record shows a case for a removal upon a different ground from that alleged in the petition.⁹⁴ It has been said that, when the jurisdiction of the Federal court is doubtful, the cause should be remanded.⁹⁵ The decision upon a motion to remand must be based upon facts appearing on the record.

to inquire into the truth of the allegation that the defendants were jointly engaged in the operation of a car).

⁹¹ *Marshall v. Holmes*, 141 U. S. 589, 591, 35 L. ed. 870, 871; *Hax v. Caspar*, 31 Fed. 499; *Broadway Ins. Co. v. Chicago G. W. Ry. Co.*, 101 Fed. 507; *McGuire v. Great Northern Ry. Co.*, 153 Fed. 434.

⁹² *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388; *Southern Pac. R. R. Co. v. California*, 118 U. S. 109, 112, 30 L. ed. 103, 104; *Wood v. Matthews*, Fed. Cas. No. 17,955 (2 Blatchf. 370); *Kessinger v. Vannatta*, 27 Fed. 890; *Lowry v. Chicago, B. & Q. R. Co.*, 46 Fed. 83; *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832. But see *Nashville v. Cooper*, 6 Wall. 247, 18 L. ed. 851.

⁹³ *Fogarty v. Southern Pac. Co.*, 123 Fed. 973.

⁹⁴ See § 545, *supra*.

⁹⁵ *Heath v. Austin*, Fed. Cas. No. 6,305 (12 Blatchf. 320); *Deakin v. Lea*, Fed. Cas. No. 3,695 (11 Biss. 27); *Evans v. Faxon*, 10 Fed. 312 (11 Biss. 175); *Wolff v. Archibald*, 14 Fed. 369 (4 McCrary, 581); *Lévy* Fed. Prac. Vol. II.—121.

v. Laclede Bank, 18 Fed. 193; *State v. Bradley*, 26 Fed. 289; *Fitzgerald v. Missouri Pac. Ry. Co.*, 45 Fed. 812; *Blue Bird Min. Co. v. Largey*, 49 Fed. 289; *Largey v. Blue Bird Min. Co.*, 49 Fed. 292; *Hutcheson v. Bigbee*, 56 Fed. 329; *Johnson v. Wells, F. & Co.*, 91 Fed. 1; *Plant v. Harrison*, 101 Fed. 307; *McKown v. Kansas & T. Coal Co.*, 105 Fed. 657; *Nash v. McNamara*, 145 Fed. 541; *Mathews Slate Co. v. Mathews*, 148 Fed. 490 (holding that the question, whether a State statute was by a State statute that could not be enforced in the Federal court was so doubtful that the cause should be remanded). For cases of estoppel of the defendant, see *Mazieka v. North & Judd Mfg. Co.*, 176 Fed. 747; *Baldwin v. Pacific Power & Light Co.*, 199 Fed. 291. *Contra*, *Heath v. Austin*, Fed. Cas. No. 6,305 (12 Blatchf. 320); *Concord Coal Co. v. Haley*, 76 Fed. 882. But see *Kessinger v. Vannatta*, 27 Fed. 890 (holding that where the question, whether a State statute was unconstitutional, was doubtful the case should be remanded). *Wrightsville Hardware Co. v. Hardware &*

Suspensions are insufficient to justify the order.⁹⁶ Upon a motion to remand, the court has no power to dismiss the bill, but merely to remand the cause to the State court.⁹⁷ Where a case was removed by an officer of the United States, upon the ground that it was brought because of an act done under the revenue laws, and that did not appear upon the pleadings, it was held that the question would not be determined upon a motion for remand, but would be postponed until the trial.⁹⁸ A motion to remand will not be granted because the Federal courts enforce a different rule of damages from that which prevails in the State tribunals;⁹⁹ nor because of the effect upon the general proceedings for widening the streets of a city in case of a decision of the Federal court against the right to widen streets on the land of a railroad company, or upon the amount of the value of the property of such corporation or of the assessments for benefits, which should be made against the same;¹⁰⁰ nor because the evidence taken in the Federal court will not be admissible in the

W. Mfg. Co., 180 Fed. 586; *Kamenicky v. Catterall Printing Co.*, 188 Fed. 400, in which the author was counsel; *Jackson v. Hooper*, 188 Fed. 509; *Drainage Dist. No. 19 v. Chicago, M. & St. P. Ry. Co.*, 198 Fed. 253.

⁹⁶ *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, 29 C. C. A. 438. *Contra*, *Cassidy v. Atlanta & C. A. L. Ry. Co.*, 109 Fed. 673 (where, after a removal by a nonresident defendant, the plaintiff entered a nonsuit as to him, leaving the only defendant a resident of the same State with the plaintiff, and then moved to remand the cause; it was held that the order should be for a dismissal and not for a remand).

⁹⁷ *Richmond v. Brookings*, 48 Fed. 241; *Thacker Coal & Coke Co. v. Norfolk & Western Ry. Co.*, 171 Fed. 271. *Contra*, *Merchants' Nat. Bank v. Brown*, 17 Fed. 161 (4 Woods, 263); *Cassidy v. Atlanta & C. A. L. Ry. Co.*, 109 Fed. 673, where plaintiff entered a nonsuit as to the

nonresident defendant and moved to remand; but the Federal court denied his motion and dismissed the whole case. *Lawrence v. Southern Pac. Co.*, 180 Fed. 822; where, it appearing that there was an indispensable party, whose joinder would defeat the Federal jurisdiction, the court dismissed the case, although the result of it was that the court could not maintain the suit in any forum. In *Baum v. Longwell*, 200 Fed. 450, the bill did not state a case of Federal jurisdiction, but the defendant filed a cross-bill setting forth such a cause of action. The court sustained a demurrer to the bill for want of jurisdiction, but retained the case for hearing upon the cross-bill, which, it appeared, could dispose of the entire controversy between the parties.

⁹⁸ *Dennistoun v. Draper*, Fed. Cas. No. 3,804 (5 Blatchf. 336).

⁹⁹ *Free v. Western Union Tel. Co.*, 122 Fed. 309.

¹⁰⁰ *Union Pac. R. Co. v. Myers*,

State court;¹⁰¹ nor, it was held, under the act of 1875, because the defendant had given a bond in the State probate court, which might have affected the jurisdiction of the Federal court to entertain the suit originally.¹⁰² But, where all the property of a foreign corporation had been placed in the custody of receivers appointed by the State courts, so that any judgment recovered in the Federal court must be referred to the State court for payment; it was held that the case should be remanded.¹⁰³

It has been held that the fact that the Federal court, upon a motion to remand, has no power to decide a motion made by a nonresident to quash the service of process upon a resident defendant, does not preclude a consideration of the question, whether such resident was in court or not at the time limited for the filing of the petition for the removal.¹⁰⁴ Where the State court had decided, upon defendant's application for a removal, that there was no separate controversy which gave him a right to the same; it was held that he could not contend for a contrary decision upon the same point in the Federal court upon a motion by plaintiff to remand the cause.¹⁰⁵ It has been held that a cause will not be remanded because there was a defect in the form of the signature to the bond;¹⁰⁶ nor for a defect in the form of the bond;¹⁰⁷ nor because the sureties on the bond are insufficient;¹⁰⁸ nor for mere irregularities in the removal.¹⁰⁹ Where the bond did not show the residence, nor the sufficiency, of the surety, and the petition stated that the petitioners "have made and herewith file a bond with good and sufficient surety;" it was held that this statement must be accepted by the Federal

115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319.

¹⁰¹ Birdseye v. Shaeffer, 37 Fed. 821; writ of error dismissed, Birdseye v. Nickerson, 140 U. S. 672, 11 Sup. Ct. 1017, 35 L. ed. 403.

¹⁰² Filer v. Levy, 17 Fed. 609.

¹⁰³ Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831.

¹⁰⁴ Diday v. New York, P. & O. R. Co., 107 Fed. 565.

¹⁰⁵ Beadleston v. Harpending, 32 Fed. 644.

¹⁰⁶ Kain v. Texas Pac. R. Co., Fed. Cas. No. 7,596; Chambers v. Mc-

Dougal, 42 Fed. 694. See § 547, *supra*.

¹⁰⁷ Baker v. Peterson, Fed. Cas. No. 776 (4 Dill. 562, note); Dennis v. Alachua County, Fed. Cas. No. 3,791 (3 Woods, 683).

¹⁰⁸ Dennis v. Alachua County, Fed. Cas. No. 3,791 (3 Woods, 683); Van Allen v. Atchison, C. & P. R. Co., 3 Fed. 545 (1 McCrary, 598); Chambers v. McDougal, 42 Fed. 694.

¹⁰⁹ Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339 (9 Sawy. 348).

court as true, until the contrary was shown; although it did not appear that the State court had either accepted or refused the surety.¹¹⁰ The Federal court has discretionary power to grant a motion to remand a cause because the transcript was not filed in time.¹¹¹ It may deny a motion for a remand upon that ground, if the defendant gives a reasonable excuse for his delay and offers to file the transcript at once.¹¹²

A defect in the transcript is no ground for a remand. The remedy for such a defect is a writ of *certiorari* for a diminution of the record.¹¹³

It has been held that, where the complaint sets out several causes of action, one of which is removable because of a difference of citizenship, and the others are assigned claims over which the Federal court would have had no original jurisdiction, the whole case can be removed.¹¹⁴ Where the plaintiff prayed for an injunction and for damages, the injunctive relief being ancillary to a suit previously pending in the State court; it was held that, although the claim for damages might have been separately removable, the court, upon a motion to remand, had no power to order the pleadings recast into two suits, in law and equity; but that the whole must be remanded.¹¹⁵ Where, before the removal, a rule had been issued directing the defend-

¹¹⁰ Probst v. Cowen, 91 Fed. 929.

¹¹¹ St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703; Bright v. Milwaukee & St. P. R. Co., Fed. Cas. No. 1,877 (14 Blatchf. 214); Jackson v. Mutual Life Ins. Co., Fed. Cas. No. 7,141 (3 Woods, 413); McLean v. St. Paul & C. Ry. Co., Fed. Cas. No. 8,892 (16 Blatchf. 309); affirmed, St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703; Kidder v. Featteau, 2 Fed. 616 (1 McCrary, 323); Hall v. Brooks, 14 Fed. 113 (21 Blatchf. 167); McGregor v. McGillis, 30 Fed. 388.

¹¹² Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; St. Paul & C. Ry. Co. v. McLean, 108 U. S. 212, 216, 27 L. ed. 703, 704; Bright v.

Milwaukee & St. P. R. Co., 14 Blatchf. 214; Kidder v. Featteau, 2 Fed. 616 (1 McCrary, 323); Woolridge v. McKenna, 8 Fed. 650; Hall v. Brooks, 14 Fed. 113 (21 Blatchf. 167); Winchell v. Coney, 27 Fed. 482; Rowell v. Hill, 28 Fed. 433; McGregor v. McGillis, 30 Fed. 388; Lucker v. Phoenix Assur. Co., 66 Fed. 161.

¹¹³ Dennis v. Alachua County, Fed. Cas. No. 3,791 (3 Woods, 633); Cook v. Whitney, Fed. Cas. No. 3,166 (3 Woods, 715). See § 553, *supra*.

¹¹⁴ Sharkey v. Port B. Mill Co., 92 Fed. 425; *s. c.*, C. C. A., 102 Fed. 259; Hoge v. Canton Ins. Office, 103 Fed. 513; § 541, *supra*.

¹¹⁵ Ladd v. West, 55 Fed. 353.

ant to show cause why he should not be attached for contempt of an injunction in the suit; the Federal court remanded the contempt proceedings, but kept jurisdiction of the principal suit.¹¹⁶

Ordinarily, when a motion to remand is granted, costs are imposed upon the removing party.¹¹⁷ Where the remand was made after a verdict against the removing party, no costs were imposed.¹¹⁸ When a judgment or decree is reversed for want of jurisdiction, costs are usually imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant.¹¹⁹ Judgment for such costs is entered in the District Court of the United States.¹²⁰ The costs imposed upon a remand are: the docket fee of twenty dollars; and such taxable disbursements as have been incurred in the Federal court;¹²¹ but not disbursements incurred in the State court after the petition for removal was filed;¹²² except the fees paid the State clerk for certifying to the transcript. In the absence of a stipulation in the bond to

¹¹⁶ Voorhees v. Albright, Fed. Cas. 16,999.

¹¹⁷ Josslyn v. Phillips, 27 Fed. 481.

¹¹⁸ Ferguson v. Ross, 3 L.R.A. 322, 38 Fed. 161.

¹¹⁹ Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380; Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435; Everhart v. Huntsville College, 120 U. S. 223, 30 L. ed. 623; King Bridge Co. v. Otoe County, 120 U. S. 225, 30 L. ed. 623; Peninsular I. Co. v. Stone, 121 U. S. 631, 30 L. ed. 1020; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800; Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. ed. 602; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. ed. 804; Walker v. Collins, 167 U. S. 57, 42 L. ed. 76, 17 S. Ct. 738;

Grand Trunk Ry. Co. v. Twitshell, 59 Fed. 727, 8 C. C. A. 237. Where the case had been removed by one only of two defendants, the other objecting to the removal, and it was subsequently remanded by agreement to the State court, where a verdict was given for plaintiff against both; it was held that the costs in the Federal court should be taxed against the defendant who had removed the case, but not against the one who had objected thereto. Whilt v. Chester Traction Co., 7 Pa. Dist. R. 693.

¹²⁰ Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; reversing decree, Corbin v. Boies, 34 Fed. 692; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. ed. 602.

¹²¹ Josslyn v. Phillips, 27 Fed. 481.

¹²² Young v. Merchants' Ins. Co., 29 Fed. 273.

that effect, the court cannot, in its order of remand, direct the entry of judgment against the surety without a separate suit, upon which he is entitled to a hearing.¹²³

A formal order remanding the case is customary and is the regular practice.¹²⁴ It seems, however, that such an order is not indispensable, at least where the record does not show a removable case and the State court enters an order dismissing the petition.¹²⁵

§ 557. Review of order of remand. The Judicial Code of March 3rd, 1887, provides: that "no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."¹ If the State court proceeds to judgment in a cause, notwithstanding an application for removal, and there has been no remand by the Federal court, such decision of the State court can be reviewed by the Supreme Court upon writ of error to the highest court of the State, in which a decision upon the question could have been had.² The subsequent appearance

¹²³ Colburn v. Hill, C. C. A., 103 Fed. 340.

¹²⁴ Seeligson's Ex'rs v. Texas Transp. Co., 70 Tex. 198, 7 S. W. 708. *Supra*, § 554.

¹²⁵ Patten v. Cilley (N. H.), 42 Atl. Rep. 47.

§ 557. 1 Jud. Code, § 28, re-enacting 36 St. at L. 1087; Chicago, St. Paul & M. & O. Ry. Co. v. Roberts, 141 U. S. 690, 35 L. ed. 905.

² U. S. R. S., § 709; Gordon v. Longest, 16 Peters, 97, 10 L. ed. 900; Kanouse v. Martin, 14 How. 23, 14 L. ed. 310, 15 How. 198, 14 L. ed. 660; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. ed. 61; Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 582, 40 L. ed. 539, 542; Missouri, K. & T. Ry. Co. v. Missouri R. R. & Warehouse Com'rs, 183 U. S. 53, 46 L. ed. 78; Southern Ry. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078; Cincinnati & T. Ry. Co. v. Bohon, 200 U. S. 221, 50 L.

ed. 448; State ex rel. Jumel v. Johnson, 29 La. Ann. 399. In the absence from the transcript of the petition for the removal, it will be presumed that it was defective. Bush v. Kentucky, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. ed. 354. Where a State court has refused to allow the removal of a cause, on the ground that the defendant has failed to prove the diverse citizenship of the parties, and has proceeded with it to a final decision on writ of error to the State court although the case is not within the letter of Rule 32, which provides that, where a writ of error or an appeal is brought under the act of March 3, 1875, it may be advanced on motion and heard under the rules applicable to motions to dismiss. Burlington, C. R. & N. Ry. Co. v. Dunn, 121 U. S. 182, 7 Sup. Ct. 1114, 30 L. ed. 885. The fact that the State court refused to dismiss the complaint as against a resident defendant and that there was

in the State court by the defendant and his defense to the suit, does not waive his right to avail himself of such an error;³ but if he seeks affirmative relief in the State court, he makes such a waiver.⁴

The Supreme Court of the United States cannot review immediately, either by appeal or writ of error, an order of a District Court,⁵ or of a Circuit Court of Appeals,⁶ remanding a cause. The fact that the remand is made upon a decision overruling a demurrer does not give a right to a review by the Supreme Court.⁷ The Supreme Court of the United States can-

a verdict against him shows that an assignment of error because of a refusal to permit the case to be removed is frivolous. *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 57 L. ed. —. A defendant who makes an application for a removal cannot assign, for error, the refusal of the State court to permit a removal on the application of other defendants. *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; *Danville Banking & Trust Co. v. Parks*, 88 Ill. 170. Where, in a suit pending before it, a State court dissolved an injunction against proceedings to sell mortgaged premises under a foreclosure already had, and after such dissolution, the effect of which was to leave in force a final decree of sale, an alien defendant petitioned for removal into the United States Court under the act of July 27, 1866, and the State court refused to grant that petition, the defendant not excepting, and the case was not afterwards taken to the State Supreme Court, upon an appeal from such decree of dissolution; held that the Supreme Court of the United States had no jurisdiction to review such decree under U. S. R. S., § 709. *Fashnacht v. Frank*, 23 Wall. 416, 23 L. ed. 81.

³ *Insurance Co. v. Dunn*, 19 Wallace, 214, 22 L. ed. 68; *Removal Cases*, 100 U. S. 457, 25 L. ed. 593.

⁴ *Texas & Pac. Ry. Co. v. Eastin*, 214 U. S. 153, 53 L. ed. 946.

⁵ *Morey v. Lockhart*, 123 U. S. 56, 8 Sup. Ct. 65, 31 L. ed. 68; *Richmond & D. R. Co. v. Thouron*, 134 U. S. 45, 10 Sup. Ct. 517, 33 L. ed. 871; *Gurnee v. Patrick County*, 137 U. S. 141, 11 Sup. Ct. 34, 34 L. ed. 601; *Texas Land & Cattle Co. v. Scott*, 137 U. S. 436, 11 Sup. Ct. 140, 34 L. ed. 730; *Birdseye v. Schaeffer*, 140 U. S. 117, 11 Sup. Ct. 885, 35 L. ed. 402; *Chicago, St. P., M. & O. R. Co. v. Roberts*, 141 U. S. 690, 12 Sup. Ct. 123, 35 L. ed. 905; *Joy v. Adelbert College of Western Reserve University*, 146 U. S. 355, 13 Sup. Ct. 186, 36 L. ed. 1003; *Illinois Cent. R. Co. v. Brown*, 156 U. S. 386, 15 Sup. Ct. 656, 39 L. ed. 461; *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. ed. 536; *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92, 42 L. ed. 673, 18 S. Ct. 264.

⁶ *German Nat. Bank v. Speckert*, 181 U. S. 405, 45 L. ed. 926.

⁷ *Gurnee v. Patrick County*, 137 U. S. 141, 11 Sup. Ct. 34, 34 L. ed. 601; *Birdseye v. Schaeffer*, 140 U. S. 117, 11 Sup. Ct. 885, 35 L. ed. 402.

not, by a writ of error to the final judgment of a State court, review an order remanding the cause, which was made by a Federal court.⁸

Under a previous statute, it was said that the question whether the defendant had a reasonable excuse for his delay in filing the transcript rested in the discretion of the Court to which the case was removed and would not be reviewed by appeal or writ of error, unless it clearly appeared that there was an abuse of such discretion.⁹ An order remanding a cause cannot be reviewed by mandamus.¹⁰ The Circuit Court of Appeals cannot review an order remanding a cause.¹¹ It has been held by a State court that, after a Court of the United States has entered an order remanding a cause, it cannot set the same aside and recover jurisdiction of the case.¹² When the Federal court had set aside its order of remand at the term when the same was made, and meanwhile plaintiff had filed a copy of the first order in the State court and obtained a judgment there, which was affirmed on appeal by the Supreme Court of the State; it was held that a motion by the plaintiff in the Federal court, to strike the cause from its docket, would not be decided until the defendant had had an opportunity to bring the judgment of the State court before the Supreme Court of the United States for review.¹³

§ 558. Review of order denying remand. An order denying a motion to remand can be reviewed by the Supreme Court of the United States;¹ or, it seems by the Circuit Court of Appeals;² upon writ of error to, or appeal from, the final judgment or decree, as the case may be. It cannot, however, be re-

⁸ *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536.

⁹ *McLean v. St. Paul & C. Ry. Co.*, Fed. Cas. No. 8,892 (16 Blatchf. 309); affirmed *St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703.

¹⁰ *Ex parte Hoard*, 105 U. S. 578, 26 L. ed. 1176; *Re Sherman*, 124 U. S. 364, 8 Sup. Ct. 505, 31 L. ed. 423; *Re Pennsylvania Co.*, 137 U. S. 451, 34 L. ed. 738.

¹¹ *Re Coe*, 49 Fed. 481, 1 C. C. A. 326, 5 U. S. App. 6; *Cole v. Gar-*

land, 107 Fed. 759, 46 C. C. A. 626.

¹² *Chisolm v. Propeller Tow-Boat Co. of Savannah*, 59 S. C. 549, 38 S. E. 156.

¹³ *Empire Min. Co. v. Propeller Tow-Boat Co.*, 108 Fed. 900.

§ 558. ¹ *Edrington v. Jefferson*, 111 U. S. 770, 4 Sup. Ct. 683, 28 L. ed. 594; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. ed. 804; *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. 264.

² *Barth v. Coler*, 60 Fed. 466, 9

viewed by an immediate appeal or writ of error, since it is not a final order.³ If a review by the Supreme Court of the United States is desired, a certificate of jurisdiction should be obtained at the time of the entry of final judgment or decree.⁴ Unless the transcript or record shows the jurisdiction, either by the petition for the removal or by statements in the pleadings or evidence, the appellate court will reverse the judgment and order a remand.⁵ It has been said that the petition for removal is an essential part of the record to enable the court to determine its own jurisdiction, without which it will not proceed to a final adjudication.⁶ In case of an erroneous removal of a criminal prosecution, and a refusal to remand the same, the State may obtain a writ of mandamus to compel the remand of the prosecution and the restoration of the custody of the accused,⁷ and

C. C. A. 81, 19 U. S. App. 646; *Wabash R. Co. v. Barbour*, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102.

³ *Bender v. Pennsylvania Co.*, 148 U. S. 502, 13 Sup. Ct. 640, 37 L. ed. 537; *Patten v. Cilley*, 50 Fed. 337, 1 C. C. A. 522, 5 U. S. App. 9; *Harding v. Corn Products Mfg. Co.*, C. C. A., 198 Fed. 628, where the order denied the motion that awarded costs and directed execution to issue therefor against the complainant.

⁴ *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. 264; *infra*, § 688.

⁵ *Hancock v. Holbrook*, 112 U. S. 229, 5 Sup. Ct. 115, 28 L. ed. 714; reversing decree 9 Fed. 353 (4 Woods, 52); *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. ed. 132; *Hegler v. Faulkner*, 127 U. S. 482, 8 Sup. Ct. 1203, 32 L. ed. 210; *Crehore v. Ohio & M. Ry. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. ed. 144; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249; *Southwestern Telegraph & Telephone Co. v. Robinson*, C. C. A., 48

Fed. 769, 1 C. C. A. 91, 2 U. S. App. 148; *Juillard v. Barr*, C. C. A., 177 Fed. 921. See *Bush v. Kentucky*, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. ed. 354. Where, upon a foreclosure suit, the appeal was from an order confirming the sale, but not from the decree directing the sale, and this decree did not affirmatively disclose a want of jurisdiction; the Supreme Court of the United States did not examine the record prior to the decree of sale to see whether the case was properly removed. *Turner v. Farmers' Loan & Trust Co.*, 106 U. S. 552, 1 Sup. Ct. 519, 27 L. ed. 273. When the right to a remand depends upon the evidence it will not be reviewed upon appeal, unless such evidence is contained in the record. *Wirgman v. Persons*, C. C. A., 126 Fed. 449.

⁶ *Larned v. Jenkins*, C. C. A., 109 Fed. 100, 48 C. C. A. 252.

⁷ *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633.

may also appeal to the Supreme Court from an order of the Federal court granting the writ of *habeas corpus*.⁸ In a case not within the original jurisdiction of the Supreme Court, it is very doubtful whether an order denying a motion to remand a case may be reviewed by the writ of mandamus or prohibition.⁹ The District Court may review its own order denying a motion to remand, under the same circumstances that it can review any other order granted by it.¹⁰ Where there is no fraud or collusion, a District Court of the United States cannot declare void, in a collateral action, a judgment of a District Court or of a Circuit Court of Appeals, in a case removed from a State court; although the record fails to show facts necessary to warrant the removal.¹¹ Where the right of removal depended upon the existence of a separate controversy between parties whose difference of citizenship was not disputed, it was held that a decree dismissing a bill against one defendant, which was entered after a motion to remand had been improperly denied, could not be set aside at a subsequent term, although a decree in favor of the remaining defendant had been reversed because the remand should have been granted.¹² Where, after an attempted removal, the State court retained jurisdiction, tried the case and entered a judgment in favor of plaintiff, which was affirmed by the Supreme Court of the United States; it was held that a previous judgment of the Federal court, in favor of the defendant, was not void, but that defendant was estopped from using the same as the basis of a suit to enjoin the enforcement of the judgment of the State court.¹³ Where the petition to remove was defective, it was held that the entry of a discontinuance by the plaintiff in the Federal court, after his motion to remand had been overruled, did not dismiss the action which remained pending in the State court.¹⁴

⁸ *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633.

⁹ See *ex parte Harding*, 219 U. S. 363, 55 L. ed. 252; *supra*, § 457.

¹⁰ *Supra*, § 558.

¹¹ *Dexter, Horton & Co. v. Sayward*, 84 Fed. 296; *Ayres v. Wiswall*, 112 U. S. 187, 193, 28 L. ed. 693, 695.

¹² *Re Metropolitan Tr. Co.*, 218 U. S. 312, 54 L. ed. 1051.

¹³ *Illinois Cent. R. Co. v. Sheegog*, 177 Fed. 756; affirmed 217 U. S. 599, 54 L. ed. 897.

¹⁴ *Nichols v. Chesapeake & O. Ry. Co.*, C. C. A., 195 Fed. 913.

§ 559. **Proceedings after remand.** After the remand the Federal court can take no further proceedings in the case.¹ except perhaps to set aside such order at the same term.² It cannot confirm a sale previously made.³ The State court then alone has the power to determine what shall be done with the pleadings filed⁴ and testimony taken during the pendency of the suit in the Federal court.⁵

§ 559. ¹ Colburn v. Hill, C. C. A., 103 Fed. 340.

² See *supra*, § 554.

³ Colburn v. Hill, C. C. A., 103 Fed. 340.

⁴ Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695.

⁵ Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695; Broadway Ins. Co. v. Chicago & G. W. Ry. Co., 101 Fed. 507, 510.

CHAPTER XXXIII.

ADMIRALTY AND SEIZURES.

§ 560. **Admiralty Jurisdiction.** The Federal Constitution ordains that the judicial power shall extend "to all Cases of Admiralty and maritime Jurisdiction."¹ The Judicial Code provides that the District Courts of the United States shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty or maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."² Admiralty jurisdiction includes only maritime causes, or such as arise out of commerce and navigation upon the high seas or the navigable waters of the United States.³ In the courts of the United States, admiralty jurisdiction includes matters arising out of commerce and navigation upon the Great Lakes⁴ and navigable rivers⁵ of the United States, and even upon the State canals.⁶ Courts of admiralty have jurisdiction over contracts which are connected with navigation, although they are made on land.⁷ Courts of admiralty have jurisdiction of petitory suits or causes of property, as well as of mere

§ 560. ¹ Article III, § 2.

² § 24, subd. 3, 36 St. at L. 1087.

³ American Ins. Co. v. 356 Bales of Cotton, 1 Peters, 511, 7 L. ed. 243; The City of Panama v. Phelps, 101 U. S. 453, 25 L. ed. 1061; *Ex parte* Cooper, 143 U. S. 472, 36 L. ed. 232. For cases where there is a conflict between the jurisdiction of a court of admiralty and that of other courts, State or Federal, see *supra*, §§ 127 and 228.

⁴ *Genesee Chief v. Fitzhugh*, 12 Howard, 443, 13 L. ed. 1058.

⁵ *Jackson v. The Steamboat*, 20 How. 296, 15 L. ed. 909; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *The Eagle v. Fraser*, 8 Wall. 15, 19 L. ed. 365; *Ex parte* Garnet, 141 U. S. 1, 35 L. ed. 631. See *Williams v. Molther*, 189 Fed. 700.

⁶ *Ex parte* Boyer, 109 U. S. 629, 27 L. ed. 1056; *The Delaware*, 161 U. S. 459, 40 L. ed. 771.

⁷ *Zeane v. The President*, 4 Wash. 453; Fed. Cas. No. 18,201.

possessory suits.⁸ "The Court of Admiralty consists of two courts; the instance court, and the prize court";⁹ but it has been said that the distinction has no proper application to admiralty courts in the United States where the powers of both instance and prize courts are conferred without distinction.¹⁰ The jurisdiction of a court of admiralty to enforce contribution is not lost by the recovery of a judgment at common law against one of the parties by a person whom they have jointly injured.¹¹ A court of admiralty is not deprived of jurisdiction of a suit to recover possession of a vessel duly licensed and enrolled, under the navigation laws of the United States, by the appearance of officers of the State claiming to hold the vessel under process issued by a State court for violation of a State fishery law, where the constitutionality of such law is seriously attacked by the libellant, since such appearance does not render the suit one against the State, within the meaning of the Eleventh Constitutional Amendment, and the question is one which it is competent for the libellant to raise, and for the court to determine.¹² It has been held that the jurisdiction of admiralty extends over a barge¹³ or scow¹⁴ which has no means of propulsion and can only be moved by towing, a bath-house built on boats and designed for transporta-

⁸ *New England Ins. Co. v. The Sarah Ann*, 13 Peters, 387, 10 L. ed. 213; *Ward v. Peck*, 18 How. 267, 15 L. ed. 383.

⁹ *Percival v. Hickey*, 18 Johns. (N. Y.) 257, 265, 271, 9 Am. Dec. 210.

¹⁰ 3 Kent's Commentaries, 355, 378. See *Glass v. The Betsy*, 3 Dallas (U. S.) 6, 16, 1 L. ed. 485; *The Emulous*, 1 Gall. 563, 574, 8 Fed. Cas. No. 4,479; 22 Cyc. 1371. The instance side of the court is specifically mentioned in the Act of Feb. 16, 1875, 18 St. at L. 315, 4 Fed. St. Ann. 557.

¹¹ *The Ira M. Hedges*, 218 U. S. 264, 54 L. ed. 1039.

¹² *The W. J. Hingston*, 144 Fed. 560.

¹³ *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *Wood v. Canal Boat Wilmington*, 5 Hughes (U. S.) 205, 48 Fed. 566; *The City of Pittsburgh*, 45 Fed. 699; *Disbrow v. The Walsh Brothers*, 36 Fed. 607; *Hallett v. The Enterprise*, 11 Fed. Cas. No. 6,197, 19 Int. Rev. Rec. 108; *The Coal Boat D. C. Salisbury, Ole. Adm.* 71, 7 Fed. Cas. No. 3,694. But see *Jones v. The Coal Barges*, 3 Wall. Jr. 53, 13 Fed. Cas. No. 7,458; *Wood v. Two Barges*, 46 Fed. 204.

¹⁴ *Endner v. Greco*, 3 Fed. 411; *Woodruff v. One Covered Scow*, 30 Fed. 269.

tion,¹⁵ a chuncker,¹⁶ a dredge and its scows,¹⁷ a floating elevator,¹⁸ a ferry-boat,¹⁹ and a raft.²⁰ Admiralty has no jurisdiction over a claim for damages caused by a vessel to a building on land,²¹ nor to a bridge or dock, which, although in navigable waters, is connected with the shore and immediately concerns commerce upon land.²² A court of admiralty will ordinarily not enforce a lien against a bridge,²³ nor against a dry dock,²⁴ even though it is a float,²⁵ nor against a marine pump resting on piles, although capable of floating,²⁶ nor against a pile-driver which can be propelled with a wheel about the harbor,²⁷ nor even, it has been held, against a steamboat stripped of motive power which is used as a hotel.²⁸

The following contracts, amongst others, are enforceable in admiralty: contracts for salvage,²⁹ even when only partially

¹⁵ The Public Bath No. 13, 61 Fed. 692; The Steam-Tug M. R. Brazos, 10 Ben. 435, 17 Fed. Cas. No. 9,898.

¹⁶ Winslow v. Floating Steam Pump, 30 Fed. Cas. No. 17,880, 2 N. J. L. J. 124.

¹⁷ The Starbuck, 61 Fed. 502; The Atlantic, 53 Fed. 607; Aitcheson v. The Endless Chain Dredge, 40 Fed. 253; The Pioneer, 30 Fed. 206; The Alabama, 22 Fed. 449 (following The Floating Elevator Hezekiah Baldwin, 8 Ben. 556, 12 Fed. Cas. No. 6,449).

¹⁸ The Floating Elevator Hezekiah Baldwin, 8 Ben. 556, 12 Fed. Cas. No. 6,449.

¹⁹ U. S. v. Burlington, etc., Ferry Co., 21 Fed. 331; Murray v. The Ferry-Boat F. B. Nimick, 2 Fed. 86; The Steamboat Cheeseman v. Two Ferry-boats, 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633; The Gate City, 5 Biss. (U. S.) 200, 10 Fed. Cas. No. 5,267; The St. Louis, 48 Fed. 312.

²⁰ Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 596; The F. & P. M. No. 2, 33 Fed. 511; A Raft of Timber, 4 Woods (U. S.) 197, 15 Fed. 555; Fifty Thousand Feet of Timber, 2 Lowell (U. S.) 64, 9 Fed. Cas. No. 4,783; A Raft of Spars,

Abb. Adm. 485, 20 Fed. Cas. No. 11,529. *Contra*, A Raft of Cypress Logs, 1 Flip. (U. S.) 543, 20 Fed. Cas. No. 11,527; Tome v. Four Cribs of Lumber, Taney (U. S.) 533, 24 Fed. Cas. No. 14,083; Gastrel v. A Cypress Raft, 2 Woods (U. S.) 213, 10 Fed. Cas. No. 5,266.

²¹ Johnson v. Chicago & Pac. Elevated Co., 119 U. S. 388, 30 L. ed. 447.

²² Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co., 206 U. S. 316, 52 L. ed. 508; Duluth & S. Bridge Co. v. Steamer "Troy," 208 U. S. 321, 52 L. ed. 512, 28 S. Ct. 416.

²³ The Rock Island Bridge, 6 Wall. 213, 18 L. ed. 753.

²⁴ Cope v. Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501; s. c., below, 10 Fed. 142.

²⁵ Snyder v. A Floating Dry-Dock, 22 Fed. 685.

²⁶ The Big Jim, 61 Fed. 503.

²⁷ Pile Driver E. O. A., 69 Fed. 1005.

²⁸ The Steamboat Hendrick Hudson, 3 Ben. 419, 11 Fed. Cas. No. 6,355.

²⁹ Peisch v. Ware, 4 Cranch, 347, 2 L. ed. 643; Houseman v. The

performed and the work was stopped by the owner³⁰ and even when the salvage contract is attacked for fraud or mistake;³¹ for pilotage;³² for marine insurance;³³ for transportation of passengers on navigable waters;³⁴ for injury to a passenger at the suit of the passenger or her husband;³⁵ for the sale or hire of a chronometer;³⁶ of affreightment for the transportation of goods on navigable waters³⁷ and bills of lading when enforced by the consignor or consignee,³⁸ charter parties;³⁹ contracts of employment of sailors or other persons engaged in navigation,⁴⁰ including a bartender on a passenger boat.⁴¹

Admiralty has also jurisdiction to enforce bonds of bottomry⁴² and respondentia⁴³ to collect general average,⁴⁴ wharfage,⁴⁵ and other maritime liens, including one for the sale or hire.⁴⁶

North Carolina, 15 Peters, 40, 10 L. ed. 653; although the boat was saved from fire while in a dry-dock. *The Steamship Jefferson*, 215 U. S. 130.

³⁰ *Sea Ins. Co. v. About Five Hundred Tons of Steel Rails*, 191 Fed. 250.

³¹ *The Stanley H. Miner*, 172 Fed. 486.

³² *Hobart v. Drögan*, 10 Peters, 108, 9 L. ed. 363; *Re McNiel*, 13 Wall. 236, 20 L. ed. 624; *Re Hagar*, 104 U. S. 520, 26 L. ed. 816.

³³ *New England Mut. M. Ins. Co. v. Dunham*, 11 Wall. 1, 20 L. ed. 90.

³⁴ *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397; *The Kensington*, 183 U. S. 263, in which the author was counsel.

³⁵ *Reed v. Weule*, C. C. A., 176 Fed. 660.

³⁶ *N. Y. & Long Branch Steamboat Co. v. Johnson*, C. C. A., 195 Fed. 740.

³⁷ *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465.

³⁸ *McKinlay v. Morrish*, 21 How. 343, 16 L. ed. 100.

³⁹ *The Harriman*, 9 Wall. 161, 19 L. ed. 629; *Morewood v. Enequist*, 23 How. 491, 16 L. ed. 516.

⁴⁰ *The St. Jago de Cuba*, 9 Wheaton, 409, 6 L. ed. 122; *The Thomas Jefferson*, 10 Wheaton, 428, 6 L. ed. 358; *Sheppard v. Taylor*, 5 Peters, 675, 8 L. ed. 269; *Oliver v. Alexander*, 6 Peters, 143, 8 L. ed. 349.

⁴¹ *The J. S. Warden*, 175 Fed. 314. Former cases held that the court would not take jurisdiction of a libel to collect the amount due for the services of a musician, *Trainor v. Superior*, Gilpin, 514, or barber for passengers, *Thackarey v. Farmer of Salem*, Gilpin, 524, upon a boat, nor for a watchman or ship-keeper, *Gurney v. Crockett*, Abb. Adm. 490.

⁴² *O'Brien v. Miller*, 168 U. S. 287, 18 Sup. Ct. 140, 24 L. ed. 469.

⁴³ *Conrad v. Atlantic Ins. Co.*, 1 Peters, 386, 7 L. ed. 189; *Maitland v. The Atlantic*, Newb. Adm. 514, 16 Fed. Cas. No. 8980.

⁴⁴ *Re 4885 Bags of Linseed*, 1 Black, 108, 17 L. ed. 35.

⁴⁵ *Re Easton*, 95 U. S. 68, 24 L. ed. 373.

⁴⁶ *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. 386, 16 L. ed. 599; *The Grapeshot*, 9 Wall. 129, 19 L. ed. 651; *The Guy*, 9 Wall. 758, 19 L. ed. 710.

The Act of June 23, 1910, provides as follows: "That any person furnishing repairs, supplies or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Sec. 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies and other necessities for the vessel: The managing owner, ship's husband, master or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Sec. 3. That the officers and agents of a vessel specified in section 2 shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel or for any other reason the person ordering the repairs, supplies or other necessities was without authority to bind the vessel therefor.

Sec. 4. That nothing in this act shall be construed to prevent a furnisher of repairs, supplies or other necessities from waiving his right to a lien at any time, by agreement or otherwise, and this act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

Sec. 5. That this act shall supersede the provisions of all State statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies and other necessities."⁴⁷ Before the enactment of this statute, there was no

⁴⁷ 36 St. at L. 604; 1 Fed. St. L. 604. See *The Edna*, 185 Fed. Ann. Supp. 352, ch. 373, 36 St. at 206; *The Princess*, 185 Fed. 218.

maritime lien upon a domestic vessel for supplies furnished in her home port.⁴⁸ When the State statute creating such a lien contains a limitation upon the time within which the same shall be enforced, this limitation is enforced by the court of admiralty.⁴⁹ Ordinarily, the court of admiralty will bar a claim for laches at the expiration of the period prescribed by the State statute of limitations.⁵⁰ At least, before the enactment of this statute, admiralty had no jurisdiction to enforce a ship-building contract,⁵¹ nor a contract for the supply of engines, timber and other material in her construction,⁵² nor to foreclose or otherwise enforce an ordinary mortgage on a ship.⁵³ Admiralty has no jurisdiction to enforce a contract for the sale of a ship under a trust agreement,⁵⁴ nor to give a remedy for the breach of a covenant in a contract of partnership.⁵⁵ Admiralty has no jurisdiction of an accounting between partners in a ship,⁵⁶ or between part owners thereof,⁵⁷ nor, in general, of a complicated accounting.⁵⁸ Previously to this statute it had been held that a court of admiralty had no jurisdiction of a contract for repairs to a vessel, made on land, where the owners were represented there by a consignee who had funds,⁵⁹ nor for the

For the previous laws, see McKay v. Gulf Refining Co., C. C. A., 176 Fed. 93.

⁴⁸ The Edna, 185 Fed. 206, 209.

⁴⁹ The Edna, 185 Fed. 206, 209.

⁵⁰ See *infra*, § 576.

⁵¹ Roach v. Chapman, 22 How. 129, 16 L. ed. 294; Graham & M. Transp. Co. v. Craig Shipbuilding Co., 203 U. S. 577, 27 Sup. Ct. 777, 51 L. ed. 325.

⁵² Roach v. Chapman, 22 How. 129, 16 L. ed. 294.

⁵³ Bogart v. The John Jay, 17 How. 399, 15 L. ed. 95; Shuchardt v. Babbage, 19 How. 239, 15 L. ed. 625.

⁵⁴ The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. ed. 269.

⁵⁵ Vandewater v. Mills, 19 How. 82, 15 L. ed. 554; Ward v. Thompson, 22 How. 330, 16 L. ed. 249; Pacific Surety Co. v. Leatham & Fed. Prac. Vol. II.—122.

Smith Towing & Wrecking Co., C. C. A., 151 Fed. 440. A bond given by the charterer of a vessel to secure his performance of the conditions of the charter party, which neither requires nor authorizes the surety to perform such contract in case of the default of the principal, but merely to respond in damages for its breach, is not a maritime contract, and an action thereon is not within the admiralty jurisdiction.

⁵⁶ Ward v. Thompson, 22 How. 330, 16 L. ed. 249.

⁵⁷ The Orleans v. Phœbus, 11 Peters, 175, 9 L. ed. 677.

⁵⁸ Grant v. Poillon, 20 How. 162, 15 L. ed. 871. See Minturn v. Maynard, 17 How. 477, 15 L. ed. 235.

⁵⁹ Pritchard v. Schooner Lady Horatia, Bee Adm. 167, Fed. Cas. No. 11,438.

lease of a wharf,⁶⁰ nor for the storage of sails,⁶¹ or storage of cargo,⁶² nor with a ship broker,⁶³ nor with a passenger agent and freight agent whose office was on land,⁶⁴ nor to reimburse the libellant for money advanced to pay railroad charges,⁶⁵ nor for the sale of cargo after landing,⁶⁶ nor for services in purchasing a vessel and in travelling upon her while looking after the owner's interest, but with no connection with the navigation,⁶⁷ nor for advertising a vessel,⁶⁸ nor to procure insurance.⁶⁹ It has been held that a court of admiralty has no jurisdiction to recover money paid for maritime services under a contract fraudulent because made between two corporations by an officer common to both,⁷⁰ nor to take a vessel from the possession of a mortgagee when the mortgage is claimed to be fraudulent,⁷¹ nor to enforce a claim which has been adjusted by arbitration.⁷² The owner of a vessel is not liable in admiralty, either personally or *in rem*, for an assault and battery, committed on the high seas by his agent or servant, which he did not authorize.⁷³

A court of admiralty of the United States may libel a vessel within its jurisdiction upon a claim for damages caused by a tort, such as a collision committed upon the high seas, although the ship, the libellant, and the tort-feasor, are aliens,⁷⁴ even

⁶⁰ Upper Steamboat Co. v. Blake, 2 Appeal Cases (D. C.) 51. But see The Clifford v. U. S., 34 Ct. Cl. 223.

⁶¹ Hubbard v. Roach, 2 Fed. 393, 9 Biss. 375.

⁶² The Richard Winslow, C. C. A., 71 Fed. 426, 18 C. C. A. 344, 34 U. S. App. 542; s. c. below, 67 Fed. 259; The Pulaski, 33 Fed. 383.

⁶³ Skinner v. Harris, 98 Fed. 442.

⁶⁴ The Humboldt, 86 Fed. 351. See Richard v. Hogarth, 94 Fed. 684; The Bark Joseph Cunard, Ole. A. D. M. 120, 13 Fed. Cas. No. 7,535; The Ole Oleson, 20 Fed. 384.

⁶⁵ Pacific Coast S. S. Co. v. Ferguson, C. C. A., 76 Fed. 993, 22 C. C. A., 671, 44 U. S. App. 708; Pacific Coast Steamship Co. v. Moore, 70 Fed. 870.

⁶⁶ Waterbury v. Myrick, 1 Blatchf.

& H. A. D. M. 34, 29 Fed. Cas. No. 17,253.

⁶⁷ Doolittle v. Knobloch, 39 Fed. 40.

⁶⁸ Richard v. Hogarth, 94 Fed. 684.

⁶⁹ Andrews v. Essex F. & M. Ins. Co., 3 Mason, 6, 1 Fed. Cas. No. 374; Marquardt v. French, 53 Fed. 603; The City of Clarksville, 94 Fed. 201.

⁷⁰ United Transp. & L. Co. v. N. Y. & Baltimore Transp. Line, C. C. A., 185 Fed. 386.

⁷¹ The Helys, 173 Fed. 928.

⁷² Toledo S. S. Co. v. Zenith Transp. Co., C. C. A., 184 Fed. 391.

⁷³ The Miami, 78 Fed. 818.

⁷⁴ The Noddleburn, 28 Fed. 855; s. c., 30 Fed. 142. See The Troop, 118 Fed. 769; Pouppirt v. Elder Dempster Shipping, 122 Fed. 983;

when it occurred within a league of a foreign coast.⁷⁵ Such a court entertained jurisdiction of a suit by an American citizen residing in another district to recover upon a policy or marine insurance executed in a foreign country by a foreign corporation.⁷⁶

The Kaiser Wilhelm Der Grosse, 175 Fed. 215.

The following verdicts and awards have been sustained: \$15,000 for compound comminuted fracture of ankle of left leg. Engler v. Western Union Tel. Co., 69 Fed. 185; aff'd. Western Union Tel. Co. v. Engler, C. C. A., 75 Fed. 102, 21 C. C. A., 246. \$10,000 for loss of eyes and other injuries. Rillston v. Mather, 44 Fed. 743; aff'd. Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464. \$10,000 for loss of leg by girl five years of age. Smith v. Pittsburgh & W. Ry. Co., 90 Fed. 783, 788. \$10,000 for paralysis of right side. Osborne v. City of Detroit, 32 Fed. 36. \$8,000 for loss of leg. Shumacher v. St. Louis & S. F. R. Co., 39 Fed. 174. \$8,000 for loss by railroad brakeman of one foot and four toes on the other. Wood v. Louisville & N. R. Co., 88 Fed. 44. \$7,500 for the loss of a right eye. Korzib v. Netherlands-American Steam Nav. Co., 175 Fed. 998. \$7,500 for paralysis. Cleveland, C. C. & St. L. R. Co. v. Brown, C. C. A., 56 Fed. 804, 6 C. C. A. 142. \$6,000 for compound fracture, which resulted in shortening of right leg about three inches and leaving it permanently stiff. The Anchoria, 113 Fed. 982. \$6,500 for fracture of ankle and rupture. The Mineola, 44 Fed. 143. \$5,500 for paralysis of legs. Taylor v. Pennsylvania Co., 50 Fed. 755. \$5,000 for permanent injury and suffering while in the water after a collision. The Raleigh, 41 Fed. 527. \$5,000 for fracture of skull and collar bone, necessitating

two operations of trepanning and threatening paralysis. The Para, 56 Fed. 241; aff'd. Steel v. McNeil, C. C. A., 60 Fed. 105, 8 C. C. A., 512. \$5,000 for destroying the hearing of one ear, impairing muscular sense and rendering shipwright of 48, earning \$94 to \$96 a month, incapable of doing any but light work. The Pioneer, 78 Fed. 600. \$5,000 (to which verdict for \$10,000 was reduced) for servant on boarding-car, who had broken leg, dislocated arm and injury to back, shoulder and side. Missouri Pac. R. Co. v. Texas & P. Ry. Co., 41 Fed. 311. \$4,500 for torture inflicted as a punishment for insolent language, which arrested the circulation of blood in the hands, caused the skin and flesh to blister and decay, and so affected the cords as to cause the fingers to remain permanently bent. Bolden v. Jensen, 70 Fed. 505. \$4,500 for practical paralysis and permanent disability of left arm of dressmaker. Missouri Pac. R. Co. v. Texas & P. Ry. Co., 41 Fed. 316. \$4,000 for injury causing amputation of leg below knee. Wm. Johnson & Co. v. Johansen, C. C. A., 86 Fed. 886, 30 C. C. A. 675; *certiorari* denied 170 U. S. 706, 42 L. ed. 1218, 18 S. Ct. 943. \$4,000 for loss of hand. Witcofsky v. Wier, 32 Fed. 301. \$1,500 for fracture of left hip and arm. The A. Heaton, 43 Fed. 592. \$3,000 for loss of leg. The Iroquois, 113 Fed. 964.

⁷⁵ The Kaiser Wilhelm Der Grosse, 175 Fed. 215.

⁷⁶ Slocum v. Western Assur. Co., 42 Fed. 235.

Such a court refused to take jurisdiction of a controversy between an alien corporation and a corporation incorporated in another district of the United States when the cause of action arose in the latter district.⁷⁷ Courts of admiralty will take no jurisdiction of claims by foreign seamen against foreign vessels, when, by treaty, as in the case of Germany,⁷⁸ and Sweden and Norway,⁷⁹ exclusive jurisdiction of such suits is vested in the consul of the country who objects to the jurisdiction of the courts of the United States.⁸⁰ In such a case, an alien who has signed articles as seaman on a foreign ship, of a different country than that where he is born, is considered to be a subject of the latter kingdom.⁸¹ Ordinarily, a court of admiralty will not take jurisdiction of his claim against a foreign vessel, on which he is enrolled,⁸² unless it is necessary to prevent a failure of justice.⁸³ It may in its discretion refuse to entertain a suit by foreign seamen against a foreign ship for short allowance and bad provisions in foreign waters,⁸⁴ and for wages when their employment has not terminated and the result would be a detention of the vessel.⁸⁵ But where the libellant was a citizen of the United States, who signed in one of our ports after his discharge, the libel was sustained;⁸⁶ and where one of several sailors was a citizen of the United States, the court of admiralty took jurisdiction of the claims of all, when they were entitled to a discharge which had not been given them, the duration of their employment being a disputed question.⁸⁷ In case of injury which causes death, jurisdiction *in personam* will be sustained in admiralty, provided that a statute of the State where the injury occurred creates a cause of action in such a case.⁸⁸ If the laws of that State create a lien upon the vessel

⁷⁷ *Neptune Steam Nav. Co. v. Sul-livan Timber Co.*, 37 Fed. 159.

⁷⁸ 17 St. at L. 928, art. 13.

⁷⁹ 8 St. at L. 352.

⁸⁰ *The Koenigin Luise*, 184 Fed. 170; *The Ester*, 190 Fed. 216. As to Consular Courts, see § 74, *supra*.

⁸¹ *The Amalia*, 3 Fed. 652; *The Ester*, 190 Fed. 216.

⁸² *The Albani*, 169 Fed. 220; *The Ester*, 190 Fed. 216.

⁸³ *Ibid.*; *The Bark Lilian M.*

Vigus, 10 Benedict, 385, 7 Fed. Cas. No. 8,346.

⁸⁴ *The Gloria de Larrinaga*, 196 Fed. 590.

⁸⁵ *Slocum v. Western Assur. Co.*, 42 Fed. 235. But see *The August Belmont*, 153 Fed. 639.

⁸⁶ *The August Belmont*, 153 Fed. 639.

⁸⁷ *The Falls of Keltie*, 114 Fed. 357.

⁸⁸ *The Hamilton*, 207 U. S. 398,

52 L. ed. 264; *Monongahela River Consol. Coal & Coke Co. v. Schinnerer*, C. C. A., 196 Fed. 375. In assessing damages for death, courts of admiralty will give weight to the limit fixed by State statutes and acts of Congress in similar cases at common law. *Cheatham v. Red River Line*, 56 Fed. 248; reversed on another ground, *Red River Line v. Cheatham*, C. C. A., 60 Fed. 517, 9 C. C. A. 124. See *Farmers' L. & Tr. Co. v. Toledo, A. A. & N. M. R. Co.*, 67 Fed. 73. At common law the amount of damages is limited by the statute of the State where the injury took place; not by that of the forum, nor by that of the place of death. *Northern Pac. R. R. Co. v. Babcock*, 154 U. S. 190. The following verdicts and awards have been approved at common law and in admiralty respectively: \$12,000, railroad engineer, 45 years of age, earning from \$125 to \$175 a month, leaving widow of 38, but no children. *Vreeland v. Michigan Cent. R. Co.*, 189 Fed. 495. \$12,000, division manager of insurance company, 34 years of age, salary \$2,000 a year, unmarried, leaving widowed mother, to whose support he contributed, and also brothers, sisters, nephews and nieces. *Stockton v. Pennsylvania R. Co.*, 182 Fed. 282. \$10,000 said to be enough (a verdict of \$17,000 being set aside), architect's clerk, 30 years of age, whose services were worth from \$4,000 to \$7,000 a year, unmarried, living with both parents and working for his father, who paid nothing for his services except about \$500 a year for his personal expenses, he having agreed with his father to allow that arrangement to continue until the father had paid off his own debts. *Seofield v. Pennsylvania Co.*, 149 Fed. 601. \$10,000 held not inad-

quate in admiralty, dairy farmer, 32 years of age, earning from \$1,500 to \$2,100 a year, leaving widow and two children. *The Oceanic*, 61 Fed. 338; aff'd. *Occidental & O. S. S. Co. v. Smith*, C. C. A., 74 Fed. 261, 20 C. C. A. 419. \$9,000, member of switching crew on railroad, 29 years of age, earning from \$75 to \$78 a month, leaving widow. *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. 867. \$7,500, locomotive engineer, 25 years of age, earning from \$100 to \$130 a month, unmarried, leaving mother, whom he supported. *Baker v. Phila. & R. Ry. Co.*, 149 Fed. 882; aff'd. *Phila. & R. R. Co. v. Baker*, C. C. A., 155 Fed. 407, 84 C. C. A., 86. \$7,000, shipmaster, 35 years of age, wages \$100 a month, leaving widow and two children. *Re Humboldt Lumber Manuf'rs Ass'n.*, 60 Fed. 428; aff'd. *Humboldt Lumber Manuf'rs' Ass'n. v. Christopherson*, C. C. A., 73 Fed. 239, 19 C. C. A. 481, 46 L.R.A. 264. It has been held that an award of \$7,000 is not excessive for the death of the captain of a launch earning about \$900 a year, who left a wife and five children and who was 37 years of age; nor for the death of the engineer, 25 years of age, earning about \$900 a year, who left a wife and one child. *The Prudence*, 191 Fed. 993. \$7,000, laborer, 30 years of age, earning about \$400 a year, leaving widow and children. *Harkins v. Pullman Palace Car Co.*, 52 Fed. 724. \$6,000 (to which verdict of \$17,545 was reduced), man 29 years of age suffering from lung trouble, had spent several thousand dollars of his wife's estate and left only \$250 for his widow and five children, before marriage taught school, and after marriage hauled and stacked lumber in a sawmill, worked on a farm, and was brake-

man on a railroad when he died. *Duke v. St. Louis & S. F. R. Co.*, 172 Fed. 684. \$6,000 (to which verdict of \$10,000 was reduced), stonemason, 47 years of age, earning \$6 to \$6.50 a day, had bad habits, sobriety doubtful, but gave most of his earnings to his family, left widow and children. *Felt v. Puget Sound El. Ry.*, 175 Fed. 477. \$5,000, cook on schooner, 39 years of age, earning \$50 a month, leaving widow and three children. *Re Humboldt Lumber Manuf'rs' Ass'n.*, 60 Fed. 428; *aff'd. Humboldt Lumber Manuf'rs' Ass'n. v. Christopherson*, C. C. A., 73 Fed. 239, 19 C. C. A. 481, 46 L.R.A. 264. \$5,000, in admiralty, passenger 52 years of age, no evidence of his average earnings, left widow and seven children. *Hall v. North Pacific Coast R. Co.*, 134 Fed. 309. \$4,000, trackman, 66 years of age, earning \$300 a year, leaving widow. *Kountz v. Toledo, St. L. & W. R. Co.*, 189 Fed. 494. \$4,000, sailor, 26 years of age, paying out of his earnings about \$300 a year to his wife and children. *Nickerson v. Bigelow*, 62 Fed. 900. \$3,500, bargemaster, 61 years of age, leaving widow. *Egan v. Southern Towing Co.*, 189 Fed. 543. \$2,500 (to which verdict for \$3,500 was reduced), common laborer, 27 years of age, earning \$1.50 a day, unmarried, left father 65 years of age, to whom he sent from \$20 to \$25 a month. *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438. \$2,500, deckhand, 38 years of age, leaving three minor children. *Cheatham v. Red River Line*, 56 Fed. 248; reversed on other grounds, *Red River Line v. Cheatham*, C. C. A., 60 Fed. 517, 9 C. C. A., 124. \$2,500, healthy boy, five years of age, leaving parents. *Ross v. Texas & Pac. Ry. Co.*, 44 Fed. 44. \$1,600, sailor,

18 years of age, earning \$15, which was about to be advanced to \$20, a month, unmarried, leaving several minor brothers and sisters in part dependent upon him for support. *The Charlotte*, 124 Fed. 989. \$1,500 (to which verdict of \$5,000 was reduced), woman, 23 years of age, domestic servant, unmarried, leaving father of 52 years of age, to whom she sent about \$3 a month. *Lindstrom v. International Nav. Co.*, 117 Fed. 170. \$1,500, stevedore's man, 50 years of age, paid 50 cents an hour when he worked, leaving widow and four children. *Boden v. Demwolf*, 56 Fed. 846. \$1,500, real estate and employment broker, 34 years of age, earning about \$100 a month, bad habits, left widow and three children. *Ladd v. Foster*, 31 Fed. 827. \$1,200, colored farm laborer, 23 years of age, earning about \$25 a month, left widow but no children. *The Elizabeth*, 114 Fed. 757. \$1,000, girl, 4½ years of age, in good health, leaving mother. *The Oceanic*, 61 Fed. 338, 364; *aff'd. Occidental & O. S. S. Co. v. Smith*, C. C. A., 74 Fed. 261, 20 C. C. A. 419. \$900, colored cabin-boy, 15 years of age, earning \$10 a month, leaving a father of 51 years of age. *The Charlotte*, 124 Fed. 989. \$500, scowman, unmarried, leaving two sisters, self-supporting, to whom he had promised to supply money for their return to Norway to live upon a farm owned by him. *The O. L. Hallenbeck*, 119 Fed. 468; *aff'd. C. C. A.* 135 Fed. 1022, 68 C. C. A. 676. \$500, bargeman, over 21 years of age, leaving a mother, for whose support he was not legally responsible. *Egan v. Southern Towing Co.*, 189 Fed. 543. \$350 (to which an award of \$3,500 was reduced), for mental and physical suffering of seaman who remained

to secure the damage for such an injury, such lien will be enforced in admiralty.⁸⁹ Otherwise it has been held that no such lien will be enforced.⁹⁰ The same rules apply when injuries occur upon the high seas and the vessel which caused the same and that carrying the deceased belonged to a State or States the laws of which recognize such a liability at common law.⁹¹ Otherwise, in the absence of an act of Congress, it seems that no such liability would be enforced.⁹² It has been held, that where such is the common law of the State whose statute is enforced, the libellant must affirmatively prove the negligence of the vessel causing the injury and also the freedom of the decedent from contributory negligence.⁹³ A court of admiralty will take jurisdiction of a claim for salvage upon property within its jurisdiction, although the salvors and claimants are all foreigners,⁹⁴ unless wanton misconduct in obtaining possession of the property is charged.⁹⁵ A court of admiralty will ordinarily dismiss a libel to enforce a contract which contains a stipulation against the enforcement of the same in a foreign jurisdiction;⁹⁶ unless the interests of justice require it, as where a seaman is entitled to his discharge because of improper treatment,⁹⁷ or for

in water one hour before he was drowned. *The Robert Graham Dun*, C. C. A., 70 Fed. 270, 17 C. C. A. 90; modifying and affirming 63 Fed. 167.

The following verdict was held to be excessive: \$1,750, bridge carpenter, earning about \$2 a day, unmarried and childless, leaving a sister in Denmark, to whom he occasionally sent some money. *Serensen v. Northern Pac. R. Co.*, 45 Fed. 407.

⁸⁹ *Aurora Shipping Co. v. Boyce*, C. C. A., 191 Fed. 960; *Gretschmann v. Fix*, 189 Fed. 716.

⁹⁰ *The Corsair*, 145 U. S. 335, 36 L. ed. 727 (Louisiana); *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. ed. 751 (Louisiana); *The Nora*, 181 Fed. 845 (Florida).

⁹¹ *The Hamilton*, 207 U. S. 398, 52 L. ed. 264; *La Bourgonne*, 210

U. S. 95, 52 L. ed. 973, where the vessel belonged to France.

⁹² *The Harrisburg*, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358; *The Alaska*, 130 U. S. 201, 9 S. Ct. 461, 32 L. ed. 923.

⁹³ *Gretschmann v. Fix*, 189 Fed. 716.

⁹⁴ *The Bee*, 1 Ware (U. S.) 336, 3 Fed. Cas. No. 1219; *One Hundred and Ninety-four Shawls*, Abb. Adm. 317, 18 Fed. Cas. No. 10,521.

⁹⁵ *One Hundred and Ninety-four Shawls*, Abb. Adm. 317, 18 Fed. Cas. No. 10,521.

⁹⁶ *The Pawashick*, 2 Lowell (U. S.) 142, 19 Fed. Cas. No. 10,851; *Armstrong v. The Rydesdale*, 1 Fed. Cas. No. 547; *The Infanta*, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; *Aertsen v. Ship Aurora*, Bee Adm. 161, 1 Fed. Cas. No. 95.

⁹⁷ *Bucker v. Klorkgeter*, Abb.

want of seaworthiness of the vessel,⁹⁸ or when the voyage is broken up by some other cause than the wreck of the vessel;⁹⁹ not, however, it has been held, because of a deviation from the voyage.¹⁰⁰ Ordinarily, a court of admiralty will not take jurisdiction without the consent of the consul of the country to which the ship belongs;¹⁰¹ but this rule is not invariable;¹⁰² and under some circumstances the court will proceed against the protest of the counsel, as where, pending suit, the vessel left the district without any certain destination,¹⁰³ where the voyage was broken up and the seamen discharged¹⁰⁴ or where the seamen did not belong to the country of the consul.¹⁰⁵

§ 561. **Libel.** The first step in an admiralty suit is the filing of the libel with the clerk of the District Court. Until this is done process will not issue.¹ The form of the libel varies in the several districts with the methods of pleading adopted in the respective States, not by force of any rule of law or statute, but by a natural process of adaptation. The Supreme Court, in its Admiralty Rules, has, however, laid down certain positive rules of pleading. The libel must state the nature of the cause of action, whether of contract, tort, or damage, salvage, or possession, or otherwise, as the case may be. It should allege that the cause is within the admiralty and maritime jurisdiction of the United States and of the court.² It is the safer practice to allege specifically that the waters where the cause of action arose are navi-

Adm. 402, 4 Fed. Cas. No. 2,083; *The Infanta*, Abb. Adm. 263, 13 Fed. Cas. No. 7,030.

⁹⁸ *Ibid.*

⁹⁹ *The Infanta*, Abb. Adm. 263, 13 Fed. Cas. No. 7,030.

¹⁰⁰ *Bucker v. Klorkgeter*, Abb. Adm. 402, 4 Fed. Cas. No. 2,083; *The Infanta*, Abb. Adm. 263, 13 Fed. Cas. No. 7,030.

¹⁰¹ *The Walter D. Wallet*, 66 Fed. 1011; *The Becherdass Ambaidass*, 1 Lowell (U. S.) 569, 3 Fed. Cas. No. 1,203; *Hayes v. The Barque J. L. Wickwire*, 7 Phila. (Pa.) 594, 27 Leg. Int. (Pa.) 67, 11 Fed. Cas. No. 6,262; *Reynolds v. The Simoon*, 20 Fed. Cas. No. 11,733; *Hay v. The Bloomer*, 11 Fed. Cas. No. 6,255;

Saunders v. The Victoria, 21 Fed. Cas. No. 12,377, 11 Leg. Int. (Pa.) 70; *The Infanta*, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; *Jelly v. Tidde-man*, 13 Fed. Cas. No. 7,256a. See § 74, *supra*.

¹⁰² *Bucker v. Klorkgeter*, Abb. Adm. 402, 4 Fed. Cas. No. 2,083; *The Lady Furness*, 84 Fed. 679.

¹⁰³ *The Topsy*, 44 Fed. 631.

¹⁰⁴ *Orr v. The Achsah*, 18 Fed. Cas. No. 10,586.

¹⁰⁵ *The Bark Lillian M. Vigus*, 10 Ben. 385, 15 Fed. Cas. No. 8,346. § 561. ¹ Admiralty Rule 1.

² *Almir. Rule 23. The Falls of Keltie*, 114 Fed. 357. See *The August Belmont*, 153 Fed. 639, and *supra*, § 25.

gable.³ If the proceeding is *in rem*, the libel must allege that the property proceeded against is within the district.⁴ And when the libelants are all foreigners the nationality of the ship should ordinarily be stated.⁵ If *in personam*, it must set forth the names, occupations, and places of residence of the parties.⁶ In its substantial, as distinguished from formal, allegations the libel follows the analogies of equity. It should "propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article."⁷ A libel *in*

³ Admiralty Rule 23. But see *Lands v. A Cargo of Two Hundred and Twenty-seven Tons of Coal*, 4 Fed. 478.

⁴ Adm. Rule 23. This does not oust the court of jurisdiction where the vessel was within the district when the libel was verified, departs before it is filed, returns after the filing, and is then seized on an alias monition. *The Queen of the Pacific*, 61 Fed. 213; s. c., *Bancroft-Whitney Co. v. The Queen*, 78 Fed. 155. A libel filed to enforce a lien which did not then exist was sustained after the lien came into existence. *Clark v. Five Hundred and Five Thousand Feet of Lumber*, C. C. A., 65 Fed. 236; s. c., 70 Fed. 1020.

As to jurisdiction in proceedings to limit liability, see *Re Leonard*, 14 Fed. 53; *infra*, §§ 593, 596. A corporation may be sued *in personam* in any district where process can be served upon it. *Re Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991. But it has been held that in the Western District of Missouri suits *in personam* can only be brought in the division where the respondent resides if he is a resident of the district; and suits *in rem* only in the division where the property is situated. *The L. B. X.*,

88 Fed. 290. An appearance, the procurement of the release of the vessel by filing a stipulation, and the transfer of the suit to the division of the claimant's residence, were held to constitute a waiver of a similar objection. *The Willamette*, C. C. A., 31 L.R.A. 715, 70 Fed. 874. Where the persons charged in a libel *in personam* reside in different districts of the same State, the suit may be brought in either district. *Downs v. Wall*, C. C. A., 176 Fed. 657.

⁵ *The Falls of Keltie*, 114 Fed. 357, 359.

⁶ Adm. Rule 23.

⁷ Adm. Rule 23. Naming the libellant by the initials of his Christian name was held not to be a defect in the libel. *Hardy v. Moore*, 4 Fed. 843. Where a party is a corporation, that fact should be stated in the libel. *Sun Mut. Ins. Co. v. Mississippi V. Tr. Co.*, 14 Fed. 699. Where the cause of action arises from a written contract it has been said that the contract should be annexed to the libel or a legal excuse given for its omission. *Sun Mut. Ins. Co. v. Mississippi V. Tr. Co.*, 14 Fed. 699; *Card v. Hines*, 33 Fed. 189. But, see *Chamberlain v. The Torgorm*, 46

personam, for a collision or other tort, should state specifically that the respondent was the owner or in control of the vessel at the time when the libelant was injured.⁸ A libel for damages, because of a breach of contract, should point out the manner in which any special damages that are claimed arose.⁹ A libel which charges improper navigation is sufficient if it correctly states the essential facts, although it fails to give the proper interpretation thereof or the correct scientific reason for the result.¹⁰ A court of admiralty may, in its discretion, permit the joinder in the same libel of claims in contract and tort.¹¹ By amendment, a libel *in rem* may be changed to one *in personam*¹² when such a joinder might have been made; but it has been said not otherwise.¹³ There will be no reversal for a misjoinder of causes of action in a libel, when one of the causes of action has been dismissed, either on exception or a final hearing.¹⁴ The libel should conclude with a prayer specifying the relief¹⁵ and the form of process.¹⁶ Ordinarily, there is no objection to the recovery by the libelant of more damages than his libel claims;¹⁷ and where the allegations in the answer, when considered in connection with those in the libel, show a

Fed. 202. As to the insufficiency of allegations showing that the libelant had an interest in the property injured which entitled him to recover, see *Minturn v. Alexandre*, 5 Fed. 117. For what is required to identify goods that have been damaged, see *The Anchoria*, 9 Fed. 840. As to what is a sufficient allegation of negligence by the master, see *The Anaces*, 93 Fed. 240. Where the libel in a suit to recover for injury to a vessel alleged to have been caused by the improper navigation of another vessel correctly stated the essential facts by reason of which the injury occurred, it was held that a failure to give the proper interpretation of such facts, or the correct scientific reason for the result, did not constitute a material variance between the allegations and proof.

⁸ *The Consair*, 145 U. S. 335, 36 L. ed. 727; *Danace v. The Magnolia*, 37 Fed. 367.

⁹ *The Oscoda*, 66 Fed. 347.

¹⁰ *Kelley Island Lime & Transp. Co. v. City of Cleveland*, 144 Fed. 207.

¹¹ *Welch v. Fallon*, 181 Fed. 875.

¹² *The Monta*, 12 Fed. 331; *One Hundred and Eighteen Sticks of Timber*, 10 Ben. (U. S.) §6, 18 Fed. Cas. No. 10,519.

¹³ *The Steam Ship Zodiac*, 5 Fed. 220; *The Young America*, Brown Adm. 462, 30 Fed. Cas. No. 18,178.

¹⁴ *The S. L. Watson*, C. C. A., 118 Fed. 445.

¹⁵ Adm. Rule 23.

¹⁶ Adm. Rule 23.

¹⁷ *The Gazelle*, 128 U. S. 474, 32 L. ed. 496.

cause of action different from that pleaded and prayed, the proper relief will be granted.¹⁸ The libel should be signed by the proctor, as the attorney for the libelant is usually termed.¹⁹ The libel should be verified.²⁰ It is the safer practice for all the libelants to verify the libel;²¹ but a defect in the verification, when not objected to in the trial court, cannot be availed of upon appeal.²² If the libelant is absent from the district, his agent or attorney may verify the libel.²³ In suits brought in behalf of the United States, the district attorney files a libel of information, or, as it is usually termed, an information, which is subject to the same rules as a libel.²⁴ Such information is not usually verified.

§ 562. Security for libelant's costs. The Supreme Court Rules do not expressly require any security to be given by the libelant for costs; but in many of the districts process will not issue until the libelant has filed with the clerk a stipulation for costs.¹ This is conditioned to pay all costs and expenses which

¹⁸ *Deming v. The Rapid Transit*, 52 Fed. 320; where libelant was allowed to shift his claim, from damages upon a contract of affreightment to a demand for general average. But it has been held: that there can be no recovery for tort upon a libel which sets up an express contract only, *Hays v. Pittsburgh G. & B. Packet Co.*, 33 Fed. 552. That upon a libel *in rem* by laborers claiming wages they cannot recover for services as salvors or lightermen, *The Sarah E. Kennedy*, 29 Fed. 264. That unless the libel is amended wages cannot be recovered for services performed at a date prior to that alleged in the libel, *Pinkham v. Rutan*, 31 Fed. 496. That demurrage for detention subsequent to the filing of the original libel may in a proper case be recovered under a supplemental libel, *Eight Hundred and Forty-one Tons of Ore*, 25 Fed. 864. And that when a penalty is demanded against

a vessel upon grounds not set forth in the libel, the demand will be ignored. *The Pope Catlin*, 31 Fed. 408.

¹⁹ *Hardy v. Moore*, 4 Fed. 843.

²⁰ This is specifically required by Adm. Rule 1, S. D. N. Y. As to the practice in the Ninth Circuit, see *Northwestern S. S. Co. v. Ransom*, C. C. A., 174 Fed. 913.

²¹ *Northwestern S. S. Co. v. Ransom*, C. C. A., 174 Fed. 913.

²² *Ibid.*

²³ But see *Tibbol v. The Marion*, 79 Fed. 104. As to signature by the libelant or his attorney, see *Hardy v. Moore*, 4 Fed. 843. Cf. § 494, *supra*.

²⁴ Adm. Rule 22.

§ 562. ¹ See *Raymond v. La. Compagnie Generale*, 90 Fed. 105; *Rawson v. Lyon*, 15 Fed. 831. As to an increase of the security, see *The Brig Harriet*, Fed. Cas. No. 6,096; *The Bark Laurens*, Abb. Adm. 302. An informer who is not

shall be awarded against the libelant by the court, or, in case of an appeal, by the appellate court. In the New York districts and in New Jersey the stipulation is for \$250 in suits *in rem* and for \$100 in suits *in personam*.² In Connecticut the stipulations are executed by the libelant and one surety, who must reside in the State within which the district is situated. If, however, the libelant is a non-resident, he must, in the Southern and Eastern Districts of New York, furnish two sureties.³ Seamen suing for wages for services on board American vessels, and salvors coming into port in possession of the property libeled, are not required to give security in the first instance, but may be required to do so for adequate cause on motion.⁴ No security is required of the United States in its proceedings, as costs are not allowed against the government.⁵ Suits may be brought *in forma pauperis* upon application to the court.⁶

§ 563. **Parties.** In admiralty, the party entitled to relief should always be made libelant, and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases, such as suits by the owner to recover for loss of cargo, partially insured, where the insurance has been paid and the insurer is entitled by subrogation to a part of the recovery.¹

Persons entitled to participate in the recovery, but not made parties in the original libel, may, upon petition, be allowed to join in a suit as co-libelants on such terms as the court deems reasonable. Seamen claiming wages for the same voyage are not permitted to prosecute separate suits. Those not included in the original libel should petition to be made co-libelants.²

suing in discharge of his duty as a public officer must give security for costs. The Steamboat Planter, Newb. Adm. 262. In S. D. N. Y., the form of stipulations, justifications thereunder, further security and discharge of the same, is regulated by Adm. Rules 20-23.

² S. D. N. Y. Adm. Rule 6.

³ Ibid.

⁴ Ibid. Cf. § 425, *supra*.

⁵ The Antelope, 12 Wheaton 546, 6 L. ed. 723.

⁶ By Adm. Rule 8, S. D. N. Y., "Process *in rem* in such causes, unless specially allowed by the Court, shall not issue except upon proof of twenty-four hours notice to owner of the *res* or his agent, of the filing of the libel." See § 413, *supra*.

§ 563. ¹ Eastfield S. S. Co. v. McKeon, 186 Fed. 357.

² See Adm. Rule 3, S. D. N. Y.

If they file a second libel, they will be denied costs in case of recovery, and suits so brought will be consolidated, on motion. So suits for salvage arising out of services participated in by several vessels will be consolidated in one suit.³ Where a libel is found for a tort by a collision,⁴ or in other cases, new parties charged with the respondent with the tort may be brought into the court against the objection of the libelant.⁵ It has been held, that, in a suit by a pledgee of a bill of lading of cargo to recover from the ship for a wrongful delivery thereof to persons who have sold the same, the claimant may bring in the persons to whom such delivery was made; if it appears from the pleadings, that if the libelant's contention was sustained the claimant would have a claim against them; and the fact that an action is pending at common law brought by the libelant, against such persons will not deprive the claimant of this relief.⁶ A libel was sustained when filed under a bill of lading against the charterer and another to whom the bill of lading had been transferred, to recover freight earned thereunder, and seeking recovery in the alternative against one or the other of them, stating that the libelant was unable to determine which is liable.⁷ A libel may be filed against more than one vessel. Thus, in a cause of collision, the owner of the damaged vessel frequently proceeds against the tug which had it in tow and a third vessel. So, different interests may be proceeded against in the same suit, as, for example, in a cause of salvage, the vessel salvaged, her cargo, and her freight money. The owners of a vessel may find a libel for salvage on their own behalf and on behalf of the officers and new interests naming them.⁸ A decree will not be reversed for an award of

³ Where upon a libel in admiralty against a city, to recover for salvage services to a scow, the respondent pleaded that the scow was under the hire of a corporation, which had contracted to return it in good condition, and that the service was rendered to such company, it appearing that before the issue of citation against the corporation it had been adjudicated a bankrupt, which subsequently appeared in the suit, by its trustee, and that the

city had security; it was held that the libelant was entitled to a decree against both respondents. *Conway v. City of New York*, 194 Fed. 529.

⁴ Admiralty Rule 59.

⁵ *Dailey v. New York*, 119 Fed. 1005. Third party practice is regulated in S. D. N. Y. by Adm. Rule 15.

⁶ *The Cerea*, 149 Fed. 924.

⁷ *Neall v. Curran*, 93 Fed. 831.

⁸ *The Flottbek*, C. C. A., 118 Fed. 159.

salvage compensation to persons who are not parties, when the objection was not taken below.⁹ In case of death of any of the parties or changes of interest in the suit, necessary new parties may be made such upon a petition on their part or by the party of adverse interest.¹⁰ It has been held, the substitution of a new owner as claimant of a libeled vessel which has been released on stipulation is not the bringing in of a new party, and may be allowed without notice to the surety on the stipulation.¹¹

§ 564. Mesne Process—Joinder of process in rem and in personam. The process issued in pursuance of the prayer of the libel is either *in rem* or *in personam*.¹ A joinder of the two forms of proceeding is sometimes permitted, as in a cause

⁹ Ibid.

¹⁰ By Adm. Rule-5, S. D. N. Y., "Whenever, from the death of any of the parties, or changes of interest in the suit, defect in the pleadings or proceedings, or otherwise, new parties to the suit are necessary; the persons required to be made parties may be made such either by a petition on their part or by the adverse party. In either mode, it shall be sufficient to allege briefly the prayer of the original libel, the interest which the party sought to be added or substituted has in the action, the several proceedings in the cause and the date thereof, and to pray that such persons required to be made parties in the suit may be made such parties. On service of a copy of such petition and of notice of the presenting thereof, such order will be made for the further proceeding in the cause as shall be proper for its speedy and convenient prosecution as to such new parties; and the same stipulations and security shall, in all such cases, be required and given, as in cases of persons becoming originally parties to a suit." Upon the death of a Rear Admiral

who filed a libel in prize in his own behalf and also for all who took part in an engagement, the court where the suit is then pending may substitute any proper person interested in the litigation without bringing in the personal representatives of the decedent or the designation of any one *ex officio*. U. S. v. Sampson, 187 N. S. 436, 47 L. ed. 248.

¹¹ The Cerea, 149 Fed. 924.

§ 564. ¹ Adm. Rule 9, S. D. N. Y.: "Mesne process may be either *in personam*, or *in rem*, or both, and shall be issued by the Clerk. Process *in personam* may be: (1) A simple citation in the nature of a summons to appear and answer to the suit; (2) such a citation, with a clause therein that if the respondent cannot be found, his goods and chattels to the amount sued for be attached; (3) such a citation and attachment, together with a clause of foreign attachment of the respondent's property and credits to the amount sued for in the hands of garnishees named therein. The names of the garnishees and the specific property in their hands shall be stated in the libel or peti-

of collision against a ship and her master. The decisions of the several districts are not uniform on this question.

The Admiralty Rules provide as follows: "12. In all suits by material men for supplies or repairs, or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. 13. In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*. 14. In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone of the master alone *in personam*. 15. In all suits for damages by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*. 16. In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only. 17. In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*. 18. In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer. 19. In all suits for salvage, the suit may be *in rem* against the

tion and in the process, and the garnishees shall be cited to appear and answer on oath. (4) A warrant of arrest of the person upon the special order of the Court, either alone, or with an attachment. Process *in rem* shall be by a warrant to arrest the ship, goods or other things to be arrested, with a

monition to all persons interested therein. But except on a libel for liquidated damages not exceeding \$500, no process of attachment or foreign attachment shall issue unless allowed by special order of the Court, upon due proof of the demand and of the propriety of the attachment being first made."

property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed." It has been said that in no case under the Admiralty Rules promulgated by the Supreme Court con proceeding, *in rem* and *in personam* be joined in the same libel except when therein expressly authorized.² "The admiralty rules of the Supreme Court, with regard to joinder of person and thing, it is presumed, cannot be considered as repealing or abrogating the sound and salutary principle, that, wherever the libellant's cause of action gives him, at the same time, a lien or privilege against the thing, and a full personal right against the owner, he may by a libel, properly framed, proceed against the person and the thing, and compel the owner to come in and submit to the decree of the court against him personally, in the same suit, for any possible deficiency."³ It has been held that in a collision case, the joinder of the owner and his ship is forbidden,⁴ but that one ship and the owner of another ship may be joined,⁵ and that the vessel and owner may be joined in suits upon charter parties, bills of lading, and contracts of affreightment.⁶

§ 565. Process in rem. If process *in rem* is prayed for, the clerk issues a monition, returnable on a day named, which

² The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; The Alida, 12 Fed. 343; Dean v. Bates, 2 Woodb. & M. (U. S.) 87, 7 Fed. Cas. No. 3,704; Hale v. Washington Ins. Co., 2 Story (U. S.) 176, 11 Fed. Cas. No. 5,916; Citizens Bank v. Nantucket Steamboat Co., 2 Story (U. S.) 16, 5 Fed. Cas. No. 2,730; The Blackheath, 154 Fed. 758. But see The Planet Venus, 113 Fed. 387.

³ Benedicton's Admiralty [3d ed.] § 397.

⁴ Adm. Rule 15; Joice v. Canal Boats, 32 Fed. 553; The Clatsop Chief, 8 Fed. 163.

⁵ Adm. Rules 46, 59; Joice v. Canal Boats, 32 Fed. 553; The Samson, 197 Fed. 1017.

⁶ The Baracoa, 44 Fed. 102; The Director, 26 Fed. 708; The Monte A., 12 Fed. 331; The Brig Aldebaran, Olc. Adm. 130, 1 Fed. Cas. No. 150; Arthur v. The Schooner Cassius, 2 Story (U. S.) 81, Fed. Cas. No. 564. But see The Monte A, 12 Fed. 331; The Thomas P. Sheldon, 113 Fed. 779. Where a libel against the vessel and owner contained no prayer for monition and personal judgment and no service of monition or attachment of the property was made upon the owner, it was held that his appearance to answer the libel *in rem* gave the court no authority to enter personal judgment against him. The Ethel, C. C. A., 66 Fed. 340.

recites the filing of the libel and its prayer for relief, and directs the marshal to arrest the property proceeded against, describing it, and cites all persons interested therein to appear on the return day¹ and answer the libel.² The monition should be delivered to the marshal, who must thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and cause public notice thereof, and of the time assigned for the return of process, to be given in the newspaper within the district designated by the court.³ By the notice all persons claiming any interest in the property attached are notified that they must present their claims on the return day, or their default will be taken and the property condemned.⁴

§ 566. Cases in which the res cannot be arrested. The public vessels or other property of the United States¹ or of a foreign sovereignty are exempt from seizure in admiralty;² also vessels which are the property of a State or municipal corporation, or a department thereof, and are devoted to public uses.³ Where property is in the possession of the Government of the United States, as, for example, in bonded warehouse or elsewhere in the custody, actual or constructive, of the collector of customs, it is irrepleviable, and subject only to the orders and decrees of the Federal courts.⁴ The marshal is permitted to make the attachment without taking the property into his custody by leaving with the collector or person in charge of the property a copy of the monition, and also a notice requiring such person to

§ 565. ¹In the Southern District of New York, Tuesday in the return day; in the Eastern District it is Wednesday; in New Jersey, Monday.

²By Adm. Rule 7, S. D. N. Y., "In all possessory suits, the process shall be made returnable at the first general return day not less than three days after the filing of the libel, unless otherwise ordered by a Judge. . . . The answer shall be filed upon return of the process duly served, and a day of hearing, then fixed unless otherwise ordered."

³Adm. Rule 9. By Adm. Rule 7, S. D. N. Y., "Notice by publication Fed. Prac. Vol. II.—123.

will not be required unless specially ordered."

⁴The form and time of publication in S. D. N. Y. is regulated by Adm. Rule 26.

§ 566. ¹The Fidelity (Waite, C. J.), 16 Blatchf. 569.

²At least if in the full and complete possession of such foreign government. *Long v. The Tampico & Progresso*, 16 Fed. 491.

³The Protector, 20 Fed. 207; *The F. C. Latrobe*, 28 Fed. 377; *Workman v. New York*, 179 U. S. 552, 565, 45 L. ed. 314, 322.

⁴U. S. R. S., § 934. *The Conqueror*, 49 Fed. 99; *Re Fassett*, 142 U. S. 479, 35 L. ed. 1086.

detain the property in custody until the further order of the court.⁵ He cannot take actual possession of the property without the express order of the court.⁶ Property actually in the custody of a sheriff cannot be attached by the marshal.⁷ But the possession of a sheriff will not defeat the operation of the laws of the United States imposing forfeiture for the wrongful act of the owner or person in charge of a vessel.⁸ Canal boats cannot be libeled for wages.⁹ But whatever the form of a vessel may be, if she is not engaged in navigating canals she is not a canal boat within the meaning of the statute.¹⁰

§ 567. **Process in personam.** In suits *in personam*, the process issued is either a simple citation,¹ which is in the nature of a summons to appear and answer, or a citation with clause of foreign attachment. The latter directs the marshal to cite the party proceeded against to appear on the return day,² and, if he cannot be found, to attach his goods and chattels, describing them and if such property cannot be found, his credits and effects.³ This process will not issue for a sum exceeding five hundred dollars, unless by the special order of the court upon proof of its propriety.⁴ A citation in admiralty in a suit *in personam* should be personally served on the defendant, or, if he cannot be found, by an attachment of his property in accordance with Admiralty Rule.⁵ Service by leaving a copy of the citation with a servant at defendant's residence is not sufficient.⁶ Service of monition in a proceeding *in rem* may be made on an agent of a non-resident in conformity with such a State statute authorizing such mode of service in actions at law or in equity.⁷ Where the libellant begins a pro-

⁵ U. S. v. One Case of Silk, 4 Ben. 526. *Contra*, vol. xix, p. 101.

⁶ The Conqueror, 49 Fed. 99.

⁷ Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028; *supra*, § 56.

⁸ U. S. v. The Reindeer, 2 Cliff. 57.

⁹ U. S. R. S., § 4251.

¹⁰ Smith v. Canal Boat Wm. L. Norman, 49 Fed. 285.

§ 567. ¹ The words "citation" and "monition" are used in the Supreme Court Rules interchangeably, but it is usual to confine cita-

tions to process *in personam*, and monition to process *in rem*.

² In the New York districts, process *in personam* may be served at any time not less than three days before the return day.

³ Admiralty Rule 2.

⁴ Admiralty Rule 7.

⁵ Walker v. Hughes, 132 Fed. 885.

⁶ *Ibid*.

⁷ Insurance Co. of North America v. Frederick Leyland & Co. Ltd., 139 Fed. 67.

ceeding in admiralty *in rem* to enforce a claim which does not constitute a maritime lien, and has made no personal service of a monition upon the owner, he cannot convert his libel by amendment into a proceeding *in personam*, although the latter has appeared to claim and release the ship without entering any general appearance.⁸ In case of foreign attachment the marshal serves the citation upon the garnishee, and if he finds goods or chattels of the respondent in the hands of the garnishee, he takes them into his own possession. If credits only are found, they are held by the garnishee "to answer the exigency of the suit."⁹

Although the Supreme Court Rules still contain a provision for warrants of arrest of the person,¹⁰ such process cannot be issued by courts of the United States in states where imprisonment for debt has been abolished, and arrests of the person are now dependent upon the laws for similar arrests in the respective states.¹¹

§ 568. Return of process and defaults. On the return day, the marshal having returned the monition of the clerk with proof that he has seized the property and made due publication, proclamation is made in open court, and, if no one appears to claim the property, the libellant is entitled to a decree by default. In suits *in personam*, if the respondent, when served with the citation, fails to appear, his default is

⁸ The Lowlands, 147 Fed. 986.

⁹ Admiralty Rule 37. Adm. Rule 11, S. D. N. Y., provides for the service of foreign attachment on the garnishee and service of process in proceedings *in rem*, &c. Adm. Rule 10, S. D. N. Y., provides for the return by the garnishee and for payment of the garnished funds into court. Adm. Rule 12, S. D. N. Y., provides for the form of the monition in proceedings *in rem* in behalf of the United States and for service of the same.

¹⁰ Adm. Rule 7. See The Alpena, 7 Fed. 361; Harriman v. Rockaway B. P. Co., 5 Fed. 461.

¹¹ Act of March 2, 1867, U. S. R.

S., § 990; Admiralty Rule 47; Louisiana Ins. Co. v. Nickerson, 2 Low. 310. The Carolina, 14 Fed. 424; Chiesa v. Conover, 36 Fed. 334; The Bremena v. Card, 38 Fed. 144. It has been held that a party who has been arrested can be discharged upon giving the bail required by the State laws. Stone v. Murphy, 86 Fed. 158. But it has been held that the power of a court of admiralty to arrest a defendant upon a claim for damages for a personal injury and cruel treatment of a sailor is not affected by the State law. Bolden v. Jensen, 69 Fed. 745. Cf. *supra*, § 471.

taken in the same way. So, in cases of foreign attachment, where goods and chattels have been attached, the default of the respondent may be taken. Where the property attached consists of credits or effects, the garnishee is required to appear and make return under oath, showing the property in his hands belonging to the respondent at the time the attachment was served, and at the time of the return. If he fails to appear or to make such an affidavit or to answer the interrogatories put to him as to the property of the respondent in his hands, he is subject to the compulsory process of the court, and may be punished for contempt, and compelled to furnish a stipulation.¹ Upon a default the court will hear the cause *ex parte*, and "adjudge therein as to law and justice shall appertain,"² or for convenience will refer it to a referee to ascertain the amount due the libellant. In the Southern District of New York, process must be returned by the marshal on the return day; and if not then returned, within four days after written notice so to do. The return must state the day of seizure or of sale. All processes upon the return day thereof are called by the clerk, and if there is no opposition the orders prayed for, in accordance with the practice of the court, may be entered by the clerk without the intervention of a judge.³

§ 569. Release of property from custody of marshal—Claim. The owner of property attached, or his agent, may obtain its release from the custody of the marshal by filing with the clerk a claim to the property, and either depositing in the court a sum sufficient to secure the amount sued for, or giving a bond or stipulation therefor.¹ A bond accepted by the court

§ 568. ¹ Admiralty Rule 37.

² Admiralty Rule 29. By Adm. Rule 28, S. D. N. Y., where no proctor has appeared for any claimant, a *fiery facias* will not issue, nor a decree enter, without proof of actual notice of the suit to an owner or agent of the *res* or to the master of the vessel in custody.

³ Adm. Rule, S. D. N. Y., 13.

§ 569. ¹ Adm. Rule 11. By Adm. Rule 17, S. D. N. Y., "If, after decree for either party in a possessory suit, the other party shall ap-

ply to the Court for process in a petitory suit, and file the proper stipulation, the property shall not be delivered to the prevailing party in the possessory suit until after an appraisal is made, nor until he shall give a stipulation with sureties to restore the property without waste, in case his adversary shall prevail in the petitory suit, and also to abide all interlocutory and final decrees of the District Court, and, on appeal, of the Appellate Court."

is a substitute for the property.² The claim must state under oath that the claimant is the true and *bona fide* owner of the property attached, and that no other person is the owner thereof. If put in by an agent, it must state that he is authorized to put it in; and if the master of a ship, that he is the bailee thereof for the owner.³

§ 570. **Security for defendant's costs.** A claimant must file with his claim a stipulation for costs similar to that required of a libellant.¹ In some districts, the respondent in a suit *in personam* is required to give a stipulation for costs, or his appearance or answer will not be received on file.² In the New York districts the stipulation is for \$250 in suits *in rem*, and for \$100 in suits *in personam*.³ It is not necessary to obtain the approval of stipulations for costs by the court or the adverse party before filing them; but the sureties must justify if the adverse party requires it.

§ 571. **Stipulation for value—Sureties.** The form of security required in order to obtain the release of property from custody is either a bond to the marshal in double the amount claimed in the libel, or a stipulation for the value of the property or in the Southern District of New York, at least in suits for sums certain, by payment into court of the amount claimed, with interest up to the stated term next succeeding the return day, together with costs.¹ Such a stipulation is called a stipulation for value. Its amount is determined by an appraisal, unless fixed by the agreement of the parties. Where the value of the property attached is much greater than the amount of the libellant's claim, the parties usually agree upon a less value, for the purposes of bonding only, sufficient to secure the claim. The condition of a stipulation for value is that the claimant will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered by the District Court, or by the appellate court if any appeal intervene.²

² The *Palmyra*, 12 Wheat. 1, 6 L. ed. 531; *U. S. v. Ames*, 99 U. S. 35, 25 L. ed. 295; *The Haytian Republic*, 154 U. S. 118; 38 L. ed. 930.

³ Admiralty Rule 26; *The Two Marys*, 12 Fed. 152.

§ 570. ¹ Adm. Rule 26.

² Adm. Rule 25, S. D. N. Y., Adm. Rule 6; *Rawson v. Lyon* (S. D. N. Y.), 15 Fed. 831.

³ S. D. N. Y., Adm. Rule 6.

§ 571. ¹ Adm. Rule 16, S. D. N. Y.

² Adm. Rules 10 and 11. But see

The stipulators in a stipulation for value are liable for costs, although the stipulation does not specify them, and even when a separate stipulation for costs has been given.³ When such a stipulation provides for the payment of interest, the stipulators are liable for the same pending an appeal, which results in an affirmance, although the libellant has waived further security upon such appeal.⁴ The stipulators are not liable for interest on the sum stipulated, unless expressly provided for, except on default in complying with the terms of the stipulation.⁵ The court cannot enter a decree against the stipulators for a greater sum than that named in the stipulation.⁶ A stipulation for value, like stipulations for costs, must be executed by two sureties if the principal is a non-resident; if he is a resident of the district, one surety is enough. Sureties need not be freeholders, but they must be residents of the State in which the district is situated. A bond or stipulation for value cannot be filed unless it is approved either by the libellant's proctor, or by the court or some one authorized by the court to take bail.⁷ In order to obtain the approval of the court, the claimant should

³ *Pope v. Seckworth*, 46 Fed. 858. For a case where after the stipulation, the court allowed it to be withdrawn because of the invalidity of the warrant of seizure, see *Deas v. The Berkeley*, 58 Fed. 920. *Of. The Zodiac*, 5 Fed. 220. In a case of a mistake as to the value of the vessel, the court has the power to reduce the amount of the stipulation after it is filed. *The Iris*, C. C. A., 100 Fed. 104. As to the liability for a malicious seizure, see *Gow v. William W. Brauer S. S. Co.*, 113 Fed. 672.

³ *The Mt. Desert*, 186 Fed. 395.

⁴ *Ibid.*

⁵ *The Ann Caroline*, 2 Wall. 538, 17 Fed. 833; *The Webb*, 14 Wall. 406, 20 L. ed. 774; *The Wanata*, 95 U. S. 600, 24 L. ed. 461; *The Sydney*, 47 Fed. 260. But see *the Maggie J. Smith*, 123 U. S. 349, 31 L.

ed. 175; *The Maggie M.*, 33 Fed. 591.

⁶ *The James M'Caulley*, 181 Fed. 932.

⁷ Admiralty Rule 5. It seems the court may, upon a summary application, relieve against an exorbitant demand of damages in a libel. *The Stelvio*, 30 Fed. 509. The court may in a proper case require additional security. *The City of Hartford*, 11 Fed. 89; *The Fred M. Lawrence*, 88 Fed. 910. But see *Barney Dumping B. Co. v. The Mutual*, 78 Fed. 144. The sureties are not bound to pay the claims of intervenors filed subsequently to the release of the vessel. *The Willamette*, C. C. A., 31 L.R.A. 715, 70 Fed. 874. See *the Oregon*, 158 U. S. 186, 39 L. ed. 943. The sureties after payment of the decree are subrogated to the right of the libellant. *The Madgie*, 31 Fed. 926.

serve upon the libellant's proctor a notice of justification, giving the name, occupation, and residence of each of the sureties proposed, and the time and place at which the libellant may attend and examine them. Such notice should be served a reasonable time before the examination. In the New York districts twenty-four hours' notice is required, except in suits for wages, when notice may be given *instante*. When the sureties have been examined, the bond should be presented to the court for approval, on notice. Where the stipulation provides that upon the failure of the stipulators to pay the amount of a decree against them, execution may issue against both the claimant and his surety, no demand is necessary upon the claimant in order to justify a demand on the surety.⁸ In such a case, upon payment of the decree by the surety, he is entitled to a writ of *fieri facias* against the principal.⁹

§ 572. **Bond to the marshal.** Under the Act of Congress of March 3, 1847,¹ property attached must be discharged from custody by the marshal on receiving from the claimant a bond in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in the case.² This statutory bond is under seal, and in that respect differs from the stipulations peculiar to admiralty. As by the terms of the statute the marshal is required to discharge the property on receiving such a bond, he cannot look to the claimant for his fees. But where a stipulation for value is given, the marshal's fees must be paid by the claimant. A bond under the act differs from a stipulation for value also in respect to the manner of enforcing it. A summary judgment may be entered against both the claimant and his sureties for the penal sum named in the bond; but where a stipulation for value has been given, judgment cannot be entered against the sureties in the first instance. In case a decree is

⁸ The Mt. Desert, 186 Fed. 395.

⁹ Leary v. Murray, C. C. A., 178 Fed. 209.

¹ U. S. R. S., § 941.

² See S. D. N. Y. Adm. Rules 16, 19, 20, 21. By Adm. Rule 18, S. D. N. Y., except in suits for seamen's

wages, when the attachment is issued upon certificate pursuant to U. S. R. S. §§ 4546 and 4547, attachments and arrests may be summarily vacated upon evidence of improper practice or manifest want of equity.

not satisfied by the claimant, an order will be granted directing the stipulators to show cause within a fixed time³ why execution should not issue, and if the stipulators fail to fulfill the engagements of their stipulation within such time, judgment is entered against them, and execution issues.

§ 573. Appraisement. The usual method of obtaining an appraisement of property for the purpose of bonding is to apply to the court for an order appointing one or more appraisers. If the parties agree upon the appraisers, an order is not necessary. Before acting, appraisers should take and subscribe before the clerk or deputy clerk an oath or affirmation for the faithful performance of their duties, which should be filed. Notice of the time and place of making the appraisement should be given in writing by the appraisers to the proctors in the cause, and should also be affixed in a conspicuous place near the court rooms, where the marshal usually affixes his notices. Upon completing the appraisement the appraisers should make and sign a report, which must be filed. Exceptions to the report may be filed by the parties, which will be heard by the court on notice.¹

§ 574. Petition to bring in additional parties under Rule 59. Where the claimant of a vessel proceeded against or a respondent in a suit *in personam*, desires to have some other vessel or person proceeded against in the same suit for the damage claimed by the libellant, he may file a verified petition, containing suitable allegations, showing negligence in such other vessel or person contributing to such damage, and the particulars thereof and praying that process be issued against such vessel or person, to the end that they may be proceeded against in the original suit. If such process is duly served, the suit proceeds as if the vessel or party thus brought in had originally been proceeded against. The petition must be filed before or at the time the petitioner answers the libel, and the petitioner must give a stipulation, with sufficient sureties, to pay to the libellant,

³In the New York Districts, within four days of the service of a copy of the order on the proctor for the claimant. S. D. N. Y., Adm. Rul. 44.

§ 573. ¹The practice in S. D. N. Y. is regulated by Adm. Rule 24.

and to any claimant or new party brought in, all costs, damages, and expenses that may be awarded against the petitioner.¹

A party thus brought in must give the same bonds as he would have had to give if proceeded against by the libellant in the first instance and must answer both the libel petition

Rule 59 was adopted by the Supreme Court in consequence of a decision of the District Court for the Southern District of New York in a collision case,² and by the terms is limited to causes of damage by collision; but the proceeding has been extended by the courts to other cases. Thus, in a suit for damage to cargo, the charterers of a vessel have been made respondents upon the petition of the owners;³ and wharfingers have been brought in on the petition of the claimants of a steamship sued for negligence in discharging cargo on a wharf which was insufficient.⁴

§ 575. Answer. The answer should be filed upon the return day, unless further time is allowed by the court or the libellant's proctor.¹ It must be full, explicit, and distinct to each separate allegation of the libel in the same order as if numbered in the libel.² If indefinite, a bill of particulars may be

§ 574. ¹ Admiralty Rule 59.

² The Hudson, 15 Fed. 162.

³ The Alert, 40 Fed. 836; The Barnstable, 181 U. S. 464, 45 L. ed. 954.

⁴ The City of Lincoln, 25 Fed. 835.

§ 575. ¹ By Adm. Rule 14, S. D. N. Y., "In cases where process has not been issued, but a claim or notice of appearance has been filed, the answer or exceptions shall be filed within two weeks thereafter, or within such further time as may be allowed by the court, or by consent." After general appearance and an answer upon the merits it is too late to move for a dismissal because of a misnomer in the libel and monition. *Mina v. I. & V. Floria S. S. Co.*, 23 Fed. 915

² Adm. Rules 27 and 48. New matter set up as a defense should be articulated and pleaded separately

and not blended with the response to any article of the libel. The Whistler, 13 Fed. 295. Where, after a libel in admiralty had been filed, respondent made default, and settled the case out of court, it was held that he was not entitled to have a release executed on such settlement filed in satisfaction of a judgment recovered against him by default, except on payment of costs. *Naretti v. Scully*, 133 Fed. 828. A plea to the jurisdiction may be combined with an answer to the merits. *Inman v. The Lindrup*, 70 Fed. 718. It has been said that an objection to the jurisdiction of a court of admiralty over a cause should be made by plea, or, where the want of jurisdiction is palpable, by demurrer. *The August Belmont*, 153 Fed. 639. Allegations that a collision or the sinking of a boat, was caused

ordered, under a penalty of not permitting testimony concerning the point as to which the particulars are omitted.³ Where a party is not informed as regards allegations, he may so state and raise the issue thereupon without a positive denial;⁴ but it has been held that a positive denial, or a denial upon information and belief, of allegations concerning seaworthiness, proper manning and equipment, must set forth the facts upon which the respondent relies.⁵ The answer must be verified, except where the amount involved is less than fifty dollars.⁶

The answer may set up defenses by way of counter-claim, but no affirmative judgment can be obtained by the claimant or respondent without filing a cross-libel.⁷ It has been held that a set-off in admiralty is cognizable only so far as it relates to the particular transaction which is the subject of the libel and

from the fault and want of care of the owner or from causes within the privity and knowledge of the owner and its managing officers, or careless and improper navigation, or permitting engines, machinery, appliances and equipment to be insufficient and defective, was set aside upon exceptions. *The Pere Marquette* 18, 203 Fed. 127, 130. See *Re Davidson S. S. Co.*, 133 Fed. 411.

³ Adm. Rules 27, 48. In the Southern District of New York all answer must be verified. See *Virginia Home Ins. Co. v. Sundberg*, 54 Fed. 389; *Burrill v. Crossman, C. C. A.*, 69 Fed. 747; *The John H. Starin*, 175 Fed. 527. In a suit for collision against a tug and her tow, it was held that the two should be considered as one vessel and that an answer by the claimant of the tug was insufficient unless it also answered the charges against the tow. *The Teaser*, 188 Fed. 721.

⁴ *Re Davidson S. S. Co.*, 133 Fed. 411.

⁵ *Re Davidson S. S. Co.*, 133 Fed. 411; *The Pere Marquette* 18, 203 Fed. 127, 130. See *The Comman-*

der in Chief, 1 Wall. 43, 17 L. ed. 609.

⁶ Adm. Rules 27, 48. By S. D. N. Y. Adm. Rule 1, it must in all cases be verified.

⁷ *The Reuben Doud*, 3 Fed. 520. It was held, under a plea that the libellant, a pilot, after signaling an offer of service, had pulled down his signal and sailed away, that the respondent could not prove that other pilots had offered their services at the same time, and that it would have put the vessel to serious inconvenience if it had taken the libellant. *Marshall v. The Earnwell*, 68 Fed. 228. See also *White v. The Renaiier*, 45 Fed. 773; *Am. Steel Barge Co. v. Chesapeake & O. Coal Agency Co., C. C. A.*, 116 Fed. 857; *infra*, § 580. Where in a suit *in rem* in a collision case, one of the vessels is so wholly lost that no cross-libel against her can be maintained, the defendant, if he desires to recoup or offset any damage, must state the facts in his answer in the same manner as upon filing a cross-libel, and such statement of damage is without prejudice to any defense he may make that the col-

goes to reduce or overcome the original demand.⁸ In a collision suit, the allegation in the libel that the libellant's vessel was without fault, should be answered by either a denial, an admission or an averment of want of knowledge.⁹ Contributory negligence is not a bar to a recovery in admiralty.¹⁰ Where an injury is caused by the concurrent negligence of two ships, the custom is to divide the damages in accordance with the equitable considerations.¹¹ It has been said that the rule in admiralty for the division of damages may be enforced in any case where the loss results from acts of negligence of both parties, without regard to the issues raised by the pleading.¹² The rule of the English common law as to imputed negligence¹³ does not apply in admiralty.¹⁴

"When the defendant, in his answer, alleges new facts these shall be considered as denied by the libellant, and no repli-

lision, was wholly the fault of the other vessel. Adm. Rule 41, S. D. N. Y.

⁸ *Roney v. Chase, Talbot & Co.*, 160 Fed. 268; *United Transp. & Lighterage Co. v. N. Y. & Baltimore Transp. Line*, 180 Fed. 902; S. C., C. C. A., 185 Fed. 386. To a libel for services in 'lighterage' the respondent cannot plead as a set-off or by way of cross-libel, a claim to recover money paid for similar services under previous contract, which are charged to have been exorbitant and fraudulently contracted for. *United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line*, 180 Fed. 902; S. C., C. C. A., 185 Fed. 386.

⁹ *The Teaser*, 188 Fed. 721.

¹⁰ *The Max Morris*, 137 U. S. 1, 34 L. ed. 586.

¹¹ *The North Star*, 106 U. S. 17, 27 L. ed. 91; *The Max Morris*, 137 U. S. 1, 34 L. ed. 586. In collision cases, where both vessels are found guilty of fault contributing to the collision, and only one of them is injured, the libellant recovers one-

half of his damages; where both vessels are injured, the damages suffered by the two vessels are added together and equally divided, and the vessel which suffers must recover one-half the difference between the amounts of their respective losses. *The North Star*, 106 U. S. 17, 27 L. ed. 91; *J. T. Morgan Lumber Co. v. West Kentucky Coal Co.*, 181 Fed. 271. In cases of tort other than collision the same rule has frequently been applied; although the Supreme Court has held that in such cases contributory negligence does not bar a recovery, it has not determined whether the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages. *The Max Morris*, 137 U. S. 1, 34 L. ed. 586.

¹² *J. T. Morgan Lumber Co. v. West Kentucky Coal Co.*, 181 Fed. 271.

¹³ *Thorogood v. Bryan*, 8 C. B. 115.

¹⁴ *The Bernina*, 12 Prob. Div. 58;

cation, general or special, shall be filed unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libellant may amend his libel so as to confess and void, or explain, or add to, the new matters set forth in the answer; and within such time as may be fixed in like manner, the defendants shall answer such amendments."¹⁵

§ 576. **Laches in admiralty.** There is no statutory time within which a suit in admiralty must be instituted. Courts of admiralty are not bound by the State statute of limitations.¹ Laches is, however, a valid defense, a delay which will defeat a suit, and depends in every case upon the peculiar circumstances.² In the absence of special circumstances, such courts will usually follow the analogy of the State statute of limitations.³ This was done even when the respondent was a foreign corporation, which could not take advantage of the statute in the State courts.⁴ A less period of time has been held to constitute laches.⁵ Because of laches, payment of the costs of a suit in

Little v. Hackett, 116 U. S. 366; Robinson v. D. & C. Nav. Co., 73 Fed. 883.

¹⁵ Admiralty Rule 51, as amended January 27, 1896; 160 U. S. 693.

§ 576. ¹ Pacific Coast S. S. Co. v. Bancroft-Whitney Co., C. C. A., 94 Fed. 180.

² The Key City, 14 Wall. 653, 20 L. ed. 896; Southard v. Brady, 36 Fed. 560; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., C. C. A., 94 Fed. 180, 189. See § 182, *supra*.

³ Nesbit v. Amboy, 36 Fed. 925; Bailey v. Sundberg, C. C. A., 49 Fed. 583, a libel *in personam*; the Southwark, 128 Fed. 149; Davis v. Smokeless Fuel Co., 182 Fed. 1004, a libel *in personam*. In Scull v. Raymond, 18 Fed. 547, a libel *in personam* was barred after eight and one-half years. In Coburn v. Factors' & Tr. Ins. Co., 20 Fed. 644, after nine years. *Contra*, Pacific Coast S. S. Co. v. Bancroft-Whitney

Co., C. C. A., Ninth Ct. 94 Fed. 180, 189, 190, where, in a suit *in rem* for damages to cargo, the court refused to follow the State statute making four years the period of limitation.

⁴ Davis v. Smokeless Fuel Co., 182 Fed. 1004.

⁵ Magee v. The Lyndhurst, 48 Fed. 839, where a delay of less than a year was held to bar a libel *in rem* for supplies, when, since the lien was incurred, the vendor had become insolvent and the vessel was in the hands of *bona fide* purchasers. See, also, The Thomas Sherlock, 22 Fed. 253. But see Metcalfe v. The Alaska, 130 U. S. 201, 32 L. ed. 923; The Alaska, 33 Fed. 107; Starin v. The John Dillon, 46 Fed. 527; Jones v. The Carrie, 46 Fed. 796; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., C. C. A., 94 Fed. 180.

the State court may be required before relief is given in admiralty.⁶ It has been said that the defense of laches cannot be raised unless pleaded in the answer.⁷

§ 577. Tender. A tender made before suit is of no avail as a defense unless, on suit brought, it is deposited in court. When a tender is first made after suit brought, it must include interest up to the next term of the court and the taxable costs then accrued.¹

§ 578. Exceptions. Pleadings may be excepted to for surplusage, irrelevancy, impertinence, or scandal. Either party may also except to the sufficiency, fullness or definiteness of the pleading.¹ Exceptions correspond to special demurrers.² They must clearly specify the parts to which exceptions are taken.³ Exceptions to a number of interrogatories "for the reason that they are each and all open to one or more of the following objections," followed by a statement of a number of objections, were held to be bad.⁴ The party against whom the exceptions are taken should notify the other side that he submits to them, or else notice them for hearing before the court. If the defendant's exceptions are overruled, he must file his answer within such time as the court allows. Where exceptions are peremptory, as for example, to the jurisdiction, if they are sustained, judgment may be entered in favor of the successful party; if not peremptory the pleading excepted to must be

⁶ *The Ocean Spray*, 117 Fed. 971.

⁷ *The Shady Side*, 23 Fed. 721.

§ 577. ¹ By Adm. Rules 30-32, S. D. N. Y., tenders, offers to allow the entry of decrees, offers to allow libelants damages to be assessed at a specified sum and the withdrawal of the same, are regulated.

§ 578. ¹ Admiralty Rules 28, 30. Adm. Rule 34, S. D. N. Y., allows exceptions to the jurisdiction or sufficiency of a libel before answer. And Adm. Rule 35, S. D. N. Y., regulates the form and time of exceptions to the answer. Adm. Rule 36, S. D. N. Y., permits amendments within five days after notice of submission to exceptions. Upon

the allowance of exceptions, the court fixes the time for the amendment. An affidavit cannot be considered upon the hearing of an exception to a libel. *Prince Steam Shipping Co. v. Lehman*, 39 Fed. 704. The courts will, however, then consider facts not pleaded of which they may take judicial notice. *The Seminole*, 42 Fed. 924; *supra*, §§ 329, 366. See also *U. S. v. The Haytian Republic*, 57 Fed. 508.

² *Erie & Western Transp. Co. v. Great Lakes Towing Co.*, 184 Fed. 349.

³ *Ibid.*

⁴ *Ibid.*

amended. Exceptions to a libel should be filed on return of process. The time within which exceptions to an answer must be filed is determined by the rules of practice of the several districts.⁵ Where allegations in an answer are unnecessary and not responsive, they are not subject to exception for insufficiency.⁶ Where an exception admitted the signature of a corporation to a contract pleaded by the libelant, it was presumed that the corporation executed the same, either as principal or surety.⁷

§ 579. Amendments. Great freedom of amendment is allowed in admiralty. In matters of form, pleadings may be amended at any time, on motion, as of course; in matters of substance they may be amended at any time before the final decree upon such terms as the court shall impose.¹ A libel *in rem* may be changed by amendment into one *in personam*, by adding a prayer for relief *in personam*, and a monition will then be issued against the owner.² Where a case has been tried upon a theory not properly pleaded in the libel an amendment

⁵ In the Southern district of New York, the libelant has five days from the filing of the claim or answer in which to except thereto. S. D. N. Y. Adm. Rule, 35. It has been held that where exceptions to an answer were drawn with several specifications, the failure to sustain any specification was fatal to the exception. *The Intrepid*, 42 Fed. 185; and that exceptions to an answer for insufficiency and impertinence cannot be taken to the same matter either conjunctively or disjunctively. *The Whistler*, 13 Fed. 295. As to exceptions to answers, see *Todd v. Tulchen*, 2 Fed. 600; *The Dictator*, 30 Fed. 699; *The City of Salem*, 10 Fed. 843; *Morgan L. & T. S. S. Co. v. De Arrotegui*, 25 Fed. 624.

⁶ *The Teaser*, 188 Fed. 721.

⁷ *Downs v. Wall*, C. C. A., 176 Fed. 657.

¹ *The Adeline*, 9 Cranch, 244, 284, 3 L. ed. 719. By Adm.

Rule 2, S. D. N. Y., "Amendments, or supplementary matters, must be connected with the libel or other pleadings by appropriate references, without a recapitulation or restatement of the pleading amended or added to." Where exceptions to a libel against a vessel and its owner were sustained, on the ground that they could not be sued jointly, the libelant was permitted to amend so as to declare against the vessel alone. *The San Rafael*, 141 Fed. 270. See *supra*, § 563. For cases when amendments to libels were disallowed, see *The Iona*, C. C. A., 80 Fed. 933; *The Keystone*, 31 Fed. 412; *New Haven S. D. Co. v. The Mayor*, 36 Fed. 716. See *supra*, §§ 211, 567. For a case where an amendment to an answer was disallowed, see *The Horace V. Parker*, C. C. A., 74 Fed. 640.

² *The Monte A.*, 12 Fed. 331, 336, 337, 338.

to conform to the pleadings in evidence will always be allowed.³ The failure of the libellant or his agent to sign the libel is a defect curable by amendment.⁴ Notice of an application for an amendment should be served upon any party that has appeared.⁵

§ 580. **Cross-libel.** A defendant cannot recover an affirmative judgment without filing a cross-libel;¹ and the practice of stipulating that the answer in the original suit operate as a cross-libel has been expressly disapproved by the Supreme Court.² A cross-libel cannot be maintained unless it arises out of the same cause of action as that propounded in the original libel.³ Whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action as that for which the original libel was filed, the respondents or claimants, as the case may be, must give security in the usual amount and form to respond in damages as claimed in the cross-libel, unless the court on cause shown shall otherwise direct.⁴ Upon application to the court, all proceedings upon the original libel will be stayed until such security is given.⁵

³ *Kelley Island Lime & Transport Co. v. City of Cleveland*, 144 Fed. 207.

⁴ *Hardy v. Moore*, 4 Fed. 843.

⁵ *The Monte A*, 12 Fed. 331, 336.

§ 580. ¹*The Reuben Doud*, 3 Fed. 520; *The Nadia*, 18 Fed. 729. As to the matters which may be set up by a cross-libel, see *The Highland Light*, 88 Fed. 296. New and distinct matters, not included in the original libel, but arising out of separate transactions, cannot be made the subject-matter of a cross-libel in admiralty, which must be confined to matters arising out of the same maritime transaction for which the original action was brought. *George D. Emery Co. v. Tweedie Trading Co.*, 143 Fed. 144. Cf. § 197, *supra*.

² *Ward v. Chamberlain*, 21 How. 572, 16 L. ed. 219.

³ *United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line*, 180 Fed. 902, S. C., C. C. A., 185 Fed. 386.

⁴ Admiralty Rule 53; *Genther v. Wiley*, 85 Fed. 797; *Empresa Maritima v. N. & S. Am. St. Nav. Co.*, 16 Fed. 502; *Old Dominion S. S. Co. v. Kufald*, 100 Fed. 331; *Lochmore S. S. Co. v. Hagar*, 78 Fed. 642.

⁵ *Vianello v. The Credit Lyonnais*, 15 Fed. 637; *Empresa Maritima a Vapor v. N. & S. Am. St. Nav. Co.*, 16 Fed. 502. It has been held that upon a cross-libel the court has power to order a *monition in personam*, to be served upon the proctors of the original libellants who are nonresidents. *The Eliza Lines*, 61 Fed. 308.

§ 581. **Interrogatories.** Interrogatories may be annexed either to the libel¹ or to the answer.² They must be answered under oath by the adverse party, unless to answer them would expose him to prosecution for a penalty or for a crime, or to forfeiture of his property for a penal offense.³ The party interrogated may object to the interrogatories on the ground of irrelevancy or impertinence, or on any ground for which exceptions to a pleading are permitted.⁴ It has been held that it is no ground for exception to an interrogatory annexed to a libel, that a respondent's answer has answered the same.⁵ The extent of interrogatories rests largely in the discretion of the court of first instance,⁶ and great liberality is permitted in their allowance.⁷ It is no ground for an exception to interrogatories that they call for detailed information, which will involve the expenditure of considerable time and labor by the respondent, or that incidentally they may solicit information which the interrogator would otherwise not be entitled to call for.⁸ The defendant to the libel must answer the interrogatories propounded to him at the same time that he files his answer. The time

§ 581. ¹ Admiralty Rule 23; *Scobel v. Giles*, 19 Fed. 224; *The Edwin Baxter*, 32 Fed. 296. See § 596, *infra*. As to interrogatories addressed to corporations, see *Bock v. International Nav. Co.*, 124 Fed. 711.

² Admiralty Rule 32; *Stoffregan v. The Mexican Prince*, 70 Fed. 246.

³ Admiralty Rules, 31, 32; *Pollock v. The Sea Bird*, 3 Fed. 573; *Pollock v. Bridgeport St. Co.*, 114 U. S. 411, 29 L. ed. 147; *La Bourgonne*, 104 Fed. 823. See §§ 339, 348, *supra* § 602, *infra*. It is not necessary that a party to a suit in admiralty should be personally before the court in order to avail himself of the privilege given him by Admiralty Rules 31 and 32 to refuse to make answer to interrogatories which will expose him to any prosecution or punishment for crime, or for any penalty or any

forfeiture of his property for any penal offense; but he is required to state specifically that his answers would have that effect, and a statement in refusing to make answer that the interrogatories were framed in support of allegations, which, if true, would or might tend to expose him to a penalty or forfeiture, is insufficient as a claim of privilege. *Re Knickerbocker Steamboat Co.*, 139 Fed. 713.

⁴ Adm. Rule 28.

⁵ *The Teaser*, 188 Fed. 721.

⁶ *Erie & Western Transp. Co. v. Great Lakes Towing Co.*, 184 Fed. 349.

⁷ *Chirurg v. Knickerbocker Steam Towage Co.*, 177 Fed. 943; *Erie & Western Transp. Co. v. Great Lakes Towing Co.*, 184 Fed. 349.

⁸ *Erie & Western Transp. Co. v. Great Lakes Towing Co.*, 184 Fed. 349.

within which the libellant must answer interrogatories annexed to an answer is determined by the rules or practice of the several districts.⁹ In default of due answer to interrogatories the court may adjudge the party in default, or compel his answer by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the other party.¹⁰ Answers to interrogatories are parts of the pleadings and do not stand as evidence for the party answering. Exceptions may be filed to insufficient or evasive answers to interrogatories.¹² In the Southern District of New York, oral examinations of the parties are allowed.¹³ In the same district, the rules provide for the discovery of documents,¹⁴ and for the production of documents for inspection upon notice to produce and a penalty in case of a default of the loss of right to put the document in evidence, unless the court is satisfied that there was some sufficient reason for non-compliance with the notice.¹⁵ In the same district, the rules also make provision for the discovery by examination of the execution-defendant and of other material witnesses upon the return of an execution wholly or partly unsatisfied.¹⁶

§ 582. Trial. In many of the districts, as in New Jersey and Pennsylvania, the evidence is taken before the clerk, as in equity and the court merely hears the case summed up. The proofs are taken subject to objections, which are renewed upon the trial and then passed on by the court. In other districts, as in Massachusetts, New York and Connecticut, the witnesses are examined in open court. The judge is the trier of the facts as well as the law. In some of the districts experts are at times called by the court to sit with it in order to pass upon questions of navigation like the Trinity masters in the English practice.¹ In the trial of an admiralty cause, where the testi-

⁹ In the New York districts, within four days from the filing of the answer and interrogatories.

¹⁰ Adm. Rule 32.

¹¹ Cushing v. Laird (Blatchford, J.), 6 Ben. 408; The Serapis, 37 Fed. 436.

¹² See Adm. Rule 37, S. D. N. Y.

¹³ Adm. Rule 38, S. D. N. Y.

¹⁴ Adm. Rule 39, S. D. N. Y.

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¹⁵ Adm. Rule 40, S. D. N. Y.

¹⁶ Adm. Rule 46, S. D. N. Y.

§ 582. ¹ The Hypodame, 6 Wall. 216, 18 L. ed. 794; The Empire (E. D. Mich.), 19 Fed. 558. After a decree *pro confesso* in admiralty the damages must still be proved. Cape Fear T. & Tr. Co. v. Pearsall, C. C. A., 90 Fed. 435; *supra*, §§ 171, 172. Where a case was submitted upon

mony is taken before the court, all testimony offered, although objected to, should be admitted subject to the objection for the benefit of the appellate court, unless so utterly irrelevant or immaterial that there can be no question of its inadmissibility.² The decree of a foreign court of admiralty determining the fault for a collision between the two vessels, is conclusive of that question as between the same in a subsequent suit against both in a court of admiralty of the United States.³

On the trial, a motion should not be made to dismiss the libel on the libelant's proofs alone, except where the defendant does not intend to introduce any evidence in his own behalf. He cannot move to dismiss the libel on the libelant's proofs, and then, if the motion is denied, proceed with his own proofs.

The Revised Statutes provide for a jury trial in causes relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upwards enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes.⁴ The verdict of the jury, in such a case, is

the pleadings, it was held that averments of new matter in the answer, and allegations in the libel which the answer denied, must both be disregarded, except in so far as they were admissions against interest. *North Am. Dr. & Imp. Co. v. The River Mersey*, 48 Fed. 686. By Adm. Rule 4, S. D. N. Y., "When various actions are pending, all resting upon the same matter of right or defence, although there be no common interest between the parties, the Court, by order, at its discretion, may compel said actions to be tried together, and will enter a decree in each cause conformably to the evidence applicable thereto."

² *Minnesota S. S. Co. v. Lehigh Valley Transportation Co.*, C. C. A., 129 Fed. 22.

³ *The Kaiser Wilhelm der Grosse*, 175 Fed. 215. See § 186, *supra*.

⁴ *The Erie Belle*, 20 Fed. 63. A trial by jury is not necessary upon a libel for a penalty for the failure to report a vessel from a foreign port to the consul and to enter the required manifest. *The Paolina*, 11 Fed. 171. Nor to a libel against a vessel engaged in commerce exclusively between ports of the same State. *Sanderson v. The City of Toledo*, 73 Fed. 220. Nor to one against a vessel engaged in commerce upon the rivers Ohio and Monongahela. *Bigley v. The Venture*, 21 Fed. 880. It seems that the verdict of the jury is merely advisory. *The Empire*, 19 Fed. 558; *Sanderson v. The City of Toledo*, 73 Fed. 220; *The Western States*, 151 Fed. 929; *supra*, §§ 378-381.

reviewable by appeal, and not by writ of error.⁵ Leave to dismiss a libel without prejudice is ordinarily in the discretion of the trial court⁶ and will ordinarily be refused after the judge has indicated the nature of his decision.⁷ The libellant has no right to a dismissal of his libel, without prejudice, after a hearing and the filing of an opinion against him.⁸ Upon a motion to reopen a case after a trial, in order to offer further evidence, the applicant should show that competent evidence can be produced by him.⁹

§ 583. Evidence. The rules of evidence are the same in admiralty as in other cases in the Federal courts.¹ As, however, an appeal in admiralty is a new trial, it is not necessary to take exceptions to the rulings of the trial judge. All the rights of the appellant are preserved by the noting of objections in the District Court. In admiralty causes most of the evidence is taken *de bene esse*, as the witnesses are, for the most part, seafaring men. The practice is governed by §§ 863-865 of the

⁵ U. S. R. S., § 566; *Boyd v. Clark*, 13 Fed. 908. Ordinarily new trials and amendments cannot be ordered unless a motion is made at the term at which the decree is entered. *The Comfort*, 32 Fed. 327; *The Annex*, 38 Fed. 669. But see *The Madgie*, 31 Fed. 926. In an extraordinary case a new trial was ordered by the District Court upon a libel of review filed by a surety after the term. *Jackson v. Munks*, 58 Fed. 596; s. c., C. C. A., 69 Fed. 571. But see *The Annex*, 38 Fed. 620; *Mainwaring v. The Carrie Delap*, 1 Fed. 880. A new trial in the District Court has been ordered on an appeal. *The Glide*, C. C. A., 72 Fed. 200. It has been held that the act of Feb'y. 16, 1875 (18 St. at L. 315, 4 Fed. St. Ann. 557), which directs the finding of facts by the Circuit Courts in admiralty cases, and, upon the consent of the parties, a trial by jury there by not less than five and no more than twelve, has been repealed. Munson

S. S. Line & Miramar S. S. Co., C. C. A., 167 Fed. 960, 93 C. C. A., 360; *The Nyack*, C. C. A., 199 Fed. 383, 386.

⁶ *Folger v. Robert G. Shaw Co.*, 2 W. & M. 531, Fed. Cas. No. 4,899; *The Bainbridge*, C. C. A., 199 Fed. 404. See § 455, *supra*.

⁷ *The Bainbridge*, C. C. A., 199 Fed. 404.

⁸ *The Bainbridge*, C. C. A., 199 Fed. 404. Cf. § 455, *supra*.

⁹ *Ibid*.

§ 583. ¹ See chapter XXI, *supra*. Admissions are evidence against the pleader, *Ward v. Fashion*, Fed. Cas. 17,154; *The Santa Claus*, Fed. Cas. 12,327; *Berry v. The Montezuma*, Fed. Cas. 1358a. The old rule in equity as to the weight of a sworn and responsive statement in the answer, *supra*, § 331, does not apply. *U. S. v. The Matilda*, Fed. Cas. 15,741, *Brun. Col. Cas.* 5 *Hughes* 44; *Sherwood v. Hall*, Fed. Cas. 12,777; *Eads v. The Bacon*, Fed. Cas. 4,232.

Revised Statutes.² The powers vested in United States commissioners are now extended to notaries public.³

§ 584. **Interlocutory decree and reference.** The question of damages is seldom tried before the court. In case the libellant is successful, an interlocutory decree is entered, by which it is referred to a commissioner or referee to ascertain the damages sustained by the libellant, and report thereon to the court. Such a referee has the powers of a master in chancery.¹ The practice before such a commissioner is analogous to that before a master in chancery.² But, unlike a master taking proofs before trial, he rules upon questions of evidence. Upon the filing of the report by the commissioner, the successful party should serve his opponent with notice of the filing, and of a motion to confirm the report, and thus limit the time within which exceptions may be filed; or the report may be confirmed *nisi* on motion, without notice, on the return day, which will also fix the time within which exceptions may be filed. The party filing exceptions should notice them for hearing. They must be specific³ unless all the evidence is attached to the report.⁴ Then a general exception is sufficient.⁵ His findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses should not be disturbed unless clearly erroneous.⁶ Where, by consent, the commissioner has been directed to hear and determine the issues the court is without power to rule upon the findings and the exceptions

² §§ 386-390, *supra*.

³ Act of Aug. 15, 1876, ch. 304; U. S. R. S., § 1778.

§ 584. ¹ Adm. Rule 44; *The Eliza Lines*, 114 Fed. 307; *La Bourgogne*, 144 Fed. 781.

² *Ibid.* See *supra*, ch. XXVII.

³ *The Comander-in-Chief*, 1 Wall. 43; *The Cayuga*, C. C. A., 59 Fed. 483, § 393, *supra*. But see *Ross v. So. Cotton Oil Co.*, 41 Fed. 152. It has been held that the claimant may move to dismiss at the close of the libellant's case, and take testimony pending that motion without waiving his right to have his motion

decided, regardless of the other facts brought out upon the cross-examination of his witnesses.

Puget Sound M. Depot v. The Guy C. Cross, 53 Fed. 826. But see amendment to Rule 52, S. D. N. Y.

⁴ *The Paquete Habana*, 189 U. S. 453, 47 L. ed. 901.

⁵ *Ibid.*; *Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co.*, D. C. S. N. Y., June, 1904.

⁶ *La Bourgogne*, C. C. A., 144 Fed. 781; *The Minnehaha*, 151 Fed. 782. For a form of a commissioner's report, see *The Itasco*, 117 Fed. 885.

should be dismissed.⁷ In a decree *in personam*, the admiralty rule fixing the rate of interest on decrees entered upon a bond or stipulation for value does not apply and the legal rate of interest allowed by the State statute is usually allowed.⁸ Upon the expiration of the time allowed by the practice of the District Court for the filing of exceptions, if none have been filed, a final decree may be entered. The final decree should contain a provision confirming the report. It is not necessary to enter an order of confirmation.⁹ The rules of the Southern and Eastern Districts of New York provide: that a defendant may serve a written order to allow libelants, damages to be assessed at a specified sum and that unless the libellant obtains a decree for a larger sum he shall not recover any subsequent costs and expenses upon a reference after the offer.¹⁰

§ 585. **Final decree.** Where the form of the final decree varies according to the form of the action and the nature of the security furnished. In suits *in rem*, if the *res* has been bonded under the Act of 1847,¹ a summary judgment for the amount of the bond may be entered against the claimant and his sureties.² Where a stipulation for value has been given, the final decree provides that, unless the decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of the court, the stipulators for costs and value cause the engagements of their stipulations to be performed, or show cause within a time fixed by the rules,³ or on the first day of jurisdiction thereafter, why execution should not issue against their property to enforce satisfaction of the decree. At the expiration of the time provided by the rules of the several districts and on proof of service of a copy of the decree on the proctors for the unsuccessful

⁷ Luckenbach v. Delaware, L. & W. R. Co., 168 Fed. 560.

⁸ Steamship Wellesley Co. v. C. A. Hooper & Co., C. C. A., 185 Fed. 733.

⁹ In the New York districts four days are allowed from the date of notice of filing the report or from the return-day on which it is confirmed *nisi*, in which to file exceptions.

¹⁰ Adm. Rule 37.

§ 585. ¹ U. S. R. S., § 941.

² Johnson v. Chicago & Pac. Elev. Co., 119 U. S. 388, 30 L. ed. 447. Motions to allow a bond to be substituted for a fund deposited in the registry of the court are not usually granted in the Eastern District of Pennsylvania. The R. C. Veit, 131 Fed. 400.

³ In the New York districts, four days.

party, the court will grant an order to show cause why execution should not issue against the stipulators. In suits *in rem*, the final decree always provides for the condemnation and sale of the *res*; but this provision is not carried out by an actual sale if the *res* has been bonded. The bond or stipulation takes the place of the *res*, which once released cannot be reached again by process, unless it be subject to execution as the property of one of the stipulators or bondsmen.⁴ In suits *in personam*, the decree follows the form of an ordinary decree in equity containing, however, a provision for judgment against the stipulators for costs similar to that contained in a decree against stipulators for value. A decree *in personam* cannot be entered in a suit *in rem*.⁵

Where two vessels are proceeded against and both are adjudged in fault, the decree should be against the two vessels and their respective stipulators severally, each for one moiety of the entire damage, interest, and costs, so far as the stipulated value of each vessel extends and should provide that any balance of such moiety over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, be paid by the other vessel or its stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessels.⁶ Where both the libellant's and the claimant's vessels are in fault, the damage done to both vessels is added together in one

⁴ *The Union*, 4 Blatchf. 90; *The Thales*, 3 Ben. 327; *Johnson v. The Hattie Belle*, 65 Fed. 119.

⁵ *The Zodiac*, 5 Fed. 220. Where, in a creditor's suit in a Circuit Court against a corporation ship owner, in which defendant's vessels had been taken possession of through a receiver, claimants of maritime liens on such vessels intervened, asserting their liens and asking their adjudication and payment, their right to such liens was tried and determined adversely to them, both by the Circuit Court and on appeal. It was held that such adjudication is conclusive, and the interveners could

not thereafter maintain a suit *in rem* in a court of admiralty to establish and enforce the same liens against the vessels in the hands of a purchaser under the equity decree. *The J. R. Langdon*, 145 Fed. 64. It has been held that summary proceedings are not maintainable in admiralty to set aside or satisfy a decree previously entered, where the controversy either arises collaterally between the parties or involves an adjudication between strangers to the original litigation. *Carroll et al. v. Davidson*, C. C. A., 152 Fed. 424.

⁶ *The Alabama and Gamecock*, 92 U. S. 695, 23 L. ed. 763.

mass or sum and divided equally, and a decree is pronounced in favor of the vessel which has suffered the most against the other vessel for half the difference between the amounts of their respective losses.⁷

§ 586. Sales. In suits *in rem*, where a default has been taken, or where, although a defense has been interposed, the *res* has not been bonded, the final decree orders the clerk to issue a writ of *venditioni exponas* to the marshal, directing him to sell the property in his custody at public auction.¹ Such a sale gives the purchaser an absolute title, good as against all the world, if the proceedings have been duly taken.² Sales under a *fiery facias*, on the other hand, convey only the defendant's interest in the property sold.³ In no case will a sale be permitted in a proceeding *in rem* by default or by consent of parties unless publication has been duly made. Where a court of admiralty ordered the sale of a libeled vessel by a marshal at public auction, it was held to be without authority to accept in open court a private bid or to authorize the marshal to accept the same;⁴ but where a decree for a private sale was reversed after its confirmation and the buyers had resold the ship to persons outside of the district, who bought it in good faith and removed it therefrom, it was held that the vessel should not be recovered from the second purchasers, nor ordered resold, it appearing that in all probability the amount that would be realized after the payment of the costs would be less than was paid at the original sale.⁵ A sale may be set aside for the inadequacy of

⁷ *The North Star*, 106 U. S. 17, 28, 27 L. ed. 91, 95. The court may in a proper case consolidate two libels, try them together and enter a single decree. *The North Star* and *The Ellen Warley*, 106 U. S. 17, 27 L. ed. 91; *The Eliza Lines*, 61 Fed. 308; *The Sarah E. Kennedy*, 25 Fed. 672; *supra*, § 575. Or it may sever the claims in the same libel and render a decree in one before it disposes of the other. *Larrinaga v. Two Thousand Bags of Sugar*, 40 Fed. 507.

§ 586. ¹ By Adm. Rule 29, S. D. N. Y., "Notice of sale of property

after condemnation in suits *in rem* (except under the Revenue Laws and on seizure by the United States), shall be daily for at least six days before sale unless otherwise directed in the decree; and shall be published in the manner directed by § 939, U. S. Rev. Stat."

² *The Trenton*, 4 Fed. 657.

³ *Milwaukee & M. R. R. Co. v. James*, 6 Wall 750, 18 L. ed. 854, 17 Cyc. 1289.

⁴ *Lambert's Point Towboat Co. v. U. S., C. G. A.*, 182 Fed. 388.

⁵ *The John Twohy, Jr.*, 189 Fed 965.

the price.⁶ The proceeds of sale must be paid over by the marshal forthwith to the clerk, who holds them in the Registry.⁷ All moneys deposited in the District Court are thus held in the Registry, being deposited by the clerk in some bank designated by the court subject to its orders.⁸

§ 587. Sales as perishable. It often becomes necessary, from the perishable nature or condition of the property attached, or its liability to deterioration, decay, or injury by being detained in custody, to sell it before the termination of the suit. In such cases, upon application, the court will order a sale, and direct the proceeds to be brought into court to abide the event of the suit.¹ A sale will not be allowed merely on the ground

⁶ *Lambert's Point Towboat Co. v. U. S., C. C. A.*, 182 Fed. 388. See § 394, *supra*.

⁷ Admiralty Rule 41.

⁸ U. S. R. S., § 995; Admiralty Rule 42. It has been said that conceding the jurisdiction of a court of admiralty in a suit *in rem* to enforce liens against a vessel to direct the payment of maritime creditors who have proved their claims, but have been adjudged without lien, from the remnants remaining in the registry of the court after all liens have been satisfied, as against the owner of the vessel, still such jurisdiction should not be exercised where such owner is an insolvent corporation, represented by a receiver appointed by a state court in insolvency proceedings to wind up the affairs of the corporation; but in such case the remnants should be paid over to the receiver, to be distributed between the maritime and other creditors in accordance with the laws of the state. The admiralty court may, however, if the pleadings are sufficient to support judgments *in personam* against the owner, determine the amount due each of such maritime claimants, and enter judgment

therefor. "It may be well enough to remark that the case is not of that kind where a court having obtained jurisdiction for one purpose, will keep it for all purposes to avoid further litigation and a multiplicity of suits. If that principle ever applies to a court of admiralty so as to authorize it to exercise common-law or equitable jurisdiction, it surely does not authorize the incongruous jurisdiction which would be found in operation if a court of admiralty should undertake to wind up an insolvent corporation under the statute of a state, either wholly or only as to a part of the assets of the corporation which happens to be found in the court of admiralty as remnants. The case of *The Edith*, 5 Ben. 432, Fed. Cas. No. 4,282, affirmed 11 Blatchf. 451, Fed. Cas. No. 4,283, and again affirmed by the supreme court, 94 U. S. 518, 24 L. ed. 167, fully sustains the ruling we here make, if it does not go further, and deny the right of any one to be paid out of the remnants in admiralty, even against the owner, unless he has a lien." *The Liberty*, 119 Fed. 539, 541.

§ 587. ¹ Admiralty Rule 10. *Cf.*

that the expenses of custody pending the suit may be a burden to the owners of property.

§ 588. **Intervenors.** In suits *in rem* third persons often desire to intervene for their own interest or protection, as, for example, where there are many claims against a vessel, and one libellant contests the claim of another, either on the merits or on the question of amount due. Such a contestant is permitted to intervene in a suit and file an answer or petition upon giving security for costs.¹ In a suit in admiralty to recover a vessel which has been seized by State officers for violation of a State fishery law, and is held by respondents merely as their custodians, such officers or other representatives of the state may appear and answer without giving the stipulation with sureties for the payment of costs and damages.²

§ 589. **Petition against proceeds of sale.** The proceeds of a sale when paid into the registry take the place of the *res*, and may be proceeded against in the same way as the *res* itself. It is not necessary to issue process; any person having an interest in the fund may file a petition against the proceeds, in which he should set forth his cause of action, and allege the sale and payment into court of the proceeds.¹ This petition is subject to all the rules applicable to libels. After the claims against a *res* and its proceeds have been paid or otherwise disposed of by the court, the person entitled to the remnants and surplus thereof may file a petition setting forth

Jones v. Springer, 226 U. S. 148, 57 L. ed. —; § 394, *supra*.

§ 588. ¹Adm. Rule 34. See The Ethelwold, 165 Fed. 806; §§ 258–261, *supra*.

²The W. J. Hingston, 144 Fed. 560.

§ 589. ¹Admiralty Rule 43; Schuchardt v. Babridge, 19 How. 239, 15 L. ed. 625; Petrie v. The Coal Bluff, 3 Fed. 531; Adm. Rule 48, S. D. N. Y.: "In proceedings *in rem*, after a sale of the property under a final decree, claims upon the proceeds of sale, except for seamen's wages, will not be admitted in behalf of lienors filing libels or

petitions after the sale, to the prejudice of lienors under libels filed before the sale, but shall be limited to the remnants and surplus." In The Ethelwold, 165 Fed. 806, it was held that a libellant, who had brought a suit *in rem* and *in personam*, and after intervening libels asserting liens had been filed, without opposing them, proved his claim and took a decree only *in personam* against the owner, thereby waived his right to assert a lien upon the fund, and that such election bound his insurer who claimed the right of subrogation.

his interest and obtain thereon an order of reference to determine his right to the fund. The court has power to distribute the surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated.² Where the salvor of derelict property, who claimed the whole, was awarded only half of its proceeds and the remainder deposited in the registry of the court; after ten years had elapsed without any claimants for the same, it was held that he was entitled to the balance.³ The court of admiralty has jurisdiction to allow the fees and disbursements of a receiver in bankruptcy, who had custody of the boat, to be paid as a preferred claim out of the proceeds of a sale, although he was not a party to the suit and presented no claim.⁴ The Revised Statutes provide: "All moneys paid into any court of the United States or received by the officers thereof in any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer or Assistant Treasurer or a designated depository of the United States in the name and to the credit of such court, provided that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties under the direction of the court."⁵ "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term time or in vacation to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn, and it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid which have remained in the registry of the court unclaimed for ten years or longer to be deposited in a designated depository of the United States to the credit of the United States."⁶

² *The Lottawanna*, 21 Wall. 558, 582, 22 L. ed. 654, 664; *The E. V. Mundy*, 22 Fed. 173; *The Guiding Star*, 18 Fed. 263.

³ *Re Moneys in Registry of District Court*, 170 Fed. 470.

⁴ *Hudson Oil & Supply Co. v. Booraem*, 216 U. S. 604. See *The Falcon*, C. C. A., 177 Fed. 916.

⁵ U. S. R. S., § 995, as amended by Act of February 19, 1897, c. 265, § 3, 29 St. at L. 575 (U. S. Comp. St. 1901, p. 711).

⁶ U. S. R. S., § 996, as amended by Act of February 19, 1897, c. 265, § 3, 29 St. at L. 575 (U. S. Comp. St. 1901, p. 711).

§ 590. **Priorities.** When the proceeds of a sale or the amount of a stipulation for value are insufficient to satisfy all the claims against a vessel or other *res*, it becomes necessary for the court to determine the order in which the claims shall be paid. The court will order payment in accordance with the priorities as settled by the admiralty law, without reference to the time when the libel was filed or the decree entered; but the libellant who files the first libel or in whose suit a sale is had has ordinarily a priority so far as costs are concerned.¹

§ 591. **Libel of review.** A court of admiralty may entertain a libel of review to correct its decree after the expiration of the term, where the petitioner is shown to be free from fraud or negligence, and the decree was entered through such fraud, accident or mistake, as would entitle the party to relief in equity.¹ It has been said that mere negligence or oversight will not be sufficient; but that a direct case of fraud, or something equivalent thereto, must be shown.² This relief was granted where the clerk, without the knowledge of the judge or counsel, entered a decree dismissing the libel, in accordance with an oral statement by the judge that he intended to dismiss the same, and the time for appeal had expired before discovery of the entry of that decree.³

§ 592. **Appeals.** Since the Evarts Act of March 3, 1891, an appeal may be taken from the final decree of a District Court in admiralty to the Circuit Court of Appeals irrespective of the amount involved.¹ The decision of the Circuit Court of Appeals is final in all admiralty cases, except that it may certify to the Supreme Court any questions of law concerning which it desires instruction, or the Supreme Court may itself require by *certiorari* or otherwise such a case to be certified

§ 590. ¹The Fanny, 2 Low. 508.

§ 591. ¹Snow v. Edwards, 2 Lowell, 273, Fed. Cas. No. 13,145; Munks v. Jackson, 66 Fed. 571, 13 C. C. A. 641; The Columbia, 100 Fed. 890; Hall v. Chisholm, C. C. A., 117 Fed. 807. See *supra* § 451. See § 568.

²The New England, 3 Sumner, 495, Fed. Cas. No. 10,151; N. W.

Car Co. v. Hopkins, 4 Bissell, 51,

Fed. Cas. No. 10,334.

³Hall v. Chisholm, C. C. A., 117 Fed. 807.

§ 592. ¹Jud. Code, § 128, 36 St. at L. 1087, re-enacting 26 St. at L. 826, § 6; The Robert W. Parsons, 191 U. S. 17, 33, 48 L. ed. 73, 80. See Chapter on Writs of Error and Appeals, *infra*.

to it for review and determination.² From the final sentences and decrees in prize cases, irrespective of the amount involved, appeals are taken immediately to the Supreme Court of the United States.³ What are final decrees is discussed in the concluding chapter.⁴ An order or decree disallowing a claim against the proceeds of a sale cannot be reviewed, except on an appeal by the claimant.⁵ In a suit for wages by the master of a vessel against the owner and insurers, the only controversy was as to the ownership of the vessel during the time libellant's services were rendered; the owner claiming to have abandoned her to the insurers, and the insurers denying such abandonment. The court dismissed the libel as to the insurers and entered a decree in favor of libellant against the owner, who alone appealed. It was held that he was entitled to maintain such appeal and to a review of the decision as between himself and his correspondents.⁶ Where cross-suits between the same parties, one in the Circuit Court and one in the District Court in admiralty, were by agreement tried together on the same evidence, but separate judgments were entered in each court, it was held that a subsequent order of the trial judge finding that the causes were consolidated into the admiralty case was not sufficient to effect a *nunc pro tunc* consolidation, and the judgment which remained of record in the Circuit Court was not reviewable on an appeal taken in the admiralty suit.⁷ Although a decree dismissing a libel in admiralty by a charterer to recover damages for breach of charter party was erroneous, it was not reversed, further than to award costs to the libellant, where with his acquiescence a portion of the damages claimed by him were proved and allowed as a set-off in a cross-action brought against him by the owners in another court, and no proceedings have been prosecuted to review the judgment in such action.⁸ Appeals must be taken within six months after

² Ibid. The writ is frequently issued in cases of admiralty. See § 689, *infra*.

³ Jud. Code, § 238, 36 St. at L. 1086, re-enacting 26 St. at L. 828, § 5; *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320

⁴ See § 695, *infra*.

⁵ *Henderson v. Kanawha Dock Co.*, C. C. A., 185 Fed. 781.

⁶ *Hume v. Frenz*, C. C. A., 150 Fed. 502.

⁷ *S. P. Shotter Co. v. Larsen*, C. C. A., 134 Fed. 705.

⁸ Ibid.

the entry of the final decree.⁹ But the rules of the District Courts fix the time in which if the appellant wishes to stay execution, an appeal must be taken.¹⁰ An appeal is usually taken by the service of a brief notice in writing on the clerk of the District Court and the proctor for the adverse party of the intention of the appellant to appeal. The practice on appeals in admiralty is now analogous to the former practice on appeal from the Circuit Courts to the Supreme Court, rather than from the District to the Circuit Courts. The rules of the Circuit Courts of Appeals as to *supersedeas* and cost bonds, citations, returns, usually called apostles, docketing cases, dismissals of appeals, printing records and briefs, motions, arguments, rehearings, costs, and mandates apply as well to admiralty as to equity.¹¹ While the findings of the trial judge will not be disturbed by an appellate court upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there is found to be a decided preponderance of evidence to the contrary,¹² a finding based solely on the preponderance of the testimony is open to review and consideration *de novo* by the appellate court.¹³ Where the testimony was taken by deposition, the former rule does not apply.¹⁴ Where upon a joint libel stating separate causes of action, as to some of them no finding or decree was made below, and the only appeal was by the claimant from decrees in favor of some of the libelants on one cause of action, the record not containing evidence relating to the others; it was held that the appellate court could

⁹ Act of March 3, 1891, ch. 517, § 11, 26 St. at L. 829.

¹⁰ In the New York and New Jersey districts the appellant has ten days from the entry of the final decree in which to appeal; in Connecticut, twelve.

¹¹ The Admiralty rules of the Court of Appeals for the Second Circuit, which are published in the Appendix, *infra*, provide that an appeal may be taken by filing in the clerk's office and serving on the proctor of the adverse part a simple notice of appeal, security in the sum of two hundred and fifty dol-

lars for costs to be given within ten days after filing the notice (I, II). They allow the appellant to appeal from a part only of the decree (III). They also regulate the contents and form of the apostles or transcript, and the briefs (IV, XV).

¹² Reed v. Weule, C. C. A., 176 Fed. 660; Peterson v. Larsen, C. C. A., 177 Fed. 617.

¹³ The Fin MacCool, C. C. A., 147 Fed. 123. See *infra*, §§ 437, 503.

¹⁴ The Santa Rita, C. C. A., 30 L.R.A. (N.S.) 1210, 176 Fed. 890.

not try the case anew and enter decrees upon such other causes of action.¹⁵ The court cannot review findings below unless the recitals contain the evidence.¹⁶ Where the decree directed the payment of a fund to a person therein named, the Circuit Court of Appeals presumed that such payee was a party to the suit or appeared below as a claimant, in the absence of evidence upon the point.¹⁷ "Where the final condition of the record is in accordance with the substantial rules of law, neither equity nor admiralty looks at the intervening steps,"¹⁸ An appeal in admiralty by either party from the District Court to the Circuit Court of Appeals vacates altogether the decree of the District Court and opens the whole case for trial anew in the appellate court.¹⁹ In some respects an appeal in admiralty is a new trial. The cause is tried before the appellate court *de novo*.²⁰ The pleadings may be amended, and new proofs introduced, or a new decision may be sought on the pleadings and proofs which were before the District Court.²¹ According to the old practice, within ten days from the taking of the appeal the appellant must file with the clerk of the District Court, and serve upon the proctor for the appellee, a petition of appeal,²² which is a summary statement of the proceedings in the cause, showing when and for what the libel was filed, when the answer was filed, and what relief was prayed for in it, when and before whom the cause was tried, what the decree of the District Court was, when it was entered, and when the appeal therefrom was taken. It must state whether the appellant intends to make new allegations or proofs in the Circuit Court of Appeals, to pray different relief, or to seek a new decision on the facts. The appellant cannot amend his plead-

¹⁵ The John and Winthrop, C. C. A., 182 Fed. 380.

¹⁶ The Falcon, C. C. A., 177 Fed. 916.

¹⁷ The Falcon, C. C. A., 177 Fed. 916.

¹⁸ Putnam, J., in The S. L. Watson, C. C. A., 118 Fed. 945, 951.

¹⁹ The San Rafael, C. C. A., 141 Fed. 270.

²⁰ Irvine v. The Hesper, 122 U. S.

256, 30 L. ed. 1175. See *infra*, § 687.

²¹ The Lucille, 19 Wall. 73, 22 L. ed. 64.

²² The rules of the Second Circuit adopted July 1, 1892, do away with the necessity for a petition of appeal and provide that the record shall contain a summary statement of the proceedings in the cause.

ings or take new proofs in the appellate court unless he has stated his intention to do so in his petition of appeal.²³

Unless the appellant give security for damages and costs, the decree of the District Court may be enforced at the expiration of the time limited by the rules, as if there had been no appeal. The bond runs to the appellee, and should be executed by the appellant and two sureties; but it is not necessary that all the appellants should sign the bond.²⁴ The obligation of the bond is that the appellant will prosecute his appeal to effect, and answer all damages and costs that may be decreed against him by the appellate court, if he fail to make his appeal good. If a stay of execution is not sought, the bond may be given for costs only. So, if the security given in the District Court is by its terms enforceable in the appellate court, an additional bond for the whole claim will not be exacted. Security will be required only in an amount sufficient to pay the costs of the suit and damages for delay, and costs and interest on the appeal.²⁵

The general rules of the Circuit Courts of Appeal provide that the appellant shall file an assignment of the errors which he intends to urge on appeal, and that errors not so assigned will be disregarded. Rule 11 is broad enough in its terms to include admiralty causes. It is therefore necessary for the appellant in admiralty to file a formal assignment of errors.²⁶ except in the Second Circuit and such other Circuits as have by rule provided for appeals without the assignments. An assignment that the court erred in not dismissing a libel against a vessel with costs was a mere expression of opinion of coun-

²³ *Phenix Ins. Co. v. Liverpool & G. W. S. S. Co.*, 22 Blatchf. 372; s. c. *sub nom.* *The Montana*, 22 Fed. 715, 730. No severance is needed to allow the claimant to appeal alone without his sureties. *The Glide*, C. C. A., 72 Fed. 200. But part of the claimants for damages who have intervened in a proceeding cannot ordinarily maintain a separate appeal from a decree limiting liability without procuring a severance from the others. *Short v. The Columbia*, C. C. A., 67 Fed. 942. See *infra*, 709.

²⁴ *Brockett v. Brockett*, 2 How. 238. In the Second Circuit the amount of the bond for costs is \$250, (C. C. A. Rule II, 2d Ct.)

²⁵ C. C. A. Rule 13; *The Brantford City*, 32 Fed. 324.

²⁶ See *infra*, §§ 699, 700. In the Second Circuit the rules adopted May 20, 1892, do away with the necessity of an assignment of errors. Their validity in this respect has not been decided by the Supreme Court.

sel as to the duty of the District Judge, and not a sufficient assignment of error.²⁷ Where a computation made by a commissioner in admiralty contains a plain error, which was called to the attention of the court, it may be corrected in the appellate court, although no formal exception was taken on that ground to the commissioner's report.²⁸

A bill of exceptions is not required on an appeal in admiralty from the District Court. The apostles as the transcript is called are made as provided in Rule 52 of the Rules of the Supreme Court in Admiralty. They should contain the style of the court, the names of the parties, both original and substituted, the process, all bail and stipulations, and if a sale has been made, the orders, warrants, and reports relating thereto, the pleadings, testimony, and exhibits, any order or report to which exception is taken, the final decree, the notice and petition of appeal, citation, *supersedeas*, assignment of errors, and the opinion of the District Judge.²⁹ The clerk will, however, omit

²⁷ The Wyandotte, C. C. A., 145 Fed. 321.

²⁸ The Eliza Lines, C. C. A., 132 Fed. 242.

²⁹ Admiralty Rules IV and V of the Second Circuit are as follows:

"IV. Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

"(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of

the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

"(2) All the pleadings, with the exhibits annexed thereto.

"(3) All the testimony and other proofs adduced in the cause.

"(4) The interlocutory decree and any other order of the court which appellant may desire to have reviewed on the appeal.

"(5) Any report of the commissioner or commissioners, to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

"(6) All opinions of the court,

any of the pleadings, testimony, or exhibits which the parties agree by written stipulation may be omitted. Although an appeal in admiralty opens the decree of the lower court, and gives the parties another trial, the proofs adduced in the District Court are invariably used in the appellate court. If new proofs are taken, the witnesses are examined upon notice before a commissioner or notary public,³⁰ and their depositions are offered in evidence upon the hearing of the appeal. A party is not permitted deliberately to withhold evidence in the District Court, and after having failed there to offer it in the

whether upon interlocutory questions or finally deciding the cause.

"(7) The final decree, and the notice of appeal. And

"(8) The assignments of error.

"Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

"Sec. 3. Where the appellant shall appeal specially, and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal."

"V. The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all the papers contained therein on file in his office."

It is the safer practice to prepare the record so that it will show which witnesses were examined in the presence of the district judge, and which were not. The Gypsum Prince, C. C. A., 67 Fed. 612.

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³⁰ Adm. Rule 49. This rule is by its terms confined to new proofs "taken in a Circuit Court," and is therefore strictly not applicable to proofs taken in a Circuit Court of Appeals. The rules of the Second Circuit Court of Appeals provide that "upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party" (VII). "If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath. If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing" (VIII). See *infra*, § 709.

appellate court.³¹ Objections to the taking or admission of new proofs must be made promptly, and if the appellee has cause to show why new proofs should not be offered, he should give notice thereof to the Court of Appeals at the opening of the term, on affidavits stating the cause intended to be shown.³² The act of February 16, 1875³³ which required the Circuit Court to make findings of fact and conclusions of law, was designed to relieve the Supreme Court from the necessity of deciding questions of fact in admiralty causes. It does not apply to appeals to the Circuit Court of Appeals.³⁴ The practice upon appeals to the Supreme Court in Admiralty is the same as that upon other appeals to that tribunal, except that in prize cases testimony might perhaps be taken upon the appeal.³⁵

§ 593. Limitation of the liability of shipowners. By the general maritime law, a ship-owner is liable in full for all damages caused by the negligence of his employees.¹ This liability has been limited by statute in Great Britain² and in the United States. The statutes in force in the United States on the subject are as follows: "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or for-

³¹ *The Saunders*, 23 Fed. 303; *The Stonington*, 25 Fed. 621. *Of. Re Hawkins*, 147 U. S. 486, 37 L. ed. 251; *supra*, § 457.

³² *The Stonington*, 25 Fed. 621. The Supreme Court of the United States refused to review this rule, although petitioned so to do by the leading members of the admiralty bar. *Re Hawkins*, 147 U. S. 486, 37 L. ed. 251. See *The Nyack*, C. C. A., Seventh Ct., 199 Fed. 383, 387.

³³ 18 St. at L., p. 315, ch. 77, § 3.

³⁴ *The Havilah*, C. C. A., 48 Fed. 684. It was held on appeal from a District to a Circuit Court that defective process could not be cured by amendment. *The City of Lincoln*, 19 Fed. 460. It has been held

to have been repealed. *Munson S. S. Line v. Miramar S. S. Co.*, C. C. A., 167 Fed. 960, 93 C. C. A., 360; *The Nyack*, C. C. A., 199 Fed. 383.

³⁵ For the practice see *infra*, Chapter on Writs of Error and Appeal.

§ 593. ¹ *The Wild Ranger*, Lush. 553. Whether the Employers' Liability Act of April 22, 1908 (35 St. at L. 65, Comp. St. Supp. 1909, p. 1171), by implication, repeals so much of this statute as would otherwise apply to the vessels of a railroad company engaged in interstate commerce, has not yet been decided. *The Passaic*, 190 Fed. 644.

² *The Merchants' Shipping Act of 1894*, 57 and 58 Vict., c. 60.

feiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.”³ “It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.”⁴ The Admiralty Rules provide: “When any ship or vessel shall be libeled or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled ‘An act to limit the liability of ship-owners, and for other purposes,’ now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisalment to be had of the amount of value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisalment, make an order for the transfer by him or them

³ U. S. R. S., § 4283, 4 F. S. A. ⁴ U. S. R. S., § 4285, 4 F. S. A.
839, in Pierce’s Fed. Code, § 2146. 850, in Pierce’s Fed. Code, § 2148.

of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice reserved through the post-office, or otherwise, as the court in its discretion may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.”⁵ “Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exception thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.”⁶ “In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel for petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from lia-

⁵ Adm. Rule 54.

⁶ Adm. Rule 55.

bility, or to a limitation of liability under the said act of Congress, or both.”⁷ “The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in the district other than that in which the said ship or vessel may be, the said proceedings may be had in the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinafter provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.”⁸ “All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the circuit courts of the United States where such cases are or shall be pending in said courts upon appeal from the district courts.”⁹ The Hepburn Act regulating the respective rights of shippers and carriers,¹⁰ does not repeal any of the provisions of these sections of the Revised Statutes.¹¹ Whether this is done by the Employers’ Liability Law of April 22, 1908,¹² has not yet been decided.¹³ The statute applies to foreign as well as to domestic vessels.¹⁴ Owners of a foreign vessel may, in a proper case, file a petition for the limitation

⁷ Adm. Rule 56.

⁸ Adm. Rule 57.

⁹ Adm. Rule 58.

¹⁰ Act of February 4, 1887, ch. 104, 24 St. at L. 379, Comp. St. 1901, p. 3154; Act of June 29, 1906, ch. 3591, § 7, 34 St. at L. 595, Comp. St. Supp. 1907, p. 909.

¹¹ The Hoffmans, 171 Fed. 455.

¹² 35 St. at L. 65 (Comp. St. Supp. 1909, p. 1171).

¹³ The Passaic, 190 Fed. 644, 649; Chatfield, J.: “It may well

be considered that the Congress in granting a broad right *in personam* implied an intent to repeal any compulsory limitation of liability in a particular class of cases, and that the purpose of protecting and benefiting employees shows a plain negation of the idea of defeating that right by the substitution of a limited right *in rem*.”

¹⁴ The Scotland, 105 U. S. 24, 26 L. ed. 1001.

of their liability.¹⁵ Owners of a domestic vessel may be relieved from their liability to a foreign vessel and its owners by proceedings under the statute.¹⁶ When the injury is caused by a collision between a foreign and American vessel, the American statute applies, although the law of the vessel's flag imposes a severe liability.¹⁷ But where an injury is caused by negligence in the navigation of a foreign ship upon the high seas, no American vessel having any connection therewith, it has been held that the law of the flag applies.¹⁸

The statute applies to all vessels at sea, including fishing vessels,¹⁹ lighters,²⁰ barges,²¹ tugs²² and their tows,²³ and to all vessels engaged in inland navigation on lakes, rivers and canals, including canal boats.²⁴ The owner, who has chartered the vessel,²⁵ the charterer,²⁶ and an insurer, to whom a vessel has been abandoned as a total loss,²⁷ may take the benefit of the statute; but it has been held that a lighterage company, which, in order to fulfill a contract to transfer cargo, charters a lighter, the owner of which employs the stevedores and superintends the work, cannot thus procure a limitation of his liability for a loss of cargo, caused by the capsizing of the lighter through negligent loading.²⁸ The Statute applies, although the liability is for a tort non-maritime, such as a collision with a structure on the land.²⁹ A claim for salvage after a collision is one of the debts and liabilities of the owner, limitation for his liability for which is de-

¹⁵ *The Scotland*, 105 U. S. 24, 26 L. ed. 1001.

¹⁶ *Re Leonard*, 14 Fed. 53.

¹⁷ *The Scotland*, 105 U. S. 24, 26 L. ed. 1001.

¹⁸ *The Titanic*, U. S. D. C., S. D. N. Y., April 1913.

¹⁹ *Whitcomb v. Emerson*, 50 Fed. 128.

²⁰ *The Annie Faxon*, 66 Fed. 575, 580; *Smith v. Booth*, 110 Fed. 680, aff'd. C. C. A., 122 Fed. 626.

²¹ *The Bordentown*, 40 Fed. 682, 687; *The Annie Faxon*, 66 Fed. 575, 580.

²² *The Bordentown*, 40 Fed. 682, 687; *The Columbia*, C. C. A., 73 Fed. 226.

²³ *The Bordentown*, 40 Fed. 682, 687; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 645, 35 L. ed. 886, 887.

²⁴ *The Annie Faxon*, 66 Fed. 575, 580.

²⁵ *Quinlan v. Pew*, C. C. A., 56 Fed. 111, 5 C. C. A. 438.

²⁶ *Thorp v. Hammond*, 12 Wall. 408, 20 L. ed. 419.

²⁷ *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886.

²⁸ *Smith v. Booth*, 110 Fed. 680; aff'd. in C. C. A., 122 Fed. 626, 58 C. C. A. 479.

²⁹ *Richardson v. Harmon*, 222 U. S. 96, 56 L. ed. 110. This overrules

terminated by the proceedings.³⁰ It may be, however, that a highly meritorious salvage service, which benefits both the owner and the other claimants, is entitled to a preference upon the distribution of the fund.³¹ It may be that claims for general average are also entitled to a preference.³² A surrender of the vessel to the insurer does not relieve the ship from liability.³³ The proceedings have no effect against a party who has already obtained a satisfaction of his demands.³⁴ The statute does not relieve the owner from any individual liability to material-men or repairers which he may have incurred.³⁵ The proceeding may be instituted after judgment in the State court,³⁶ but the court of admiralty may compel the petitioner to pay the costs of a suit in the State court that has proceeded to trial.³⁷ The court is not ousted of jurisdiction by the recovery by the claimants of less than the stipulated value of the boat, where their original claims were greater than such value.³⁸ The proceeding is not *in rem*, but partakes rather of the character of a suit *in personam*.³⁹

§ 594. Court where petition for limitation of liability may be filed. The petition should be filed in the District Court of the district in which the vessel's owner has been sued or in that of the district in which the vessel then is.¹ The filing

the case of *Ex parte Phoenix Ins. Co.*, 118 U. S. 610, 30 L. ed. 274, decided before the statute was amended. It has been held that the statute does not apply to an injury caused to a man on a pier by a collision of the vessel with the same. *Elwell v. Bender*, 79 Hun (N. Y.) 243, 29 N. Y. Supp. 357.

³⁰ *Richardson v. Harmon*, 222 U. S. 96, 56 L. ed. 110; *The San Pedro*, 223 U. S. 365, 56 L. ed. 473.

³¹ *The San Pedro*, 223 U. S. 365, 376, 56 L. ed. 473. See *The H. F. Dimock*, 186 Fed. 662.

³² *The H. F. Dimock*, 186 Fed. 662.

³³ *The City of Norwich*, 118 U. S. 468, 505, 30 L. ed. 134, 147.

³⁴ *New York & W. Steamship Co.*

v. Mount, 103 U. S. 239, 26 L. ed. 351; reversing 18 Fed. Cas. No. 10,200, 9 Ben. 44.

³⁵ *The Leonard Richards*, 41 Fed. 818; *Gokey v. Fort*, 44 Fed. 364, 366.

³⁶ *Gleason v. Duffy*, C. C. A., 116 Fed. 298.

³⁷ *Gleason v. Duffy*, C. C. A., 116 Fed. 298; *The Ocean Spray*, 117 Fed. 971.

³⁸ *Briggs v. Day*, 21 Fed. 727.

³⁹ *The City of Norwich*, 6 Benedict, 330, 5 Fed. Cas. No. 2,762.

§ 594. ¹ *Adm. Rule 57*; *Re Morrison*, 147 U. S. 14, 37 L. ed. 60; *The John K. Gilkinson*, 150 Fed. 454.

of the petition for a limitation of liability with an offer of stipulation by the owner, gives the court jurisdiction, which is not lost by subsequent irregularities in the proceedings,² nor by the sailing of the vessel into another district.³ Where a libel *in personam* has been instituted against a ship-owner in one district, he cannot institute proceedings to limit his liability in any other district.⁴ In such a case, the proceedings can be instituted in the district where he is sued, although the action is brought in the State court and the boat is in another district.⁵ The residence of the petitioner is immaterial.⁶ The benefit of the statute may also be secured by proper allegations in the answer in admiralty,⁷ or at common law; even in a State court.⁸

§ 595. Privity or knowledge of owner. In the case of a corporation, the privity or knowledge of its president,¹ or general manager,² or local manager with general powers in the place where his office is situated,³ or superintendent,⁴ is sufficient to bind the company. The privity or knowledge of a master of a vessel,⁵ or wrecking master, or a marine inspector who had, amongst other duties, that of going to the assistance of wrecked and stranded vessels, is not.⁶ The liability of the ship-owner cannot be limited for a failure to comply with an act of Con-

² *Re Morrison*, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60.

³ *Ibid.*

⁴ *The Alpena*, 8 Fed. 280; *The Enterprise*, 196 Fed. 404, (in this case, the ship-owner had submitted to the jurisdiction of the first court and had not instituted his proceedings elsewhere until after a decree against him, from which he had appealed).

⁵ *Gleason v. Duffy*, C. C. A., 116 Fed. 298; s. c., 54 C. C. A. 100.

⁶ *Re Leonard*, 14 Fed. 53.

⁷ *The Scotland*, 105 U. S. 24, 26 L. ed. 1001; *The Great Western*, 118 U. S. 520, 535, 30 L. ed. 156, 151.

⁸ *The Rosa*, 53 Fed. 132.

§ 595. ¹ *The Republic*, C. C. A., 61 Fed. 109, 9 C. C. A. 386; *Weiss-*

haar v. Kimball S. S. Co., C. C. A., 65 L.R.A. 84, 128 Fed. 397.

² *Parsons v. Empire Transp. Co.*, C. C. A., 111 Fed. 202; *Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co.*, 162 Fed. 912, 921.

³ *Parsons v. Empire Transp. Co.*, C. C. A., 111 Fed. 202; *Re Jeremiah Smith & Sons*, C. C. A., 193 Fed. 395.

⁴ *Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co.*, 162 Fed. 912.

⁵ *The Colima*, 82 Fed. 665, 679; *The George W. Roby*, C. C. A., 111 Fed. 601, where the master failed to station a lookout.

⁶ *Craig v. Continental Ins. Co.*, 141 U. S. 638, 645, 647, 35 L. ed. 886, 887, 888.

gress which requires a sufficient crew,⁷ or a boiler inspection, nor when the crew were sufficient in number, but composed of Chinese, nearly all of whom could not understand the language of the officers and who had never been drilled in launching life boats,⁹ nor where the president of a corporation had made an inspection and through carelessness failed to observe that the vessel was not seaworthy,¹⁰ nor when the president saw and did not object to the overloading of a boat.¹¹ But it has been held that owners may obtain limitation of their liability for the negligence of a boiler inspector whom they had employed,¹² for a defect in the rigging, of which the master knew before the voyage,¹³ for a failure to furnish a sufficient supply of life preservers when there was no violation of any act of Congress and the equipment was entrusted to a competent master,¹⁴ for a defect in loading, making the vessel unstable, which was done by the stevedore under the supervision and direction of the master and first officer,¹⁵ and when the vessel is not seaworthy, but they employed competent persons to inspect the same.¹⁶ It seems that the fact that the master is a habitual drunkard does not take a case from the operation of the statute, in the absence of evidence that this fact was within the knowledge or means of knowledge of the owner.¹⁷ When the master is a part owner, the other owner may claim the benefit of the statute, in spite of the former's fault.¹⁸ A master who was a part owner was him-

⁷ *Ibid.*, *Re Pacific Mail S. S. Co.*, C. C. A., 65 L.R.A. 71, 130 Fed. 76.

⁸ *The Annie Faxon*, C. C. A., 75 Fed. 312, 320.

⁹ *Re Pacific Mail S. S. Co.*, C. C. A., 65 L.R.A. 71, 130 Fed. 76.

¹⁰ *The Republic*, C. C. A., 61 Fed. 109.

¹¹ *Weijshaar v. Kimball S. S. Co.*, C. C. A., 65 L.R.A. 84, 128 Fed. 397.

¹² *The Annie Faxon*, C. C. A., 75 Fed. 312.

¹³ *Quinlan v. Pew*, C. C. A., 56 Fed. 111, 5 C. C. A. 438.

¹⁴ *The Jane Grey*, 99 Fed. 582.

¹⁵ *The Colima*, 82 Fed. 665, 679.

¹⁶ *Van Eyken v. Erie R. Co.*, 117 Fed. 712, 716, and cases cited. *Con-*

tra, *Re Myers Excursion & Navigation Co.*, 57 Fed. 240, 242; *aff'd.* upon another point in *The Republic*, C. C. A., 61 Fed. 109, 9 C. C. A. 386. See, also, *Re Eastern Dredging Co.*, 159 Fed. 541; *The Tommy*, C. C. A., 151 Fed. 570, 81 C. C. A. 50; *The Longfellow*, C. C. A. 104 Fed. 360, 45 C. C. A. 379; *Re Louisville, &c., Packet Co.*, 95 Fed. 996; *Memphis, &c., Packet Co. v. Overman Carriage Co.*, 93 Fed. 246; *Quinlan v. Pew*, C. C. A. 56 Fed. 111, 5 C. C. A. 438; *The City of Para*, 44 Fed. 689.

¹⁷ *The Anna*, 47 Fed. 525. But see *Parsons v. Empire Transp. Co.*, C. C. A., 111 Fed. 202.

¹⁸ *Re Leonard*, 14 Fed. 53, 55;

self allowed the benefit of the statute when he had served out his watch and was asleep during the night when the negligence occurred.¹⁹ The owner is not excluded from the benefit of the statute because the vessel was operated at excessive speed during a fog, in the absence of evidence that he acquiesced in the same.²⁰

§ 596. The libel or petition for limitation of liability. The Admiralty Rules provide that the proceeding must be instituted by a libel or petition, filed by the owner in the proper District Court of the United States, setting forth the facts and circumstances on which the limitation of liability is claimed.¹ If the owner wishes to contest his liability or the lia-

The Obey, L. R. 1 A. & E. 102; The Star of the Ocean, 34 L. J. Adm. 74; The Cricket, 48 L. T. 535.

¹⁹ The Maria & Elizabeth, 12 Fed. 627, 630.

²⁰ *Re La Bourgogne*, 117 Fed. 261; s. c., *La Bourgogne*, C. C. A., 139 Fed. 433, 440; s. c., 210 U. S. 95, 52 L. ed. 973.

§ 596. ¹ Adm. Rule 54; The Sacramento, 131 Fed. 373.

Adm. Rule 54, S. D. N. Y., provides: "Petitions or libels to limit liability must state: (1) The facts showing that the application is properly made in this district. (2) The voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of liens, on contract or in tort, arising on that voyage, so far as known to the petitioners, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and if so, when and where; the value of the vessel at the close of the voyage, or in case of wreck, the value of her wreckage, strippings or proceeds, if any, as nearly as the petitioners can ascertain, and where and in whose

possession they are; also the amount of any pending freight, recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information and belief of the petitioner, shall be sufficient."

Adm. Rule 55, S. D. N. Y.: "If a surrender of the vessel is offered to be made to a trustee, the libel or petition must further show any prior paramount lien on the vessel, and what voyages or trips if any she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens, arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; also the special facts on which the right to surrender the vessel is claimed, notwithstanding such subsequent trip or voyage, and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip. Upon surrender of the vessel no final decree exempting from liability will be made until all such liens as may be admitted

bility of the ship, independently of the limitation of the same which he claims, the petition must state the facts and circumstances by reason of which such exemption is claimed.²

The libel or petition should set forth the facts and circumstances on which the limitation is claimed,³ and pray proper relief. When a petition is filed against another vessel, with which the petitioner's boat has collided, the petition may deny all liability by reason of the collision and claim, in the alternative, relief under the statute.⁴ Interrogatories to be answered by a respondent may be attached to the libel.⁵ It should also allege either that the vessel is within the district or that the owner has been there sued.⁶ It is doubtful whether, when there is but a single claim for damage, the proceedings can be instituted, since the limitation of liability may be set up by answer in an action brought at common law.⁷ It is the safer practice

or proved, prior to such final decree, to be superior to the liens of the claims limited, shall be paid or secured independently of the property surrendered; as may be ordered by the Court; and the monition in cases of surrender, shall cite all persons having any claim upon the vessel to appear on the return day or be defaulted, as in ordinary process *in rem*."

Adm. Rule 56, S. D. N. Y.: "If, instead of a surrender of the vessel, an appraisement thereof be sought for the purpose of giving a stipulation for value, the libel or petition must state the names and addresses of the principal creditors and lienors, whether on contract or in tort, upon the voyage on which the claims are sought to be limited, and the amounts of their claims, so far as they are known to the petitioner, and the attorneys or proctors in any suits thereon; or if such creditors or lienors be numerous, then a sufficient number of them properly to represent all in the appraisement; and notice of

the proceedings to appraise the property shall be given to such creditors as the Court shall direct, and to all the attorneys and proctors in such pending suits." As to pleading, see *Butler v. Boston & S. S. Co.*, 130 U. S. 527, 32 L. ed. 1017; *Black v. So. Pac. R. Co.*, 39 Fed. 565; *The Garden City*, 26 Fed. 766; *The Benefactor*, 103 U. S. 247, 26 L. ed. 354; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 27 L. ed. 1038; *The Luckenback*, 26 Fed. 870; *The Annie Faxon*, C. C. A., 75 Fed. 312; s. c. (D. C.), 66 Fed. 575; § 561, *supra*.

² Adm. Rule 56.

³ *The Sacramento*, 131 Fed. 373.

⁴ *Re Piper Aden Goodall Co.*, 86 Fed. 670.

⁵ *The Murrell*, 188 Fed. 727. See *supra*, § 581.

⁶ *The John K. Gilkinson*, 150 Fed. 454.

⁷ Held that they cannot in *The Rosa*, (S. D. N. Y.) 53 Fed. 132; *The Eureka No. 32*, (S. D. N. Y.) 108 Fed. 672; *The Lotta*, (D. S. C.)

for the petition to show the existence, or the probability of the existence, of more than one claim for damage.⁸ It is not necessary to aver or prove that the claims against the vessel are in excess of her value.⁹

One or more of the part owners may join in a petition to limit their liability without joining the rest.¹⁰ As soon as the petition is filed the court will grant an order, either appointing appraisers to appraise the amount or value of the interest of the owner or owners in such vessel and her freight for the voyage, or referring it to a commissioner to take proofs of such value.¹¹

§ 597. Surrender to secure limitation of liability. Where an injury was produced by the fault of two vessels with the same owner, both must be surrendered in order to obtain the benefit of the statute.¹ It has been held that whaling outfits, such as whaling gear, casks, provisions and supplies are not part of the ship and need not be surrendered.² The freight to be surrendered includes what is paid for the carriage of passengers,³ as well as merchandise.⁴ Freight paid in advance under contracts which do not require its return in case of loss, must be surrendered,⁵ but not what must be returned in case the voyage is not completed.⁶ The earnings of the previous voyage, from the home port to that from which the ship was returning when the loss occurred, need not be surrendered.⁷ A claim for damages against another vessel because of a collision, which

150 Fed. 219. *Contra*, Quinlan v. Pew, C. C. A., First Ct. 56 Fed. 111, 5 C. C. A. 438; The S. A. McCaulley, (E. D. Pa.) 99 Fed. 302; *Re Starin*, (E. D. N. Y.) 124 Fed. 101; The Southside, (S. D. N. Y.) 155 Fed. 364; The Hoffmans, (S. D. N. Y.) 171 Fed. 455; Delaware River Ferry Co. v. Amos, (E. D. Pa.) 179 Fed. 756.

⁸ The Rosa, 53 Fed. 132; The Eureka No. 32, 108 Fed. 672.

⁹ The Garden City, 26 Fed. 766, 770. But see Delaware River Ferry Co. v. Amos, 179 Fed. 756.

¹⁰ The S. A. McCaulley, 99 Fed. 302.

¹¹ Providence & N. Y. S. S. Co.

v. Hill Mfg. Co., 109 U. S. 578, 591, 27 L. ed. 1038, 1043.

§ 597. ¹ The San Rafael, C. C. A., 141 Fed. 270, 72 C. C. A. 388.

² Swift v. Brownell, Holmes, 467, 472.

³ The Main v. Williams, 152 U. S. 122, 131, 38 L. ed. 381, 384, 14 Sup. Ct. 486.

⁴ La Bourgogne, 210 U. S. 95.

⁵ La Bourgogne, 210 U. S. 95, 52 L. ed. 973, affirming on this point, C. C. A., 139 Fed. 433; modifying 117 Fed. 261.

⁶ The Scotland, 105 U. S. 24, 26 L. ed. 1001.

⁷ La Bourgogne, 210 U. S. 95, 52 L. ed. 973.

caused the loss, must be surrendered.⁸ Insurance money need not be surrendered.⁹ It has been held that the owner, when he owns the cargo as well as the vessel, must surrender a fair compensation for the transportation of the former.¹⁰ The owner must surrender: in the case of a fishing boat, the earnings of the voyage;¹¹ demurrage due and unpaid;¹² salvage due under a contract, by which he received a specified sum for such service, without deducting the value of other vessels or appliances in the same service, which were not surrendered;¹³ but not an unliquidated claim for salvage that was volunteered,¹⁴ nor any part of an annual subsidy, in return for which the mails were transported and other services rendered to the Government, which had the right to use the ship in case of war.¹⁵ The value of the amount surrendered and the amount of the liability are measured as of the termination of the voyage, during which the injury occurred.¹⁶ When the vessel is sunk, the voyage terminates,¹⁷ unless the boat can be saved in whole or in part.¹⁸ Where the vessel, immediately after a collision, was surrendered to the underwriters, who took possession, and before she reached port was sunk by the negligence of her crew; it was held that she must be appraised as of the date of the second misfortune and that the amount realized by the underwriters from the sale of the wreck was the proper measure of its value.¹⁹ Wages²⁰ and towage,²¹ after the injury and before the termination of the voyage, cannot be deducted;

⁸ *O'Brien v. Miller*, 168 U. S. 287, 303, 307, 42 L. ed. 469, 475, 476. As to a right of subrogation, see *The St. Johns*, 101 Fed. 469, 477.

⁹ *The City of Norwich*, 118 U. S. 468, 30 L. ed. 134.

¹⁰ *Allen v. MacKay*, 1 Sprague, 219.

¹¹ *Whitcomb v. Emerson*, 50 Fed. 128. Held otherwise as to a whaler, in *Smith v. Brownell*, Holmes, 467.

¹² *The Giles Loring*, 48 Fed. 463.

¹³ *The Captain Jack*, 162 Fed. 808.

¹⁴ *Re Meyer*, 74 Fed. 381.

¹⁵ *La Bourgogne*, 210 U. S. 95,

52 L. ed. 973; affirming in this respect, *C. C. A.*, 139 Fed. 433; *s. c.*, 117 Fed. 261.

¹⁶ *The City of Norwich*, 118 U. S. 468, 30 L. ed. 134.

¹⁷ *The City of Norwich*, 118 U. S. 468, 30 L. ed. 134; *The Abbie C. Stubbs*, 28 Fed. 719; *The George L. Garlick*, *C. C. A.*, 107 Fed. 542.

¹⁸ *The Abbie C. Stubbs*, 28 Fed. 719, 720; *The Anna*, 47 Fed. 525, 528.

¹⁹ *The Great Western*, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. ed. 156.

²⁰ *The Abbie C. Stubbs*, 28 Fed. 719, 720.

²¹ *Ibid.*

unless they are extraordinary expenses, made in order to earn the freight, and are in the nature of salvage, when they may be allowed the owner.²² It has been held that salvage and general average charges, which accrued subsequently to the collision, may be deducted;²³ but that the cost of telegrams concerning the loss,²⁴ notarial fees for a protest,²⁵ and payments for the transportation, comfort and benefit of the survivors,²⁶ cannot. There can be no deduction from the value of the vessel or from the freight surrendered because of liens previous to the injury;²⁷ neither for bottomry,²⁸ nor for mortgage,²⁹ nor for previous pilotage,³⁰ nor for wages of seamen,³¹ nor for towage,³² previously incurred. Where the petitioner contumaciously refuses to put the court in actual or constructive possession of the fund to be distributed, its petition may be dismissed.³³ But where there is an honest controversy as to how much should be surrendered and there is no question as to the solvency of the petitioner, the court may permit him to withhold the disputed sum pending an appeal.³⁴

§ 598. Appraisement in proceedings for limitation of liability. The rules provide that upon the filing of the petition, the court, "having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment

²² The Jose E. More, 37 Fed. 122; Pacific Coast Co. v. Reynolds, C. C. A., 114 Fed. 877, 52 C. C. A. 497.

²³ The Abbie C. Stubbs, 28 Fed. 719.

²⁴ The Jane Gray, 99 Fed. 582, 593.

²⁵ The Jane Gray, 99 Fed. 582, 593.

²⁶ Pacific Coast Co. v. Reynolds, C. C. A., 114 Fed. 877, 52 C. C. A. 497; *certiorari* denied, 187 U. S. 640, 23 Sup. Ct. 841, 47 L. ed. 345; approved in La Bourgogne, C. C. A., 139 Fed. 433.

²⁷ The Maria & Elizabeth, 12 Fed. 627, 630; The Leonard Richards, 41

Fed. 818, 820; The Jane Gray, 99 Fed. 582, 592; Barnes v. Steamship Co., 6 Phila. 479, 2 Fed. Cas. No. 1021.

²⁸ Barnes v. Steamship Co., 6 Phila. 479, 2 Fed. Cas. No. 1021.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ The Jane Gray, 99 Fed. 582, 592; Barnes v. Steamship Co., 6 Phila. 479, 2 Fed. Cas. No. 1021.

³² The Jane Gray, 99 Fed. 582, 592.

³³ La Bourgogne, 210 U. S. 95, 141, 52 L. ed. 973, 994.

³⁴ *Ibid.*

the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act."¹ The practice upon appraisements and the rules regulating stipulations for value are ordinarily like the general practice in admiralty proceedings in these respects.² It is the better practice to serve notice of the hearing upon the appraisal, upon the parties liability to whom is sought to be limited;³ but an appraisement *ex parte* is not void.⁴ The vessel is valued as of the date of the termination of the voyage upon which the loss occurred.⁵ When the vessel is sunk, the voyage terminates.⁶ If the vessel has deteriorated in value, while used by the owner for a considerable time after the claims arose, the owner is responsible for the reasonable value of the vessel when the liability was incurred.⁷ Deductions from her present value on account of additions made since an accident occurred should be made at their value at the time of the appraisal, not at their cost.⁸ Where a bond for value is given by the petitioner it must cover the value of the vessel at the time she ended her voyage.⁹ There can be no deduction because of freight then pending or unadjudicated claims for salvage or for general average, although these claims might be entitled to precedence over thereof into court whenever the same shall be ordered; or, if other claimants; for such other claimants have the right to contest the same.¹⁰ The question of interest is in the discretion of the court.¹¹ When a bond or stipulation for value is given, interest runs from the date of the same¹² which should provide therefor.¹³ Where the ship-owner sets up the statutory limitation by an answer without surrendering the vessel or giving a

§ 598. ¹ Adm. Rule 54.

² *Supra*, §§ 571, 573.

³ The George L. Garlick, C. C. A., 107 Fed. 542.

⁴ The Abbie C. Stubbs, 28 Fed. 719; The George L. Garlick, C. C. A., 107 Fed. 542.

⁵ *Re Morrison*, 147 U. S. 14, 34, 37 L. ed. 60, 67.

⁶ *Ibid.*; The H. F. Dimock, 52 Fed. 598.

⁷ The Passaic, 190 Fed. 644.

⁸ The Captain Jack, 162 Fed. 808.

⁹ The H. F. Dimock, 186 Fed. 662.

¹⁰ *Ibid.*

¹¹ The Scotland, 118 U. S. 507, 30 L. ed. 153.

¹² *Smith v. Booth*, 112 Fed. 553; The George W. Roby, C. C. A., 111 Fed. 601.

¹³ *Re Harris*, C. C. A., 57 Fed. 243.

bond, interest is charged on the value of the vessel from the date of the injury.¹⁴ Otherwise, except under extraordinary circumstances, interest against the owner is charged only from the date of the decree.¹⁵

§ 599. Injunctions in proceedings to limit liability.

When proceedings for the limitation of liability are instituted, the court has the power to enjoin all proceedings against the vessel in any other court,¹ even when the same have been already instituted.² Such an injunction, however, is not necessary, since the issue of the monition has the effect of a statutory injunction at least to the extent of superseding such proceedings in the state courts should those in the Federal court be finally sustained.³ But the Federal court has allowed an action in the State court to be begun pending the proceedings to limit the owner's liability in order to stop the running of the State statute of limitations⁴ and where a verdict had been obtained prior to the institution of the proceedings for limitation of liability, the court of admiralty gave leave to the plaintiff to enter judgment upon the same, for the purpose of liquidating his claim;⁵ and it was held that this judgment, though not conclusive, should be accepted as determining the amount of the plaintiff's claim, unless the court was satisfied that it was excessive.⁶ It was held subsequently however, that, where the action in the State court had not been tried, a court of admiralty had no power to allow the question of liability to be there litigated and determined against the petitioner's objections.⁷ Attachments cannot be levied after the Federal proceedings have

¹⁴ *Smith v. Booth*, 112 Fed. 553.

¹⁵ *The Manitoba*, 122 U. S. 97, 30 L. ed. 1095, 7 Sup. Ct. 1158; *The Jose E. More*, 37 Fed. 122.

§ 599. ¹ *The Scotland*, 105 U. S. 24, 26 L. ed. 1001; *Re Morrison*, 147 U. S. 14, 35; *Moran v. Sturges*, 154 U. S. 256, 270, 38 L. ed. 981, 985; *The San Pedro*, 223 U. S. 365, 372, 56 L. ed. 473, 474.

² *Ibid.*; *The Revere*, 191 Fed. 253.

³ *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 600, 27 L. ed. 1038, 1046; *The San*

Pedro, 223 U. S. 365, 372, 56 L. ed. 473, 474.

⁴ *The Titanic*, C. C. A., 2d Ct. Feb. 1913; reversing U. S. D. C. S. D. N. Y.

⁵ *Davenport v. Winnisimmet Co.*, C. C. A., 162 Fed. 862; reversing *The City of Boston*, 159 Fed. 257; s. c., *The City of Boston*, 182 Fed. 174.

⁶ *The City of Boston*, 182 Fed. 174. See *Re P. Sanford Ross*, 196 Fed. 921.

⁷ *The Revere*, 191 Fed. 253.

begun.⁸ When judgment is recovered in the State court, the amount paid cannot exceed the value of the vessel if limitation is allowed.⁹ No injunction will run against materialmen,¹⁰ nor against others,¹¹ who have repaired a vessel upon the security of the owner, so as to forbid a suit *in personam*.

§ 600. Same—Monition. Upon the payment into court of the value ascertained, or the giving of a stipulation therefor, or the transfer to a trustee, as the case may be, the court must issue a monition against all persons claiming damages for the loss on account of which limitation of liability is sought, citing them to appear and make due proof of their claims at or before a certain time to be named in the writ, not less than three months from the issuing of the same. Public notice of the monition must be given as in other cases, and notice must also be served through the post-office or otherwise as the court may direct; and on the application of the owners the court will make an order restraining the further prosecution of all suits against said owners in respect of any such claims.¹ Such an order is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed.²

§ 601. Proofs of claim in proceedings for limitation of liability. Proof of all claims presented in pursuance of the monition must be made before a commissioner to be designated by the court.¹ The time to file a claim may be extended after the expiration of the term fixed in the monition, before,² but not, it has been held, after the final decree.³ Upon confirmation of the commissioner's report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court, or the proceeds of the ship and freight, after payment of costs and expenses, are

⁸ The Titanic, C. C. A., 2d Ct. Feb. 1913.

⁹ Re P. Sanford Ross, 196 Fed. 921.

¹⁰ The Leonard Richards, 41 Fed. 818, 822.

¹¹ Gokey v. Fort, 44 Fed. 364, 366.

§ 600. ¹ Adm. Rule 54; Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 592, 27 L. ed. 1038, 1043.

² Seese's Adm'x v. Monongahela Fed. Prac. Vol. II.—126.

River Consol. C. & C. Co., 155 Fed. 507.

§ 601. ¹ The form of the proof and proceedings upon the same is regulated in S. D. N. Y. by Adm. Rule 58. See *supra*, § 589.

² The City of Boston, 159 Fed. 257.

³ Dowdell et al. v. United States District Court for Northern District of California et al., 139 Fed. 444.

divided *pro rata* among the several claimants in proportion to the amount of their respective claims proved and confirmed, saving to all parties any priority to which they may be legally entitled.⁴ Holders of maritime liens of the same class, which have not been forfeited, are entitled to a distribution in equal proportions, irrespective of the date when they issued process or obtained decrees.⁵ In case of a collision, the fund is distributed among the parties thereby injured, without reference to liens previously accruing.⁶ Where there has been a collision, the owner of a vessel which was not in fault can share *pro rata* in the fund with the other claimants; but where such vessel was partly at fault, it will be awarded no share of the fund until the claims of passengers and owners of cargo have been satisfied.⁸ The owner of a boat sunk in a collision cannot prove, in addition to the value thereof, his loss of earnings under an unexpired charter for the season.⁹ He can recover for her "freight pending."¹⁰ Where the vessel has not been totally destroyed, he can prove all the loss due to the detention for repairs, which may include the profits of a charter, the term of which has not yet begun.¹¹ Claims for salvage¹² for personal injuries and death claims are barred by the proceedings and may be proved where a liability exists.¹³

§ 602. Answer in proceedings for the limitation of liability. The owner may contest his liability, or the liability of his vessel, on the merits, for the damage claimed, independently of the limitation provided by the statutes, in which case he must state in his libel or petition the facts and circum-

⁴ Adm. Rule 55.

⁵ The Battler, 67 Fed. 251.

⁶ The Maria and Elizabeth, 12 Fed. 627, 630.

⁷ Norwich & New York Transp. Co. v. Wright, 13 Wall. 104, 122, 20 L. ed. 585; The George W. Roby, C. C. A., 111 Fed. 601, 615.

⁸ The George W. Roby, C. C. A., 111 Fed. 601, 615.

⁹ The George W. Roby, C. C. A., 111 Fed. 601, 615.

¹⁰ Ibid.

¹¹ The Umbria, 166 U. S. 404,

421, 17 Sup. Ct. 610, 41 L. ed. 1053; Mason v. Marine Ins. Co., C. C. A., 54 L.R.A. 700, 110 Fed. 452; The George W. Roby, C. C. A., 111 Fed. 601, 615.

¹² The San Pedro, 223 U. S. 365, 56 L. ed. 473.

¹³ Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 592, 27 L. ed. 1038, 1043; Butler v. Boston & Savannah S. S. Co., 130 U. S. 527, 32 L. ed. 1017; La Bourgogne, 210 U. S. 95, 52 L. ed. 973; *supra*, § 560.

stances by reason of which he claims exemption from liability.¹ And any person claiming damages who has presented his claim to the commissioner pursuant to the monition may file an answer to the petition contesting the right of the petitioner to either an exemption or a limitation of liability.² The answer must be full and explicit and distinct to each separate article and separate allegation.³ If the party answering is uninformed in the premises, he may so state, and thus raise an issue without admitting or denying; but a denial must be founded on information, and, possessing that, the pleader must state the facts accordingly, either positively or upon information and belief.^{3a} Since the ship-owner has the burden of proving that the act of negligence of those in charge of his vessel, which caused the damage, was without his privity or knowledge, it has been said that a denial of such an allegation is unnecessary,⁴ but it is the safer practice to include one. Where the claimant interposes such a denial with the intention of raising an issue of fact and offering evidence thereupon, he should specify the acts which he contends established the privity or knowledge of the petitioner.⁵ In the absence of such an allegation, they are entitled to cross-examine any witnesses called by the petitioner to prove seaworthiness or want of privity or knowledge.⁶ The question whether a subsequent statute, such as the Employers' Liability Act,⁷ has removed a class of persons from the previous statutory right, must, it has been said, be raised by a plea in bar and is waived by an answer upon the merits.⁸ Interrogatories may be annexed to the answer;⁹ but it has been held that the petitioner may refuse to answer when the purpose of an

§ 602. ¹ *The Benefactor*, 103 U. S. 239, 26 L. ed. 351; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 27 L. ed. 1038.

² *Adm. Rule* 56. No answer can be filed until the claim has been presented. *The Pere Marquette* 18, 203 Fed. 127.

³ *Re Davidson S. S. Co.*, 133 Fed. 411; *The Pere Marquette* 18, 203 Fed. 127. See § 575, *supra*.

^{3a} *Re Davidson S. S. Co.*, 133 Fed. 411, 414.

⁴ *The Murrell*, 188 Fed. 727.

⁵ *The Murrell*, 188 Fed. 727; *The Pere Marquette* 18, 203 Fed. 127, 130.

⁶ *The John H. Starin*, C. C. A., 191 Fed. 800.

⁷ 35 St. at L. 65.

⁸ *The Passaic*, 190 Fed. 644, 649.

⁹ *La Bourgogne*, 104 Fed. 823, a most inequitable decision. See *supra*, § 581.

interrogatory is to show that he violated a statute, which imposes a penalty.¹⁰

§ 603. Trial of proceedings for limitation of liability. On the issues thus joined, the parties proceed to trial. The court first tries the case on the merits, and if it finds the petitioner liable for the loss or damage claimed, then tries the question of the petitioner's right to a limitation under the statutes.¹ The issue of a vessel's liability to the claimants must be raised by separate issues, in conformity with the general requirements applicable to pleadings in admiralty.² The proof, required in support of the petition, that any liability incurred with or without the privity or knowledge of the petitioner does not reach the subsequent issue of liability of the vessel for individual claims sought to be proved. The right to contest this is reserved to the petitioner. This issue should be presented by appropriate pleadings conforming to the general practice in admiralty. The claimant is required to allege and prove a cause of action as in an original suit.³ Where a decree dismissing a petition for the limitation of liability was reversed and the cause remanded with instructions to adjudicate the rights of the parties and to take such proceedings as were not inconsistent with the opinion of the court of review; it was held that this merely established the right to limitation and that the claimant must prove that she had a right to recover and to what extent.⁴ Where the liability of the petitioner has been adjudicated in a previous suit, that cannot be contested in a proceeding for a limitation of the same.⁵ A motion to consolidate proceedings for the limitation of liability, begun independently by the owners of each of two vessels in collision, was denied,⁶ but it was held that upon the appointment of a commissioner to take proofs of claims for damages in one of

¹⁰ Ibid.

§ 603. ¹ *Re Davidson S. S. Co.*, 133 Fed. 411. See *La Bourgogne*, 106 Fed. 232, 233. By Adm. Rule 57, S. D. N. Y., the issues are not heard until the publication of the monition, unless otherwise ordered.

² *Re Davidson S. S. Co.*, 133 Fed. 411, 412.

³ *Re Davidson S. S. Co.*, 133 Fed. 411.

⁴ *The Tommy*, 168 Fed. 563.

⁵ *The Maria and Elizabeth*, 12 Fed. 627. See *The Kaiser Wilhelm der Grosse*, 175 Fed. 215.

⁶ *The City of Boston*, 132 Fed. 171.

the proceedings, the owner of the other vessel should be brought in by notice, since he was liable to contribution if the claim was established and enforced.⁷ It has been said that a judgment upon a claim, entered before the proceedings are instituted, is *res adjudicata*;⁸ but a verdict previously rendered is merely advisory;⁹ although it has been said that it should be followed by the court, unless it appears to be excessive.¹⁰ Where a District Court has acquired jurisdiction of a proceeding for limitation of liability for a claim for damages on which the owner has sued in another district, the claimant cannot defeat such jurisdiction by appearing specially and offering or attempting to reduce the amount of his claim below the appraised value of the vessel and her pending freight.¹¹ A decree in admiralty in proceedings for limitation of liability adjudging the rights of the parties and referring the cause to a commissioner to take testimony on claims for damages is reviewable on an appeal taken after the entry of a final decree on the commissioner's report although the time for taking an appeal from the first decree has expired, such decree being in its nature interlocutory.¹²

§ 604. Summary proceedings to collect sailors' wages. The Revised Statutes provide that "the master or owner of every vessel making voyages from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall pay to every seaman his wages within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid on account a sum equal to one-fourth part of the balance due to him. Every master or owner who neglects

⁷ *Ibid.*

⁸ *Re P. Sanford Ross*, 196 Fed. 921, 923. See *The Kaiser Wilhelm der Grosse*, 175 Fed. 215.

⁹ *The City of Boston*, 159 Fed. 257, 182 Fed. 174; *The Revere*, 191 Fed. 253.

¹⁰ *The City of Boston*, 159 Fed. 257, 182 Fed. 174.

¹¹ *The John K. Gilkinson*, 150 Fed. 454.

¹² *La Bourgogne*, 210 U. S. 95, 52 Fed. 973, affirming on this point *C. C. A.*, 139 Fed. 433. See § 695, *infra*.

or refuses to make payment in manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days; during which payment if delayed beyond the respective periods; which sum shall be recoverable as wages in any claim made before the court. But the section shall not apply to the masters or owners of any vessels the seamen on which are entitled to share in the profits of cruise or voyage."¹ "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages, or of an attachment, incumbrance, or arrestment thereon; and no assignment or sale of wages, or of salvage, made prior to the accruing thereto, shall bind the party making the same, except such advantage securities as are authorized by this Title."² "No sum exceeding one dollar shall be recoverable from any seaman, by any one person, for any debt contracted during the time each seaman shall actually belong to any vessel, until the voyage for which such seaman engaged shall be ended."³ "Whenever the wages of any seaman are not paid within ten days after the time when the same ought to be paid according to the provisions of this Title, or any dispute arises between the master and seaman touching wages, the district judge for the judicial district where the vessel is, or in case his residence be more than three miles from the place, or he be absent from the place of his residence, then any judge, or justice of the peace, or any commissioner of a Circuit Court, may summon the master of such vessel to appear before him, to show cause why process should not issue against

§ 604. ¹ U. S. R. S., § 4536. See *The Ocean Spray*, 4 Sawyer, 105; *Covert v. The Brig Wexfords*, 3 Fed. 577; *Moore v. Neafie*, 3 Fed. 650; *The Minna*, 11 Fed. 759 and note; *The Ole Oleson*, 20 Fed. 384; *The Modoc*, 20 Fed. 398; *The Wanderer*, 20 Fed. 655; *Thorson v. Peterson*, 14 Fed. 742; *Boulton v. Moore*, 14 Fed. 922; *The Pacific*, 18 Fed. 703; *Marsland v. The Yose-*

mite, 18 Fed. 331; *Black v. The Louisiana*, 2 Pet. Adm. 268. In S. D. N. Y., Adm. Rules 51 and 52 authorize summary proceedings in all cases where the matter in demand does not exceed fifty dollars and regulate the practice of the same.

² U. S. R. S., § 4536.

³ U. S. R. S., § 4537.

such vessel, her tackle, apparel and furniture, according to the course of admiralty courts, to answer for the wages."⁴

"If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge or justice or commissioner shall certify to the clerk of the District Court that there is sufficient cause of complaint whereon to found admiralty process and thereupon the clerk of such court shall issue process against the vessel, and the suit shall be proceeded on in the court and final judgment shall be given according to the usual course of admiralty courts in such cases. In such suit all the seamen having cause of complaint of the like kinds against the same vessel, shall be joined as complainants; and it shall be incumbent on the master to produce the contract and log book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master. But nothing herein contained shall prevent any seaman from maintaining any action at common law for the recovery of his wages, or having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of ten days next after the delivery of her cargo or ballast."⁵ "This is an enabling statute; it affords a cumulative, not an exclusive remedy; it is permissive not imperative."⁶ The seamen may, without pursuing the remedy authorized by these statutes, libel the vessel at once.⁷ A libel will not necessarily be dismissed because prematurely brought, if substantial justice can be done under it.⁸ It is doubtful whether a delay of ten days can be exacted where a seaman is

⁴ U. S. R. S., § 4546.

⁵ U. S. R. S., § 4547.

⁶ *The Shelbourne*, 30 Fed. 510. See also *The Waverly*, 7 Bissell, 465, Fed. Cas. No. 17,301; *Murray v. Ferryboat*, 2 Fed. 86; *The Edwin Post*, 6 Fed. 206; *The Frank C.*

Barker, 19 Fed. 332; *The M. W. Wright*, 1 Brown Adm. 290.

⁷ *The Elihu Thompson*, 139 Fed. 89.

⁸ *The L. B. Snow*, 15 Fed. 282. See *McCarty v. The City of New Bedford*, 4 Fed. 818.

absolutely discharged.⁹ A dispute does not arise within the statute so as to authorize a mariner to sue before the ten days, when he has demanded his wages, and the owner has refused to pay until the expiration of the ten days.¹⁰ Where a minor, who contracted to serve on his own account, has no parent or guardian to receive his wages, courts of admiralty will permit him to sue in his own name.¹¹ Matters in bar may be set up in the answer and urged at the final hearing, although not presented in the preliminary hearing, before the magistrate, upon the summons. That hearing is not intended to preclude the owner from interposing a substantial defense upon the merits, which he has not set up on such preliminary hearing. The silence of the defendant then is no implied waiver; nor is the decision of the magistrate, as to the sufficiency of the cause shown conclusive.¹² Sailors are competent witnesses for each other.¹³ The execution, by the master, of a bill of sale of the vessel, to a claimant, does not render him an incompetent witness for the libellant in a suit *in rem* for wages.¹⁴ In the absence of shipping articles, the testimony of the master is sufficient to establish the time of each seaman's service and the amount of wages due.¹⁵ The discharge of the seamen may be established by circumstantial evidence.¹⁶ The fact that the master or owner delays unloading the vessel beyond a reasonable time may be regarded as equivalent to a discharge.¹⁷ The burden to show a discharge before the unlading is upon the

⁹ The Cypress, 1 Blatchf. & H. 83, Fed. Cas. No. 3,530; The Warrington, 1 Blatchf. & H. 335, Fed. Cas. No. 17,208; Collins v. Nickerson, 1 Sprague, 126, Fed. Cas. No. 3,016.

¹⁰ The Commerce, 1 Sprague, 34 Fed. Cas. No. 3,054.

¹¹ The David Faust, 1 Ben. 183. See Gifford v. Kollock, 3 Ware, 45, Fed. Cas. No. 5,409; McGinnis v. The Grank Turk, 2 Pittsb. Rep. 326, Fed. Cas. No. 8,800; Wicks v. Ellis, Abb. Adm. 444, Fed. Cas. No. 17,614; Coffin v. Shaw, 21 Law Rep. 463, Fed. Cas. No. 2,951; Lovrein v. Thompson, 1 Sprague, 355, Fed. Cas. No. 8,557; Luscom v. Osgood, 1 Sprague, 82, Fed. Cas. No. 8,608.

¹² The Warrington, 1 Blatchf. & H. 335, Fed. Cas. No. 17,208.

¹³ The Cypress, 1 Blatchf. & H. 83, Fed. Cas. No. 3,530; The Susan, 3 Ware, 222, Fed. Cas. No. 13,631; The Cabot, 1 Abb. Adm. 150, Fed. Cas. No. 2,277; Walsh v. The Louisiana, 4 Fed. 751.

¹⁴ The Trial, 1 Blatchf. & H. 94, Fed. Cas. No. 14,170.

¹⁵ The Trial, 1 Blatchf. & H. 94, Fed. Cas. No. 14,170.

¹⁶ The David Faust, 1 Ben. 183.

¹⁷ The Eagle, Olc. 232, Fed. Cas. No. 4,233.

seamen, and the oath of a seaman alone was held not to be sufficient to establish it.¹⁸ A receipt, purporting to be "in full of all debts, dues and demands," is not conclusive upon the sailor; since it may be shown that it was given under duress, fraud or mistake.¹⁹ The owner cannot insist that the mariner sign a receipt in full as a condition for the payment of the wages.²⁰ It is sufficient, to show a reasonable ground of belief that the vessel is about to proceed to sea within ten days.²¹ The respondent cannot avoid the payment of costs by settling with the libellant, without the knowledge of the latter's proctors.²² A set-off of indebtedness for a house was not allowed.²³ It has been held that jurisdiction under the statute may properly be exercised by a United States Commissioner.²⁴ It is doubtful whether a District Court has jurisdiction of an appeal from such proceedings before a commissioner.²⁵ It has been held that these sections do not override plain treaty stipulations with a foreign power.²⁶ When the suit is continued, all the seamen must be joined as complainants.²⁷ "The right of a seaman to his wages is perfect upon the completion of his service, and before the statutes if payment was refused, he could have instantly commenced a suit *in personam* against the owners or master, or *in rem* against the vessel or freight. The statute affects only one of these remedies, viz., against the vessel. It does not touch suits *in personam* or against the freight. By the statute, as a general rule, no proceeding can be had against the vessel until ten days after the right to wages has accrued. But there are three events in which such proceedings may be had within the ten days; viz., if a dispute has arisen, if the vessel has departed from her port of discharge or if she is about to proceed to sea. In the last two cases the statute is inoperative

¹⁸ The Eagle, Olc. 232, Fed. Cas. No. 4,233.

¹⁹ Jackson v. White, 1 Peters Adm. 179, Fed. Cas. No. 7,151; Whiteman v. The Neptune, 1 Peters Adm. 180, Fed. Cas. No. 17,569.

²⁰ The Commerce, 1 Sprague, 34, Fed. Cas. No. 3,054.

²¹ The Trial, 1 Blatchf. & H. 94, Fed. Cas. No. 14,170.

²² The Ontonagon, 19 Fed. 800.

²³ The Two Brothers, 4 Fed. 158.

²⁴ The Jefferson Borden, 6 Fed. 301.

²⁵ The Eagle, Olc. 232, Fed. Cas. No. 4,233.

²⁶ The Salomoni, 29 Fed. 534. See § 560, *supra*.

²⁷ U. S. R. S., § 4547; The Merchant, Abb. Adm. 1, Fed. Cas. No. 9,434; Oliver v. Alexander, 6 Peters, 143, 8 L. ed. 349.

and the right to process is the same as if it had never been passed. The expiration of ten days, and a dispute having arisen, are by the act made equivalent to each other; and upon the happening of either the new proceeding by summons to the master is authorized, but not required. The act is in this respect permissive, not imperative. The judge may order process against the vessel without previous summons to the master. In the absence of the judge, the clerk may issue process according to rules prescribed or instructions given by the judge."²⁸

§ 605. Proceedings in prize causes. The District Court have original and exclusive jurisdiction in prize causes.¹ The Prize Act, passed by Congress June 30, 1864, now embodied in Title LIV. of the Revised Statutes,² authorizes the District Courts to appoint three prize-commissioners in each district, one of whom must be a retired naval officer.³ It is their duty to receive from the captors the documents found on board the captured ship, or having reference to the captured property, and return them to the court with the affidavit of the prize-master that they are in the same condition as delivered to him; also to examine the prize property as soon as it comes within the district, secure it by seals, and report to the court whether any part of it is in a condition requiring immediate sale, and anything relating to its condition, custody, or disposal which may require action by the court. They are also required to take the depositions of the persons captured with, or who claim, the captured property, upon standing interrogatories prescribed by the court.⁴

These depositions are returned by the commissioner to the court, and, with the documentary evidence obtained from the captured property, constitute the only evidence on which the cause is heard in the first instance. If upon this evidence the case is doubtful, the court may require further proofs to be taken; but in no case are witnesses examined orally before the court.⁵

At any time after the property is brought within the juris-

²⁸ *The William Jarvis*, 1 Sprague, 485, 498.

⁴ U. S. R. S., § 4622.

¹ U. S. R. S., § 563, cl. 8.

⁵ *The Dos Hermanos*, 2 Wheat. 76, 4 L. ed. 189; *The Sir William Peel*, 5 Wall. 517, 18 L. ed. 696; *The Ambrose Light*, 25 Fed. 408.

² U. S. R. S., §§ 4613-4652.

³ U. S. R. S., § 4621.

diction of the court a libel may be filed for its condemnation.⁶ The proceeding must be *in rem*. Where the capture has been made by a public vessel of the United States the libel is filed in the name of the United States by the district attorney.⁷ Where the capture is made by a privateer the proceeding is begun in the name of the captors by their own proctors.

Upon the filing of the libel a monition will issue, which, in case the captured property is in port, is served by the marshal in the same way as in proceedings for forfeiture under the revenue laws. If the property is not in port, as, for example, where it has been carried into a foreign port and there delivered upon bail by the captors, the monition must be served on the parties in interest, their agent, or proctor, if known to reside in the district; otherwise by publication daily in one of the newspapers of the port for ten successive days preceding the return.⁸

Any person interested in the property who wishes to contest the capture or procure restitution of the property captured, must file a claim thereto under oath. If on the return-day no claim is interposed, a default will be entered, and the property condemned. Suspension of proceedings for a year and a day after the default is allowed only where it is doubtful, upon the evidence, whether the captured property belongs to the enemy or is neutral.⁹

Prize property will not be delivered to the claimant on stipulation, deposit, or other security, except where there has been a decree of restitution and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property, and has given the captors leave to take further proofs, or where the claimant satisfies the court that the property has a peculiar and intrinsic value to him, independent of its market value. In such a case the court may deliver the property on stipulation or deposit of its value, if satisfied that the rights and interests of the United States and the captors, or of other claimants, will not be prejudiced thereby; but a satisfactory appraisement must first be made, and an opportunity given to the district attorney and

⁶ U. S. R. S., § 4618.

⁸ Prize Rules S. D. of N. Y., Rule

⁷ The *Palmyra*, 12 Wheat. 1, 6 L. ed. 531; *Jecker v. Montgomery*, 18 How. 110, 124, 15 L. ed. 311, 317.

44.

⁹ The *Julia*, 2 Spr. 164; The *Falcon*, Blatchf. Prize Cas. 52.

the naval prize-commissioner to be heard as to the appointment of appraisers.¹⁰

By consent of the captors and claimants, or upon proof that the cargo is perishing, perishable, or liable to deteriorate or depreciate, or whenever the costs of keeping the same are disproportionate to its value, the court will order a sale by the marshal, the proceeds of which must be deposited with the assistant treasurer nearest to the place of sale, subject to the order of the court.¹

The decree of the court is either for condemnation or for acquittal and restitution. In case of condemnation the court will order testimony to be taken to show who are entitled to share in the distribution, and upon such testimony will make the final decree. In case of acquittal the court will decree delivery of the property or its proceeds, if it has been sold to the claimant, and may award damages against the captors, which will be assessed by commissioners appointed on motion.¹² Where there was probable cause for the seizure, damages are denied.¹³ An appeal lies from the final decree of the District Court direct to the Supreme Court, irrespective of the amount involved.¹⁴ It must be taken within thirty days after the rendering of the decree.¹⁵

§ 606. Proceedings on seizures. The Judicial Code provides that the District Courts of the United States shall have original jurisdiction "of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States."¹ Proceedings for the condemnation and sale of goods are *in rem*. Where the seizure is made on land, the court sits as a court of law with a jury;² where the seizure

¹⁰ U. S. R. S., § 4626.

¹³ The Thompson, 3 Wall. 155, 18

¹¹ U. S. R. S., §§ 4627 and 4629; L. ed. 55; The Pioneer, Blatchf. Prize Cas. 61; The Sarah and Caroline, id. 123.

¹⁴ 26 St. at L. 827, § 5; The Paquete Habana, 175 U. S. 677, 44 L. ed. 320.

¹² The Anna Maria, 2 Wheat. 327, 4 L. ed. 252; The Ambrose Light, 25 Fed. 408, 447. As to costs, see The Olinde Rodrigues, 174 U. S. 510, 43 L. ed. 1065; The Buena Ventura, 175 U. S. 384, 395, 44 L. ed. 206, 211.

¹⁵ U. S. R. S., § 1009; The Nuestrita Senora de Regla, 17 Wall. 29, 21 L. ed. 596.

§ 606. 136 St. at L. 1087, § 24.

² U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

is made on water, the court sits as a court of admiralty or as a court with a similar practice. In navigation, customs and revenue cases, it is the safer practice to seize through the marshal the property before the proceedings for the forfeiture thereof are instituted.³ Proceedings in admiralty for a breach of the revenue, navigation, or other laws of the United States must be brought in the name of the United States.⁴ Proceedings for the enforcement of the neutrality laws are under the control of the United States, and one instituted against a vessel seized upon the complaint of an informer cannot be continued if the Government disavows and declines to ratify the seizure.⁵ Proceedings are begun by filing a libel of information in the district in which the property is seized.⁶ The

³ The Brig Ann, 9 Cranch, 289, 3 L. ed. 734, goods imported in violation of the embargo; *Golston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 381; *The Silver Spring*, Fed. Cas. No. 12,858; *The Washington*, Fed. Cas. No. 17,222; *The Fideliter*, Fed. Cas. No. 4,755; *The Tug May*, 6 Biss. 243, Fed. Cas. No. 9,330; *The Idaho*, 29 Fed. 187, 191; *The Josefa Segunda*, 10 Wheat. 312, 6 L. ed. 329; *Dobbin's Distillery v. U. S.*, 96 U. S. 395, 24 L. ed. 637; *U. S. v. Larkin*, C. C. A., 153 Fed. 113, 82 C. C. A. 247; *Pelham v. Rose*, 9 Wall. 103, 19 L. ed. 602; *The Confiscation Cases*, 20 Wall. 92, 22 L. ed. 320; *U. S. v. Winchester*, 99 U. S. 372, 25 L. ed. 479; *The Sarah*, 8 Wheat. 391, 5 L. ed. 644. This is not the case in proceedings under the Pure Food & Drugs Act. *U. S. v. George Spraul & Co.*, C. C. A., 185 Fed. 405; § 607, *infra*.

⁴ U. S. R. S., § 919.

⁵ *Olivier v. Hyland*, C. C. A., 186 Fed. 843. See Act of March 4, 1909, c. 321, 35 Stat. at L. 1090 (*U. S. Comp. St. Supp.* 1909, p. 1393).

⁶ *Adm. Rule 22. Adm. Rule 59, S. D. N. Y.*: "Proceedings *in rem*

for a forfeiture, and *in personam* for an offense, fine, penalty or debt, may be joined in one information when having relation to the same transaction." *Ibid.*, Rule 60: "On filing an information *in personam* or *in rem*, the Clerk shall issue process thereon, corresponding as nearly as may be with that employed in the instance Court of Admiralty in similar cases. But process *in personam* may be, in the first instance, a *capias* when allowed, or an attachment against goods to compel an appearance, or a simple monition, at the election of the complainant." *Ibid.*, Rule 61: "No person shall be arrested and held to bail on an information *in personam* without the mandate of a Judge, except where such bail is required or authorized by statute. Upon granting the mandate aforesaid, the Judge shall fix the amount of bail, which may be given before the Clerk." *Ibid.*, Rule 62: "In all informations, whether *in rem* or *in personam*, the practice and procedure of Admiralty shall apply in respect of process, pleading (and exceptions thereto), delivery of property on stipulation,

information, if *in rem*, must state that the property is within the district.⁷ It is the safer practice to include in the information, a statement of the place of seizure,⁸ the district within which the property is brought and where it then is situated,⁹ and the place where the violations of the statute were committed.¹⁰ It must propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute of the United States in such case provided, which must be specified.¹¹ It is unnecessary to state specifically that acts or omissions which are described in the language of the statute were done or omitted "contrary to the form of the statute in such case made and provided." Upon the filing of the information a monition will issue, and the cause will proceed as in other suits in admiralty. Notice of the seizure and of the substance of the information must be published for fourteen days in a newspaper published near the place of seizure, and must also be posted for the same

sale of the same if perishable and intervention and appearance of claimants." Ibid., Rule 63: "A special traverse of each cause of forfeiture alleged in the information shall not be required, but the general issue may be pleaded thus: 'That the several goods in the information mentioned did not, nor did any part thereof, become forfeited in manner and form as in the information in, that behalf alleged.'"

⁷ Adm. Rule 23; *U. S. v. George Spraul & Co.*, C. C. A., 185 Fed. 405.

⁸ See Adm. Rule 22; *Coffey v. U. S.*, 116 U. S. 427, 29 L. ed. 681; *U. S. v. One Raft*, 13 Fed. 796. In *U. S. v. George Spraul & Co.*, C. C. A., 185 Fed. 405, it was held that rule 22 did not apply to cases under the Pure Food & Drugs' Act of June 30, 1906, ch. 3915, § 10, 34 St. at L. 771, Comp. St. Supp. 1909, p. 1193.

⁹ Ibid.; *infra*, § 607.

¹⁰ *U. S. v. One Raft*, 13 Fed. 796.

¹¹ *Supra*, § 394; Admiralty Rule 22; *Coffey v. U. S.*, 116 U. S. 427, 435, 29 L. ed. 681, 684. Under the Act of June 14, 1906, c. 3299, 34 St. at L. 263 (U. S. Comp. St. Supp. 1909, p. 1080), it has been held that the prosecution and conviction of the crew is not an essential prerequisite to the enforcement of the right of the Government against the offending vessel, but that in the same proceeding they can be tried and fines imposed against them and the vessel, which will be a lien against the latter. *The Tokai Maru*, C. C. A., 190 Fed. 450. In a libel under the Pure Food and Drugs' Act, *supra*, a failure to allege the date of the shipment is not fatal. *U. S. v. Two Barrels of Desiccated Eggs*, 185 Fed. 302, *infra*, § 607. For a libel that was held to be insufficient, see *U. S. v. The Haytian Republic*, 57 Fed. 508; s. c., C. C. A., 59 Fed. 476. *The Idaho*, 29 Fed. 187. An information

period at or near the place of trial.¹² Any party charged in the libel with fraud has the right to be heard;¹³ and if no opportunity for a hearing is given him, he is entitled to a new trial, when there is no laches upon his part.¹⁴ The Tariff acts of 1909 provides: "That in all suits or informations brought, where any seizure has been made pursuant to any Act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: Provided, That probable cause is shown for such prosecution, to be judged by the court."¹⁵ Where a default is entered it is not necessary for the government to take proofs; a decree of condemnation and sale may be entered forthwith. Fifteen days' notice of sale is required.¹⁶ Property seized may be bonded by the claimant on notice to the collector of customs and the United States attorney.¹⁷ When judgment is rendered for the claimant, but the court certifies that there was reasonable cause of seizure, the claimant is not entitled to costs.¹⁸

for the forfeiture of an oleomargarine plant, under Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 [U. S. Comp. St. 1901, p. 2234], is sufficient, when it charges in the language of the statute that the claimant was engaged in the business of manufacturing oleomargarine, and defrauded and attempted to defraud the United States of the tax on the oleomargarine produced by it, or a part thereof. *U. S. v. Manufacturing Apparatus, etc., of N. J. Melting & Churning Co.*, 141 Fed. 475.

¹² U. S. R. S., § 923. Where goods, seized by a collector for violation of the internal revenue law, under U. S. R. S., § 3453 [U. S. Comp. St. 1901, p. 2278], are attached while in his hands by the marshal on process issued in proceedings for their forfeiture, and a bond for their release is thereafter given by the claimant under section 3459 [U. S. Comp. St. 1901, p. 2281],

the proviso to said section, requiring notice of the pendency of the proceedings in court to be given to the parties executing the bond, is inapplicable; such notice being intended to take the place of an actual seizure by the marshal where the goods have been returned to the claimant under the bond before such seizure has been made, and unnecessary where the attachment has been made, and the proceeding *in rem* is pending when the bond is given. *U. S. v. 59,650 Cigars, C. C. A.*, 146 Fed. 130, affirming 138 Fed. 166; U. S. R. S., § 939.

¹³ U. S. v. Two Bales of Rugs, 167 Fed. 689.

¹⁴ Ibid.

¹⁵ 36 St. at L. § 20, Pierce's Fed. Code, Sup. § 1032.

¹⁶ U. S. R. S., § 939.

¹⁷ U. S. R. S., §§ 938 and 940.

¹⁸ U. S. R. S., § 970.

§ 607. **The pure food and drugs act.** The Pure Food and Drugs Act provides: "That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction, contrary to the provisions of this Act or the laws of that jurisdiction: Provided, however, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."¹ By previous sections: that the "Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for

§ 607. ¹ Act of June 30, 1906, 34 St. at L. 768, § 10, Pierce Fed. Code, § 4138.

sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country." "That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given on opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis of the examination of such article duly authenticated by the analyst or officer making such examination under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid."² "That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State Territory or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the

² *Ibid.*, § 3, Pierce Fed. Code,
§ 4131.

³ *Ibid.*, § 4, Pierce Fed. Code,
§ 4132.

penalties as in such case herein provided."⁴ It is not essential to the forfeiture of the goods that their owner or shipper should have been guilty of a misdemeanor under a still previous section of the act.⁵ It has been said: "Such articles are liable to seizure and forfeiture under section 10: (1) When in the course of being transported from state to state; (2) when, having been transported, they remain (a) unloaded, or (b) unsold, or (c) in the original packages."⁶ The opening of the packages for the removal of samples in order to test their strength, quality and purity, does not constitute a breaking of the original packages within the meaning of the act.⁷ An article is not subject to forfeiture unless, at the time of its seizure, it is in the condition forbidden by the statute; although it may, during a previous period of its transportation between two States, have been adulterated or misbranded.⁸ When a district attorney acts upon evidence furnished by a State health officer,⁹ and when he institutes the proceedings upon his own initiative,¹⁰ no investigation or hearing by the Department is necessary. No seizure by the marshal is essential to the institution of the proceedings for a forfeiture.¹¹ The marshal has no authority to make a seizure prior to the commencement of the proceedings.¹² The statute does not authorize a seizure by a private person at any time.¹³ The proceedings are purely statutory and are not within the admiralty jurisdiction of the court although the practice in the court of first instance except at the trial is analogous to the admiralty practice.¹⁴ Criminal proceedings may be insti-

⁴ Ibid., § 5, Pierce Fed. Code, § 4133.

⁵ U. S. v. Five Boxes of Asafoetida, 181 Fed. 561, 564.

⁶ Ibid.

⁷ Ibid., 181 Fed. 561, 567.

⁸ Ibid.

⁹ U. S. v. Morgan, 222 U. S. 274; U. S. v. Twenty Cases of Grape Juice, C. C. A., 189 Fed. 331, 334.

¹⁰ U. S. v. Morgan, 222 U. S. 274, 56 L. ed. 198; reversing 181 Fed. 587; overruling U. S. v. Twenty Cases of Grape Juice, C. C. A., 189 Fed. 331; U. S. v. Nine Barrels of Olives, 179 Fed. 983. See, also, U.

S. v. Fifty Barrels of Whiskey, 165 Fed. 966; U. S. v. Sixty-five Casks Liquid Extracts, 170 Fed. 449, aff'd. C. C. A., 175 Fed. 1022, 99 C. C. A. 661; U. S. v. Seventy-Five Boxes of Alleged Pepper, 198 Fed. 934.

¹¹ U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

¹² U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302; U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

¹³ U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302.

¹⁴ Four Hundred and Forty-three Cans of Frozen Egg Product v. U.

tuted by an information, instead of by an indictment.¹⁵ The libel need not allege any previous examination by the Department.¹⁶ It must specifically charge that the property had been transported from one State, Territory, district, or insular possession to another for sale.¹⁷ In case of misbranding, it must set forth the facts inconsistent with the brand used,¹⁸ and, in the case of adulteration, the nature of the same.¹⁹ It is not fatally defective for a failure to allege the date of the shipment.²⁰ A libel is not defective for failure to charge that articles of food have been transported for sale.²¹ A want of a sufficient verification is no ground for exception or demurrer to the substance of the libel.²² The proceedings can be reviewed only by writ of error and not by appeal.²³ No injunction will be granted against an act in pursuance of the statute.²⁴

S., 226 U. S. 172, 57 L. ed. —; U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302.

¹⁵ U. S. v. J. Lindsay Wells Co., 186 Fed. 248. Leave to file an information was denied in a doubtful case where the accused had had no previous notice of the decision of the Department and no opportunity to change their labels accordingly. U. S. v. Schurman, 177 Fed. 581.

¹⁶ U. S. v. Morgan, 181 Fed. 587, aff'd. 222 U. S. 274, 56 L. ed. 198, an indictment.

¹⁷ U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642.

¹⁸ U. S. v. Six Hundred and Fifty Cases of Tomato Catsup, 166 Fed. 773; U. S. v. St. Louis Coffee & Spice Mills, 189 Fed. 191. In a charge of misbranding tomato catsup, it is insufficient to aver "that said catsup is made in part from tomato pulp screened from peelings and cores, as the offal of tomato canning factories, and not from

choice ripe tomatoes, granulated sugar, and selected high grade spices, grain vinegar, as stated in said labels." U. S. v. Six Hundred and Fifty Cases of Tomato Catsup, 166 Fed. 773.

¹⁹ U. S. v. St. Louis Coffee & Spice Mills, 189 Fed. 191, an information.

²⁰ U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302.

²¹ U. S. v. 300 Cans of Frozen Eggs, C. C. A., 189 Fed. 351, holding that a consignment by the shipper to himself is forbidden by the act.

²² U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302, 307.

²³ Four Hundred and Forty-three Cans of Frozen Egg Product v. U. S., 226 U. S. 172; U. S. v. Hudson Mfg. Co., C. C. A., 200 Fed. 956, where the employee was dismissed after a trial without a jury.

²⁴ Shawnee Milling Co. v. Temple, 179 Fed. 517.

CHAPTER XXXIV.

BANKRUPTCY.

§ 608. Courts of bankruptcy and their jurisdiction. Original jurisdiction in bankruptcy is vested in the District Courts of the United States in the several States,¹ the Supreme Court of the District of Columbia,² the District Courts of the several Territories,³ The District Court, in the District of Alaska,⁴ The District Court of Porto Rico,⁵ and the District Court of Hawaii;⁶ all of which are courts of bankruptcy.⁷ The Bankruptcy Act expressly invests them, "within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt, who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely

§ 608. 130 St. at L. 544, 545,
§ 2.

² Ibid.

³ Ibid.

⁴ Ibid. Formerly also the United
States Court of the Indian Terri-

tory, Ibid.; now a part of the district of Oklahoma, 34 St. at L. 267, 276, § 16.

⁵ 31 St. at L. 84.

⁶ 31 St. at L. 158.

⁷ 30 St. at L. 544, 545, § 2.

necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; and allow such officers additional compensation for such services, as provided in section forty-eight of this Act;^{*} (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compensations and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or

^{*} 30 St. at L. 544, 546, § 8; St. at L. 838. As to § 48, see *infra*, as amended by 32 St. at L. 797; 36 §§ 663-664.

when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearing and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; (20) exercise ancillary jurisdiction of persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy.⁹ Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."¹⁰ It has

⁹ Ibid.

¹⁰ 30 St. at L. 544-546, § 2. As amended in 36 St. at L. 838. "The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) 'A person against whom a petition has been filed' shall include a person who has filed a voluntary petition." "It will be noted that some of these definitions in section 1 read 'shall mean,' while others read 'shall include.' It was not intended that definitions of words used in the act which read 'shall include' should exclude other meanings or definitions of the word, or limit the ordinary and well-understood meanings. It was intended, as the words used plainly indicate, to make sure that they would be held to include what is expressed." *Re Harper*, 175 Fed. 412, 423; "(2) 'adjudication' shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such de-

creed is finally confirmed." The word "confirmed" is not synonymous with "affirmed," but includes the termination of an appeal by a dismissal without an affirmance. *Re Lee*, 171 Fed. 266; "(3) 'appellate courts' shall include the Circuit Court of Appeals of the United States, the Supreme Courts of the Territories, and the Supreme Court of the United States; (4) 'bankrupt' shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) 'clerk' shall mean the clerk of a court of bankruptcy; (6) 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) 'court' shall mean the Court of Bankrupt-

cy in which the proceedings are pending, and may include the referee; (8) 'court of bankruptcy' shall include the District Courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) 'creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) 'date of bankruptcy,' or 'time of bankruptcy,' or 'commencement of proceedings,' or 'bankruptcy,' with reference to time, shall mean the date when the petition was filed; (11) 'debt' shall include any debt, demand, or claim provable in bankruptcy." It has been held: that it may include a claim for damages for false representations which might not be proved, *Re Harper*, 175 Fed. 412, 423; and that the phrase "owes debts" includes the debts of an infant, for which his property is legally charged, *Re Walrath*, 175 Fed. 243, "(12) 'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act; (13) 'document' shall include any book, deed, or instrument in writing; (14) 'holiday' shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed,

or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) 'judge' shall mean a judge of a Court of Bankruptcy, not including the referee; (17) 'oath' shall include affirmation; (18) 'officer' shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) 'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) 'petition' shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) 'referee' shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) 'conceal' shall include secrete, falsify, and mutilate; (23) 'secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

been said that courts of bankruptcy are not to be considered as courts of limited jurisdiction.¹¹ A Court of Bankruptcy has jurisdiction of property in its possession¹² and over a fund in the court.¹³ It has jurisdiction of a suit in equity by a stranger to the proceeding, to establish a lien upon the property

(24) 'States' shall include the Territories, and Indian Territory, Alaska, and the District of Columbia; (25) 'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) 'trustee' shall include all of the trustees of an estate; (27) 'wage-earner' shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things." 30 St. at L. 544, § 1. "Whenever time is enumerated by days in this Act or in any proceeding in bankruptcy the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday." 30 St. at L. 544, § 31a. This applies to any proceeding in bankruptcy in which the number of days is material, including the application for a discharge. In this the bankrupt

consequently has a year and a day from the date of adjudication for his application. *Re Holmes*, 165 Fed. 225. In such computations, unless there is a conflict between two proceedings instituted upon the same day fractions of a day are usually excluded. *Re Warner*, 144 Fed. 987.

¹¹ *Re Marion Contract & Construction Co.*, 166 Fed. 618.

¹² *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157; *Murphy v. John Hofman Co.*, 211 U. S. 562, 53 L. ed. 327; *Re Lucius*, 124 Fed. 455. See § 635, *infra*. A court of bankruptcy has jurisdiction of an application by the trustee in possession of land, to determine the validity of the claim of the lessor that the lien has been forfeited by an act of the bankrupt. *Gazlay v. Williams*, 210 U. S. 41, 53 L. ed. 950. An injunction may be granted by a court of bankruptcy against the prosecution of a suit by a stockholder of the bankrupt, to enforce a cause of action which had been settled in the court of bankruptcy; but not, it was held, of a suit to compel that settler to account for profits made by him through property conveyed to him as a part of the settlement, upon the ground that, being an officer of the bankrupt, he thereby secured an advantage for which he should be required to account. *Re Swofford Bros. Dry Goods Co.*, 180 Fed. 549.

¹³ *Re Lucius*, 124 Fed. 455.

of a bankrupt,¹⁴ and, it seems, of any other suit against the trustee which affects the estate.¹⁵ A Court of Bankruptcy has jurisdiction of a suit by a trustee upon the bond of a former trustee in bankruptcy;¹⁶ and of proceeding to chancery or collect a bond given it by the bankrupt,¹⁷ or by any party to the proceeding or intervenor therein.¹⁸ A Court of Bankruptcy has jurisdiction of proceedings to determine the exemptions to which the bankrupt is entitled,¹⁹ but not to administer the widow's right to a year's allowance from the estate of a bankrupt, who died after the adjudication.²⁰ A Court of Bankruptcy has jurisdiction of summary proceedings to compel the surrender of property of the bankrupt in his possession, or in that of his agent, or of a stranger to the proceedings who holds it under a claim of right which is clearly frivolous, or when the property has been taken from the possession of the Court of Bankruptcy or wrongfully surrendered by its receiver.²¹ A Court of Bankruptcy has jurisdiction to take possession of property and to determine the title to the same when the State court took possession thereof in proceedings begun within four months of the bankruptcy proceeding,²² at least when the debtor was insolvent,²³ and when the State court took possession within such four months whilst the debtor was insolvent,²⁴

¹⁴ *Cleminshaw v. International Shirt & Collar Co.*, 165 Fed. 797; *Re MacDougall*, 175 Fed. 400. It has been held that a petition, filed in a court of bankruptcy by a creditor, praying for priority of payment from the proceeds of certain lands sold by the trustee, cannot be considered to be a bill in equity to establish a resulting trust in the same. *Teter v. Viquesney*, C. C. A., 179 Fed. 655.

¹⁵ *Re McCallum*, 113 Fed. 393.

¹⁶ *U. S. ex rel. Schaufler v. Union Surety & Guaranty Co.*, 118 Fed. 482.

¹⁷ *Re Appel*, 163 Fed. 1002. But see *Jaquith v. Rowley*, 188 U. S. 620; 47 L. ed. 620.

¹⁸ *Re Regéaled Ice Co.*, 199 Fed. 340, holding that upon an applica-

tion for the cancellation of such a bond, the court has the power to order the persons for whose benefit the same was given to file their claims within a specified time.

¹⁹ *McGahan v. Anderson*, C. C. A., 113 Fed. 115. See § 650, *infra*.

²⁰ *Re Seabolt*, 113 Fed. 766.

²¹ *Infra*, § 480c.

²² *Re Knight*, 125 Fed. 35, 11 Am. Br. 1, criticised in *Remington on Bankruptcy*, § 1582.

²³ *Re Rudnick & Co.*, 158 Fed. 223, *replevin*.

²⁴ *Re Francis-Valentine Co.*, 94 Fed. 793, 2 Am. B. R. 522; *Bear v. Chase*, C. C. A., 99 Fed. 920, 3 Am. B. R. 746; *Re Kenney*, C. C. A., 105 Fed. 897, 5 Am. B. R. 355; *Re Tune*, 115 Fed. 906, 8 Am. B. R. 285. In one case, the court refused

or when a trustee in insolvency took possession within that period.²⁵

Neither the dissolution of a corporation by a State court for insolvency within four months prior to the filing of a petition for involuntary bankruptcy,²⁶ nor the appointment of a receiver of its property within or before that period,²⁷ deprives the District Court of the United States of jurisdiction. A Court of Bankruptcy has no jurisdiction except by a plenary suit to interfere with property which has been in the possession of a State court for more than four months previous to the institution of the bankruptcy proceedings;²⁸ although it may, perhaps, grant a temporary injunction to preserve the *status quo* until the trustee can intervene in the State court.²⁹ But where the State court took possession within four months of the bankruptcy proceedings, whilst the debtor was insolvent,³⁰ or a

to enjoin a sale under an execution, levied within four months under a judgment obtained several years before. *Re Shoemaker*, 112 Fed. 648, 7 Am. B. R. 437. See also *Tennessee Producer Marble Co. v. Grant*, C. C. A., 135 Fed. 322, 14 Am. B. R. 288.

²⁵ *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623; *Davis v. Bohle*, C. C. A., 92 Fed. 325, 1 Am. B. R. 412; affirming s. c., *sub nom Re Sievers*, 91 Fed. 366. 1 Am. B. R. 117; *Leidigh Carriage Co. v. Stengel*, C. C. A., 95 Fed. 645, 2 Am. B. R. 383; *Re Chase*, C. C. A., 124 Fed. 753, 10 Am. B. R. 677.

²⁶ *Re Storck Lumber Co.*, 114 Fed. 360.

²⁷ *Re Sterlingworth Ry. Supply Co.*, 164 Fed. 591.

²⁸ *Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122; *Pickens v. Deht*, 187 U. S. 177, 47 L. ed. 128; *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. ed. 413; *Re Kavanaugh*, 99 Fed. 928, 3 Am. B. R. 832; *National Bank of the Republic of Hobbs*, 118 Fed. 626, 9

Am. B. R. 190; *Tennessee Producer Marble Co. v. Grant*, C. C. A., 135 Fed. 322, 14 Am. B. R. 288. *Cf. supra*, § 52. It has been held that the possession by a sheriff, more than four months prior to the bankruptcy proceedings, under a general writ of execution, which enforces no specific lien upon the property, does not give exclusive jurisdiction to the State court. *Re Vastbinder*, 132 Fed. 718, 13 Am. B. R. 148; *Re Baughman*, 138 Fed. 742, 15 Am. B. R. 23.

²⁹ *Infra*, § 633.

³⁰ *Re Francis-Valentine Co.*, 94 Fed. 793, 2 Am. B. R. 522; *Bear v. Chase*, C. C. A., 99 Fed. 920, 3 Am. B. R. 746; *Re Kenney*, C. C. A., 105 Fed. 897, 5 Am. B. R. 355; *Re Tune*, 115 Fed. 906, 8 Am. B. R. 285. The court refused to enjoin a sale under an execution, levied within four months under a judgment obtained several years before. *Re Shoemaker*, 112 Fed. 648, 7 Am. B. R. 437. See also *Tennessee Producer Marble Co. v. Grant*, C. C. A., 135 Fed. 322, 14

trustee in insolvency took possession within that period;³¹ the Court of Bankruptcy has jurisdiction to interfere. Where part of the subject-matter of a petition filed in proceedings in bankruptcy is within the jurisdiction of the court and part is not, so much of the same as prays relief that the court has power to give may be retained and an amendment permitted limiting the petition to a prayer for such relief.³² Upon the denial of an adjudication in bankruptcy, the jurisdiction of the court terminates and the property becomes subject to the control of any court of competent jurisdiction.³³ The court has no power upon dismissing a petition, to determine the validity of the claim of the petitioning creditor,³⁴ nor to retain jurisdiction in order to permit a reorganization of a corporation respondent.³⁵ It has been said that the bankruptcy Court has exclusive jurisdiction in any case where property is sequestered by a State court, in proceedings begun within the four months.³⁶

§ 609. Jurisdiction in bankruptcy by consent. As a general rule, consent will not give a court of the United States any jurisdiction that is not conferred by statute.¹ The Bankruptcy Act, by implication, gives the courts of bankruptcy jurisdiction over suits by the trustees "by consent of the proposed defendant."² Consent is given to the jurisdiction of a court, of bankruptcy in summary proceedings against an

Am. B. R. 288. See §§ 635, 644, *infra*.

³¹ *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 5 Am. B. R. 623; *Davis v. Bohle*, C. C. A., 92 Fed. 325, 1 Am. B. R. 412; affirming s. c., *sub nom Re Sievers*, 91 Fed. 366, 1 Am. B. R. 117; *Leidigh Carriage Co. v. Stengel*, C. C. A., 95 Fed. 645, 2 Am. B. R. 383; *Re Chase*, C. C. A., 124 Fed. 753, 10 Am. B. R. 677.

³² *Re Newfoundland Syndicate*, 196 Fed. 443.

³³ *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 309, 56 L. ed. 208, 214.

³⁴ *Re Sig. H. Rosenblatt & Co.*, C. C. A., 193 Fed. 638; *Fitch v. Richardson*, C. C. A., 147 Fed. 197.

³⁵ *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 309, 56 L. ed. 208, 214.

³⁶ *Re Knight*, 125 Fed. 35, 11 Am. B. R. 1; criticised in *Remington on Bankruptcy*, § 1582.

§ 609. ¹ *Fourniquet v. Perkins*, 7 How. 160, 12 L. ed. 650; *Olds Wagon Co. v. Benedict*, C. C. A., 67 Fed. 1, 14 C. C. A. 285.

² 30 St. at L. 544, 552, § 23, subd. b. Such consent "means consent to the tribunal in which the controversy is to be carried on and not to the mode of procedure, which is regulated by general principles of law unless other provision is made." *Sinsheimer v. Simonson*, C. C. A., 107 Fed. 898, 906; approved *Re Raphael*, C. C. A., 192 Fed. 874, 876.

adverse claimant, by his appearance and answer to the merits without raising the jurisdictional objection;³ but not when he joins in the same answer an objection to the jurisdiction with a defense upon the merits.⁴ The consent need not expressly appear on the record, but may be shown by conduct necessarily implying the same,⁵ or be given by estoppel.⁶ Consent is also conferred over an adverse claimant by his intervention in the bankruptcy proceedings,⁷ or seeking relief therein;⁸ by his submitting his rights to the court or referee without raising the jurisdictional objection,⁹ by his invoking the affirmative action of the court, by an application for a receiver,¹⁰ or for an injunction,¹¹ or otherwise,¹² by his acceptance of the benefit of an order of the court,¹³ and by a waiver in the Circuit Court of Appeals of the objection, although raised in the District

³ *Ryttenberg v. Schefer*, 131 Fed. 313; *Knapp & Spencer Co. v. Drew*, C. C. A., 160 Fed. 413; *Re Mills*, 179 Fed. 409; *Re Kornit Mfg. Co.*, 192 Fed. 392; *Mitchell Storebuilding Co. v. Carroll*, C. C. A., 193 Fed. 616.

⁴ *Wood v. Wilbert*, 226 U. S. 384, 57 L. ed. —; overruling *Sheppard v. Lincoln*, 184 Fed. 182. See §§ 169, 170, *supra*.

⁵ *McEldowney v. Card*, 193 Fed. 475, where a plea of set-off claiming affirmative relief was held to be a consent to the jurisdiction of the court of the United States in a plenary suit by the trustee. But see *Re Gill*, C. C. A., 190 Fed. 726, holding that a plea of set-off seeking no affirmative relief was an adverse claim and not a consent to the jurisdiction of the referee in a summary proceeding.

⁶ *Re Plymouth Elevator Co.*, 191 Fed. 633, the surrender of property for sale without objection; *Re Trayna & Cohen*, C. C. A., 195 Fed. 486, attendance or representation at a sale without objection.

⁷ *Re Emrich*, 101 Fed. 231.

⁸ *Re Elletson Co.*, 174 Fed. 859; *Re Banzai Mfg. Co.*, C. C. A., 183 Fed. 298; *Re Jackson Brick & Tile Co.*, 189 Fed. 636; *Re Trayna & Cohen*, C. C. A., 195 Fed. 486, the abandonment of the application after it had been referred and before the taking of testimony upon the same was held not to be a withdrawal of the consent.

⁹ *Re Steuer*, 104 Fed. 976; *Chauncey v. Dyke Bros.* C. C. A., 119 Fed. 1. It has been held that this waives objections to the jurisdiction of the court of bankruptcy, but not the objection that the matter cannot properly be determined upon summary proceedings and should be the subject of a plenary suit. *Sinsheimer v. Simonson*, C. C. A., 107 Fed. 898. — See *Re Raphael*, C. C. A., 192 Fed. 874.

¹⁰ *Re Durham*, 114 Fed. 750; *Re Hadden Rodee Co.*, 135 Fed. 886.

¹¹ *Ibid.*

¹² *Re Porterfield*, 138 Fed. 192; *Re Platteville Foundry & Machine Co.*, 147 Fed. 828.

¹³ *Re Noel*, 137 Fed. 694.

Court.¹⁴ But not by an answer and defense on the merits after his objection to the jurisdiction has been overruled.¹⁵ Nor, it has been held, by filing an answer to the merits concurrently with a demurrer to the jurisdiction,¹⁶ or by failing to object to the jurisdiction until after the filing of an amended petition when the original petition alleged no cause of action.¹⁷ But proof of claim is not a consent to jurisdiction of a proceeding to compel him to pay money to the trustee;¹⁸ nor, it has been held, when he insists therein upon rights to property previously seized, does he consent that the Court of Bankruptcy shall determine the validity of the seizure.¹⁹ Leave to amend an answer by pleading an objection to the jurisdiction may be denied.²⁰ It is too late to raise an objection to the jurisdiction for the first time upon appeal.²¹ The District Court has power to decide whether the facts exist which give it jurisdiction of a suit or proceeding in bankruptcy against an adverse claimant, and consequently, its judgment overruling such an objection cannot be reviewed immediately by the Supreme court of the United States upon a certificate that a question of jurisdiction is involved.²² Consent may give the District Court jurisdiction of a bill of interpleader against the trustee in bankruptcy and another claimant of a fund in the possession of the complainant.²³ But, it was held, that consent could not give jurisdiction of an application, after a sale had been confirmed and the purchase money paid, to compel specific performance of a contract by the buyer to sell the land to the applicant, and to compel the trustee to execute a deed to the buyer.²⁴

§ 610. Jurisdiction of courts of bankruptcy over plenary suits. The Bankruptcy Act provides: "The United States

¹⁴ *Hatch v. Curtin*, C. C. A., 154 Fed. 791.

¹⁵ *First Nat. Bank v. Chicago Title & Tr. Co.*, 198 U. S. 280, 49 L. ed. 1051; *Louisville Tr. Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413.

¹⁶ *Re Michie*, 116 Fed. 749.

¹⁷ *Re Hemby-Hutchinson* Pub. Co., 105 Fed. 909.

¹⁸ *Pickens v. Dent*, 187 U. S. 177, 47 L. ed. 128; affirming 106 Fed. 653.

¹⁹ *Fitch v. Richardson*, C. C. A., 147 Fed. 196.

²⁰ *Knapp & Spencer Co. v. Drew*, C. C. A., 160 Fed. 413.

²¹ *Boonville Nat. Bank v. Blakey* C. C. A., 107 Fed. 891.

²² *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405; *Shweer v. Brown*, 195 U. S. 171, 49 L. ed. 144.

²³ *Re Blake*, C. C. A., 150 Fed. 279.

²⁴ *Henrie v. Henderson*, C. C. A., 145 Fed. 316.

circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.”¹ Whether this limitation applies, in any respect, to the District Courts since the abolition of the Circuit Courts of the United States by the Federal Judicial Code, has not been decided.² The Bankruptcy Act further provides: “Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, section sixty-seven, subdivision e, and section seventy, subdivision e.”³ This gives the District Courts jurisdiction, concurrent with the State courts, of all suits, irrespective of the citizenship of the parties or of the bankrupt, which are brought to set aside a preference and to recover the property thereby conveyed or its value,⁴ suits to set aside transfers or encumbrances of the bankrupt’s property, made within

§ 610. 136 St. at L. 544, § 23a;

² Before the enactment of this Code, where the bankrupt might have sued the defendant in a Circuit Court of the United States, the trustee might do so, although his citizenship was the same as that of the defendant. “Citizenship of the trustee is wholly immaterial to the jurisdiction of such a case.” *Bush v. Elliot*, 202 U. S. 477, 484, 50 L. ed. 1114, 1117, 26 Sup. Ct. 668. See *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. 174; *Mayer v. Cohrs*, 188 Fed. 443. It was held that the jurisdiction of a Circuit Court of the United States over a suit by a creditor of the bankrupt to recover property fraudulently transferred,

was not affected by the bankruptcy law. *Frost v. Latham & Co.*, 181 Fed. 866.

³ Bankruptcy Law, § 23b, as amended 32 St. at L. 797; 36 St. at L. 838.

⁴ *Ibid.*; § 60b, as amended by 32 St. at L. 797; 36 St. at L. 838. See *infra*, § 644. An action by the trustee against a creditor, who obtained a preference by the purchase of property at an execution sale within four months before the filing of the bankruptcy petition, is an action at law within the jurisdiction of the bankruptcy court, although the complaint alleges conversion of the property. *Grant v. Nat. Bank of Auburn*, 197 Fed. 581.

four months prior to the filing of the petition with the intent to hinder, delay or defraud his creditors, and all other conveyances or encumbrances, made by him within such four months while insolvent, which are null and void as against his creditors by the laws of the State, territory or district where the property is situated;⁵ and of suits to set aside any transfer of the bankrupt's property, which any creditor of the bankrupt might have avoided, and to recover the property so transferred or its value from the transferee, irrespective of the date of such conveyance.⁶ Such suits may also be brought by the trustee in another District Court of the United States than that where he was appointed.⁷ Such suits can only be instituted in courts

⁵ *Ibid.*; § 66e, as amended by 32 St. at L. 797. It has been held that a Court of Bankruptcy may compel an accounting by an assignee under an assignment for the benefit of creditors made within four months preceding the filing of the petition. *Re Thompson*, C. C. A., 128 Fed. 575. But see *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413. It has been held: that such a suit cannot be brought unless the elements prescribed by section 60b, quoted *supra*, are shown to exist, *Re F. M. & S. Q. Carlile*, 199 Fed. 612; that the referee has no jurisdiction of a proceeding by the trustee; and that a plenary suit is required when the trustee seeks to recover property pledged within the four months' period, upon the ground that the pledge constitutes a voidable preference. *Ibid.*

⁶ *Harris v. First National Bank of Mt. Pleasant*, 216 U. S. 382, 54 L. ed. 528. Where such a proceeding was brought by a trustee in bankruptcy in a District Court as an action at law, and, pending trial, by stipulation, an order was entered referring the cause and certain issues arising upon the pleadings to a designated lawyer, to state and

take the evidence and his conclusions of law and fact thereupon to the next term of court for its further action; it was held that this order, in effect, constituted the referee an arbitrator, whose findings could be reviewed only for fraud, misconduct or other recognized legal reasons authorizing the setting aside of an arbitrator's award. *Westall v. Avery*, 171 Fed. 626. Bankruptcy Law, § 23b, as amended 36 St. at L. 838. Before this amendment, in the last class of cases, such a suit could not have been brought without the consent of the defendant. *Wood v. Wilbert*, 226 U. S. 384, 57 L. ed. —. See *Johnston v. Forsyth Mercantile Co.*, 127 Fed. 845; *Hurley v. Devlin*, 149 Fed. 268; *Remington on Bankruptcy*, §§ 1689, 1670. *Contra*, *Gregory v. Atkinson*, 127 Fed. 183; *Ryttenberg v. Schefer*, 131 Fed. 313; *Skewis v. Barthell*, 152 Fed. 534; *Hull v. Burr*, C. C. A., 153 Fed. 945; *Re Heckman*, C. C. A., 140 Fed. 859; *Re Kane*, 152 Fed. 587.

⁷ *Lawrence v. Lowrie*, 133 Fed. 995, 13 Am. B. R. 297; *Remington on Bankruptcy*, § 1690. But see *Hull v. Burr*, C. C. A., 153 Fed. 945.

of bankruptcy by trustees; and not by creditors, who can only sue in the State courts unless there exists some other ground of Federal jurisdiction;⁸ although, when the trustee refuses to sue, they may by leave of the court sue in his name at their own expense upon filing a bond for costs.⁹ It has been held that a receiver in bankruptcy cannot institute a suit.¹⁰ Such plenary suits by trustees are not, like summary applications, "proceedings in bankruptcy;" but they are "controversies" arising out of the bankruptcy proceedings,¹¹ and under the laws of the United States. They are subject to the general rules regulating pleadings and practice in courts of equity and of common law.¹² They cannot be brought in equity, except in cases which would ordinarily be within the equitable jurisdiction of the court.¹³ They cannot be begun before a referee.¹⁴ They differ in these respects from the summary applications previously described, which are "proceedings in bankruptcy," and are not considered to be controversies at law or in equity.¹⁵ A plenary suit is necessary whenever it is sought to recover money from, or to take property from, the possession of a person who asserts an adverse claim of title to the same which is not merely colorable.¹⁶ It seems that when a suit is brought by a trustee in bankruptcy because of interference with property after the same has been reduced to his possession,¹⁷ or a breach of a contract made with

⁸ *Viquesney v. Allen*, C. C. A., 131 Fed. 21; *Remington on Bankruptcy*, § 1716. See *Brumby v. Jones*, C. C. A., 141 Fed. 318; *Henrie v. Henderson*, C. C. A., 145 Fed. 316. *Contra*, *Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. 295.

⁹ *Re Bailey*, 151 Fed. 953.

¹⁰ *Boonville Nat. Bank v. Blakey*, C. C. A., 107 Fed. 891; *Beach v. Macón Grocery Co.*, C. C. A., 116 Fed. 143; *Re Kolin*, C. C. A., 134 Fed. 557. *Infra*, § 634.

¹¹ *Boonville Nat. Bank v. Blakey*, C. C. A., 107 Fed. 891; *Stelling v. Jones Lumber Co.*, C. C. A., 116 Fed. 261; *McNulty v. Feingold*, 129 Fed. 1001; *Delta Nat. Bank v. Eas-terbrook*, C. C. A., 133 Fed. 521.

¹² *Sessler v. Nemcof*, 183 Fed. 656.

¹³ *Ibid.*

¹⁴ *Re Cohn*, 98 Fed. 75; *Re Scherber*, 131 Fed. 121; *Horskins v. Sanderson*, 132 Fed. 415; *Remington on Bankruptcy*, § 1695.

¹⁵ *Clay v. Waters*, C. C. A., 178 Fed. 385. *Of*. § 666, *infra*.

¹⁶ *Re Gill*, C. C. A. 190 Fed. 726; *Re Mimms & Parham*, 193 Fed. 276; *Re Howe Mfg. Co.*, 193 Fed. 524; *Re Spalding Cotton Mills*, 193 Fed. 554; *Re Iron Clad Mfg. Co.*, 194 Fed. 906; *Johnston v. Spencer*, C. C. A., 195 Fed. 215. See § 608, *supra*; § 635, *infra*.

¹⁷ See *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. ed. 287.

him in his representative capacity,¹⁸ the citizenship of the parties ordinarily determines the jurisdiction, irrespective of the citizenship of the bankrupt. A plea or answer praying affirmative relief is a consent to such jurisdiction.¹⁹ The jurisdiction of a Federal court of equity to continue a creditors' bill previously instituted, founded upon a judgment and execution, returned unsatisfied, is not divested by an adjudication in bankruptcy.²⁰

A District Court of the United States has jurisdiction of an action by a trustee in bankruptcy against a national bank to recover usurious interest received by the defendant from the bankrupt, since such an action arises under the laws of the United States.²¹ Where a bankrupt might have sued the defendant in a court of the United States, the trustee may do so, although the latter's citizenship is the same as that of the defendant.²² It has been held: that a Federal court of equity has jurisdiction of a suit by an adverse claimant against the trustee in bankruptcy, to determine the right to property in the possession of the trustee; but not to determine a dispute as to a water right therewith connected, when the stream is not in the custody of the court;²³ and where a bill is already pending in such a court, to which the trustee is a party, to enjoin the prosecution of subsequent suits which would interfere with the court's jurisdiction of the former.²⁴ A plenary suit to recover a debt due the bankrupt or for other relief *in personam*, where it is

¹⁸ *McEldowney v. Card*, 193 Fed. 475.

¹⁹ *McEldowney v. Card*, 193 Fed. 475. See § 169, *supra*.

²⁰ *Nat. Bank of the Republic v. Hobbs*, 118 Fed. 626.

²¹ *Reed v. American-German Nat. Bank*, 155 Fed. 233. Before the abolition of the Circuit Courts it was held: that where, in such a court, which had jurisdiction by reason of citizenship, judgment was recovered by an adverse claimant against a trustee in bankruptcy for the possession of specific property, and it then appeared for the first time that the defendant had sold

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part of the property pending the suit, the Circuit Court should order the trustee to pay the proceeds to the plaintiff; and that it was error to remit him to an application to the court of bankruptcy. *J. B. McFarlan Carriage Co. v. Solanas*, C. C. A., 106 Fed. 145.

²² *Bush v. Elliott*, 202 U. S. 477, 484, 50 L. ed. 1114, 1117, 26 Sup. Ct. 668. "The citizenship of the trustee is wholly immaterial to the jurisdiction of such a case."

²³ *Bear Gulch Placer Min. Co. v. Walsh*, 198 Fed. 351.

²⁴ *Kelley v. T. L. Smith Co.*, C. C. A., 196 Fed. 466.

not sought to recover a preference or the value of property transferred by him, is not within the jurisdiction of a Court of Bankruptcy.²⁵ Without the consent of the defendant, a court of bankruptcy has no jurisdiction of an action by a trustee to recover damages because of a conspiracy, through which property was bought at less than its true value from the bankrupt, while insolvent.²⁶ A Federal Court of equity has no jurisdiction of a bill in equity to establish a preferential claim to find in a court of bankruptcy and to set aside an order of the latter court or of its referee.²⁷

Where a court of admiralty acquired jurisdiction by a libel *in rem* against a vessel, before the institution of bankruptcy proceedings against the owner in another district, after a sale of the same; it was held that it had no further jurisdiction than to determine the rights of the parties, in admiralty, and that any rights claimed under the bankruptcy law must be submitted to the court of bankruptcy.²⁸ And a court of admiralty has jurisdiction to direct the payment of the fees of a receiver in bankruptcy, who has not appeared therein, out of the proceeds of the sale of a barge.²⁹

§ 611. Extraterritorial jurisdiction of courts of bankruptcy. A court of bankruptcy has generally no extra territorial jurisdiction.¹ It cannot enjoin the prosecution of a suit in another district by a person not served within its own jurisdiction.² It cannot order persons outside the district and not there served with any process, unless they are attorneys-at-law,³

²⁵ *Bush v. Elliott*, 202 U. S. 477, 50 L. ed. 1114; *Hinds v. Moore*, C. C. A., 134 Fed. 221; *Remington on Bankruptcy*, § 1694. So held of a suit to compel a stockholder to pay corporate debts because her shares were issued for property fraudulently overvalued. *Re Haley*, C. C. A., 158 Fed. 74.

²⁶ *Lynch v. Bronson*, 177 Fed. 605.

²⁷ *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, 56 L. ed. 1055.

²⁸ *The William B. Kibbee*, 164 Fed. 653.

²⁹ *Hudson Oil & Supply Co. v. Booraem*, 216 U. S. 604, 54 L. ed. 636. *Cf. Re Hughes*, 170 Fed. 809.

§ 611. ¹ *Re Wood & Henderson*, 210 U. S. 246, 258; *Re Waukesha Water Co.*, 116 Fed. 1009; *Re Williams*, 123 Fed. 321; *Havens & Geddes Co. v. Pierek*, 120 Fed. 244.

² *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 311, 56 L. ed. 208, 215.

³ *Re Wood & Henderson*, 210 U. S. 246.

to pay money⁴ or to surrender property⁵ or papers in their possession.⁶ It has been held that it cannot sell land which is located beyond its jurisdiction.⁷ It cannot in a plenary suit serve process outside the jurisdiction;⁸ except in cases where a court of equity might have authorized substituted service,⁹ or service by advertisement, or otherwise, upon parties without the jurisdiction,¹⁰ or perhaps when an order authorizing such a suit has been made upon due service of notice upon the parties without the jurisdiction.¹¹ "In case personal service" of a subpoena to answer a petition for involuntary bankruptcy "cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for publication in suits to enforce a legal or equitable lien in the courts of the United States,¹² except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two successive weeks and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."¹³ It has been held that, under these statutes, a person may be adjudicated to be an involuntary bankrupt, in a proper case, although he is beyond the territorial limits of the court.¹⁴ A proceeding to determine the validity of a payment in contemplation of bankruptcy, made by a bankrupt to an attorney for legal services to be rendered in the future, may be instituted, when the latter is a non-resident, by the service of an order to show cause, citation or notice of the hearing upon him without the district;¹⁵ although it is doubtful whether the order can be enforced without ancillary proceedings,¹⁶ and although the trustee may not maintain a plenary

⁴ *Re Haley*, C. C. A., 158 Fed. 74. It has been held that it has the power to determine whether foreign stockholders of a bankrupt corporation are subject to assessment for the benefit of creditors. *Re Monarch Corporation*, 196 Fed. 252.

⁵ *Re Waukesha Water Co.*, 116 Fed. 1009.

⁶ *Ibid.*

⁷ *Re Britannia Min. Co.*, 197 Fed. 459.

⁸ *Re Wood & Henderson*, 210 U. S. 246, 253, 52 L. ed. 1046, 1051.

⁹ *Supra*, § 96.

¹⁰ *Supra*, § 97.

¹¹ *Re Wood & Henderson*, 210 U. S. 246, 253, 52 L. ed. 1046, 1051.

¹² *Supra*, § 97.

¹³ 30 St. at L. 544, § 18a.

¹⁴ *Hills v. F. D. McKinniss Co.*, 188 Fed. 1012.

¹⁵ *Re Wood & Henderson*, 210 U. S. 246, 52 L. ed. 1046.

¹⁶ *Staunton v. Wooden*, C. C. A., 179 Fed. 61.

suit for that purpose against a non-resident attorney upon service of process made outside the district.¹⁷

§ 612. Ancillary jurisdiction in bankruptcy. By the act of June 25, 1910, the bankruptcy courts may "exercise ancillary jurisdiction of persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any court of bankruptcy."¹ Ancillary jurisdiction may be exercised: by directing the filing of a schedule by an officer of the bankrupt, in accordance with an order of the court of primary jurisdiction;² by compelling the delivery of the books of the bankrupt to the trustee;³ by enjoining a creditor of a bankrupt from suing an estate outside the jurisdiction of the court of his adjudication;⁴ by appointing ancillary receivers;⁵ by selling property within the

¹⁷ *Re Wood & Henderson*, 210 U. S. 246, 52 L. ed. 1046.

§ 612. 136 St. at L. 838, ch. 412. Previously to this enactment, the extent of the ancillary jurisdiction was doubtful. In *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. ed. 402, *Elkus*, Petitioner, 216 U. S. 115, 54 L. ed. 407, and *Re Peiser*, 115 Fed. 199, such jurisdiction was sustained. *Contra*, As to the right of a receiver thus to apply, see *Lovell v. Newman*, 227 U. S. 412, 57 L. ed. —. As to the right of foreign receivers to sue generally, see § 93, *supra*. *Re Williams*, 120 Fed. 38; s. c., 123 Fed. 321; *Ross-Meeham Foundry Co. v. Southern Car & Foundry Co.*, 124 Fed. 403; *Re Tybo Min. & Reduction Co.*, 132 Fed. 697; *Re Granite City Bank*, C. C. A., 137 Fed. 818; *Re Von Hartz*, C. C. A., 142 Fed. 726; *Hull v. Burr*, C. C. A., 153 Fed. 945. See "Ancillary Receivers in Bankruptcy," by L. M. Friedman, *Harv. Law Rev.*, XVIII, 519.

² *Re Brockton Ideal Shoe Co.*, C. C. A., 200 Fed. 745.

³ *Babbitt v. Dutcher*, 216 U. S.

102, 54 L. ed. 402, corporate records and stock books.

⁴ *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 311, 56 L. ed. 208, 215.

⁵ *Fidelity Tr. Co. v. Gaskell*, C. C. A., 195 Fed. 865. In *Re Peiser*, 115 Fed. 199, it was held that ancillary jurisdiction might be exercised by compelling the payment of funds of the bankrupt to a receiver appointed in the original jurisdiction, in obedience to an order of the original court of bankruptcy, notice of which had been served upon the holder of such funds in the ancillary jurisdiction. It has been said: that an ancillary receiver's duty is limited to the collection of assets and the custody of the same until the appointment of a trustee; and that in the absence of an application by the receivers in the court of original jurisdiction, he will not be directed to sell the property. *Re Brockton Ideal Shoe Co.*, 194 Fed. 233. The court appointing the ancillary receiver has the right to settle his accounts and to pay his fees and expenses out of the fund before

judicial district.⁶ By adjudicating the claims to the title to, or to legal equitable liens upon, such property, and then, and after payment of such claimants, to transmit any balance to the court of primary jurisdiction;⁷ by granting an order for the examination of a resident witness at the request of a trustee in bankruptcy.⁸ It has been held that ancillary jurisdiction may be exercised at the request of a creditor,⁹ but that temporary receivers, appointed before adjudication, cannot institute ancillary proceedings in another district to secure a confirmation of their appointment and to be put in possession of property of the corporation there situated.¹⁰

§ 613. Jurisdiction of state courts in cases affecting bankruptcy proceedings. The Bankruptcy Act, after declaring that fraudulent conveyances are void when made within four months prior to the filing of the petition in bankruptcy, expressly provides: that for the purpose of the recovery of property conveyed or encumbered by a bankrupt within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, and all conveyances, transfers or encumbrances, made by him within such four months while insolvent, "any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankrupt had not intervened, shall have concurrent jurisdiction."¹ The State courts have concurrent jurisdiction of suits by the trustee to recover an unlawful prefer-

its transmission. *Fidelity T. Co. v. Gaskell*, C. C. A., 195 Fed. 865, 874, but should afford the creditors or the trustee an opportunity to object to the same. *Loeser v. Dallas*, C. C. A., 192 Fed. 909. An application to set aside the appointment of the ancillary receiver, upon the ground that the alleged bankrupt was not insolvent and had committed no act of bankruptcy, was denied for the reason that the question should first be submitted to the original court of bankruptcy. *Re Hayes*, 192 Fed. 1018. For an-

ancillary receivers appointed by courts of equity, see § 304, *supra*.

⁶ *Re Britannia Min. Co.*, 197 Fed. 459.

⁷ *Fidelity Tr. Co. v. Gaskell*, C. C. 54 L. ed. 407.

⁸ *Elkus*, Petitioner, 216 U. S. 115.

⁹ *Re Brockton Ideal Shoe Co.*, C. C. A., 200 Fed. 745.

¹⁰ *Re Tygarts River Coal Co.*, 203 Fed. 178.

§ 613. 130 St. at L. 544, § 67, subd. e, as amended 32 St. at L. 797.

ence,² and to set aside a fraudulent transfer,³ even of an action to set aside a chattel mortgage, which the mortgagee claims to be a lien upon a fund in the possession of the court of bankruptcy.⁴ But in neither of such suits in a State court can the validity of all other claims against the bankrupt be litigated; nor can it be determined whether others have received voidable preferences and have not been required to surrender them.⁵ Such matters must be decided by the Court of Bankruptcy.⁶ A State court has jurisdiction of a suit against a trustee in bankruptcy, to reform a contract between the plaintiff and the bankrupt;⁷ or an action of trover against a trustee or receiver in bankruptcy;⁸ but not of an action of replevin against a trustee or a receiver, at least without leave of the Court of Bankruptcy.⁹ A State court has jurisdiction to continue a suit to foreclose a lien upon the bankrupt's property instituted before the filing of the petition in bankruptcy, even if the same was instituted during the four preceding months; provided, at least, that the lien previously accrued;¹⁰ although the proceedings in such a suit may be stayed by a court of bankruptcy in a proper case.¹¹ It has been even held that such a suit may be sustained when not instituted until after the adjudication of

² *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. ed. 596.

³ *Frank v. Vollkommer*, 205 U. S. 521, 51 L. ed. 911.

⁴ *Frank v. Vollkommer*, 205 U. S. 521, 51 L. ed. 911.

⁵ *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 537, 51 L. ed. 596, 605.

⁶ *Ibid.*

⁷ *Zartman v. First Nat. Bank of Waterloo*, 216 U. S. 134, 54 L. ed. 418. It has been held that a State court has jurisdiction of a suit by the member of a firm for an accounting by the trustee of his bankrupt partner. *Williams v. Lane*, (Cal. 1910) 109 Pac. 873.

⁸ *Re Kanter & Cohen*, C. C. A., 121 Fed. 984. But see § 633, *infra*.

⁹ *Re Russell & Birkett*, 104 Fed. 248. *Murphy v. John Hofman Co.*, 211 U. S. 562, 53 L. ed. 327.

¹⁰ *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; *Hobbs v. Head & Dowst Co.*, *Re New England Breeders' Club*, C. C. A., 184 Fed. 409, affirming 175 Fed. 501. It has been held that the pendency of bankruptcy proceedings, the prosecution of which has been delayed, is no defense to a petition by an intervenor to foreclose a mortgage covering land of which a receiver appointed by a court of equity has previously taken possession. *Clark v. Norwalk Steel & Iron Co.*, 188 Fed. 999.

¹¹ *Hobbs v. Head & Dowst Co.*, *Re New England Breeders' Club*, C. C. A., 184 Fed. 409; affirming 175 Fed. 501; § 633, *infra*.

the mortgagor a bankrupt.¹² It has been held that the State court retains jurisdiction of an action in replevin or other suit or proceeding, to enforce a claim of ownership in specific property, where the chattels were seized before an officer of the bankruptcy court took possession or any injunction was issued.¹³ It has been suggested that where the property was reclaimed by the bankrupt prior to the institution of the proceedings, the title might be determined in the court of bankruptcy.¹⁴ Pending suits upon debts, which are discharged by a discharge in bankruptcy, are stayed pending the proceedings;¹⁵ unless they are brought to enforce a lien, which is not discharged by the bankruptcy law,¹⁶ or to assert a right *in rem*,¹⁷ but a sale of perishable property without notice of the proceedings in bankruptcy was not thereby invalidated although it was seized under an attachment thereby vacated.¹⁸ In a suit to quiet title, a State court has jurisdiction to determine a claim, set up by a trustee in bankruptcy, that the conveyance to the plaintiff is void as an illegal preference;¹⁹ and it has been held that where the trustee there set up his claim by answer, the Federal court should stay a suit subsequently begun therein by him to obtain the same relief.²⁰ A judgment in a State court against a trustee in bankruptcy cannot be collaterally attacked in the bankruptcy proceeding;²¹ and an order of a court of bankruptcy cannot be reviewed or set aside by a State court,²² although it is claimed that the former court was without jurisdiction.²³ A State court has no jurisdiction of a suit in equity against trustees in bankruptcy, to require them to pay to complainant the pro-

¹² *New River Coal Co. v. Ruffner*, C. C. A., 165 Fed. 881, 885, 91 C. C. A. 559, 563; *Re Daner*, C. C. A., 167 Fed. 529, 93 C. C. A. 238. See *infra*, § 649.

¹³ *Heath v. Shaffer*, 93 Fed. 647; *Re Porter*, 109 Fed. 111; *Re San Gabriel Sanatorium Co.*, C. C. A., 111 Fed. 892; *Remington on Bankruptcy*, § 1586.

¹⁴ *Re Munro*, 195 Fed. 817.

¹⁵ 30 St. at L. 546, § 11a; *Re Geister*, 97 Fed. 322, 3 Am. B. R. 228; *infra*, § 633.

¹⁶ *Tennessee Producer Marble Co.*

v. Grant, C. C. A., 135 Fed. 322, 14 Am. B. R. 288; *Virginia Iron, Coal & Coke Co. v. Olcott*, C. C. A., 197 Fed. 730.

¹⁷ *Ibid.*

¹⁸ *Jones v. Springer*, 226 U. S. 148, 57 L. ed. —.

¹⁹ *Davis v. Planters' Tr. Co.*, 196 Fed. 970.

²⁰ *Ibid.*

²¹ *Re Seavey*, 195 Fed. 825.

²² *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, 56 L. ed. 1055.

²³ *Hatch v. Curtin*, 146 Fed. 200.

ceeds of property which he claims, but which the defendants sold under an order of a court of bankruptcy as assets of a bankrupt's estate.²⁴

§ 614. Jurisdiction in bankruptcy as affected by residence or place of business. The provision of the law authorizing Courts of Bankruptcy to adjudge persons bankrupt, who have had their principal places of business, residence, or domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof imposes jurisdictional conditions.¹ Its waiver by the bankrupt

²⁴ *Treat v. Wooden*, 138 Fed. 934. It has been held that bankruptcy proceedings do not suspend the jurisdiction of a State court over proceedings for the dissolution of a corporation, although it is insolvent, *Re Standard Cordage Co.*, 184 Fed. 156, nor affect an insolvent assignment, made more than four months prior to their institution, *Re Boner*, 169 Fed. 727; *Harding v. Havemeyer*, N. Y. Sup. Ct., Sp. Tm., *Erlanger, J.*, N. Y. L. J. Nov. 25, 1911; nor supersede a State insolvent law, so far as regards persons who are excepted from the former; *State Nat. Bank of Denison v. Syndicate Co. of Eureka*, 178 Fed. 359; nor supersede provisions in a State insolvency law which give preferential rights to certain creditors. *Re Standard Oak Veneer Co.*, 173 Fed. 103. But see *Frazier v. Southern Loan & Tr. Co.*, C. C. A., 99 Fed. 707.

§ 614. ¹ *Re Garneau*, C. C. A., 127 Fed. 677, 11 Am. B. R. 679; *Remington on Bankruptcy*, § 30. Before the Federal Judicial Code, where involuntary proceedings were instituted against a bankrupt within the district of his residence, but not within the division of the same where he resided; it was held that that the proceedings should be

transferred to the latter division and that new process should be issued and served upon the bankrupt in that division, there returnable. *Re Hamrick*, 175 Fed. 279. A clerk cannot ordinarily be considered as having a place of business. *Re Lipphart*, 201 Fed. 103. When a petitioner in involuntary bankruptcy resided at one district, where he was employed as clerk in a store, but was engaged in trade on his own account as a general merchant in another district, the court of the latter district took jurisdiction of the petition. *Re Brice*, 93 Fed. 942. In order to give the court jurisdiction, the residence of the bankrupt in the district must be *bona fide*; and the removal of a person from one district to another, for the express purpose of filing a petition in bankruptcy in the latter, with the intention of leaving the same as soon as he obtains his discharge, does not confer jurisdiction upon the court of such district; *Re Garneau*, C. C. A., 127 Fed. 677. But where a person placed in guardianship because of physical disability pending insolvency proceedings in one district changed his residence, with the consent of his guardian, to another and there lived for six months before he filed a voluntary

may estop him in involuntary proceedings,² but it will not bind his creditors.³ It seems that creditors waive such an objection unless they make it promptly by a motion to dismiss the petition or to vacate the adjudication in bankruptcy.⁴ It has been held that "the preceding six months" in this section of the statute relates to the time of the adjudication, and not to that time of the filing of the petition.⁵ The words are connected by a disjunctive; and there is no requirement of both residence and domicile nor of either of them besides the maintenance of a principal place of business within the district.⁶ A corporation may be adjudicated bankrupt in a State where its principal

petition in bankruptcy; it was held that the court of the latter had jurisdiction. *Re Kingsley*, 160 Fed. 275. Where the debtor had lived abroad during the greater part of the preceding six months, but had not abandoned his original domicile, the court had jurisdiction where his original domicile was situated; *Re Williams*, 99 Fed. 544. The disappearance of the bankrupt, who is an absconder, does not change his domicile. *Re Oldstein*, 182 Fed. 409; *Re Plotke*, C. C. A., 104 Fed. 964, where the bankrupt lived without the district, and had a principal place of business within it until four months before the petition was filed, when she ceased doing business, the court had no jurisdiction. *Re Plotke*, C. C. A., 104 Fed. 964.

² *Long v. Lockman*, 14 Am. B. R. 172, 135 Fed. 197, holding that a man, who had obtained the dismissal of bankruptcy proceedings in one district by alleging that he resided in another, was estopped from denying his residence in the latter when proceedings were there instituted.

³ *Re Garneau*, C. C. A., 127 Fed. 677, 11 Am. B. R. 679.

⁴ *Re Mason*, 99 Fed. 256; *Allen v. Thompson*, 10 Fed. 116; *Re Wor-*

sham, C. C. A., 142 Fed. 121. A creditor, who has proved and filed his claim, participated in the election of a trustee and received a dividend, cannot object to the discharge upon the ground that the proceeding was instituted in the wrong district. *Re Mason*, 99 Fed. 256.

⁵ *Re Tully*, 156 Fed. 634. Where, at the time of the adjudication, the bankrupt had not been a resident of the district for the statutory period of time, but the petition was filed in good faith, and the bankrupt remained a resident there; it was held that a motion to dismiss the proceeding, made after the bankrupt had remained a resident more than three months, should not be granted; but the order of adjudication was set aside and a new one entered as of a later date. *Re Tully*, 156 Fed. 634. Other cases hold that the six months must precede the filing of the petition. *Re Plotka*, 104 Fed. 964, 44 C. C. A. 282, 5 Am. B. R. 171; *Re R. H. William*, 120 Fed. 34, 9 Am. B. R. 736; *Remington on Bankruptcy*, § 31.

⁶ *Re Brice*, 93 Fed. 942, 2 Am. B. R. 197; *Remington on Bankruptcy*, § 33.

place of business is located, although it received its charter from another State.⁷ Where two petitions are filed against a corporation, one in the State by which it was incorporated and one in the district where it does business, proceedings in the latter district will be usually stayed until a hearing has been had in the court of the domicile, leaving it to such court to determine where the case can be proceeded with for the greatest convenience of the parties in interest;⁸ but they will not ordinarily be dismissed until the court of the domicile has determined in which district the proceedings should be conducted.⁹ Where one of two manufacturing corporations organized in different States owned practically all of the capital stock of the other and had an office in the State and district where the latter had its place of business; it was held that the Court of Bankruptcy there, which had first appointed a receiver of the property of both, should retain jurisdiction.¹⁰ In determining whether a corporation has its principal place of business in another State, its failure to obtain the license which the State statute there requires, is not conclusive.¹¹ The place where the principal business of the corporation is carried on, the seat of its practical rather than of its financial operations, is usually considered to be that where it is for the greatest convenience of those interested that its assets should be administered.¹² But this rule is not always followed;¹³ and the burden of proof in this respect has been said to rest upon those who ask a removal from the district of its domicile.¹⁴ It was held that where a corporation closed its manufacturing works in one district five months before the petition was filed, discharging all its employees there except a watchman and a local superin-

⁷ *Re United Button Co.*, 137 Fed. 668; *Re Alaska American Fish Co.*, 162 Fed. 498.

⁸ *Re Tybo Min. & Reduction Co.*, 132 Fed. 697; *Re Globe Sec. Co.*, 132 Fed. 709. See *Kyle Lumber Co. v. Bush, C. C. A.*, 133 Fed. 688.

⁹ *Ibid.*

¹⁰ *Re Southwestern Bridge & Iron Co.*, 133 Fed. 568. It has been held that, upon the appointment of receivers in a district, a corporation

ceases to do business therein. *Re Perry Aldrich Co.*, 165 Fed. 249.

¹¹ *Re Duplex Radiator Co.*, 142 Fed. 906; *Re Perry Aldrich Co.*, 165 Fed. 249.

¹² *Re General Metals Co.*, 133 Fed. 84, 12 Am. B. R. 770.

¹³ *Re Tybo Mining & Reduction Co.*, 132 Fed. 978; *Re United Button Co.*, 137 Fed. 668.

¹⁴ *Re Tybo Min. & Red. Co.*, 132 Fed. 978.

tendent who were kept to preserve the property, and in the intervening time carried on a liquidation of its affairs in its general office in another district where its principal officers lived, its directors' meetings were held, its books kept, its banking business transacted and its principal purchases and sales made, the court of the latter district had jurisdiction."¹⁵ So has the court of the former.¹⁶ The Act further provides: "In the event petitions are filed against the same person, or against different members of a partnership in different Courts of Bankruptcy, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of the parties in interest."¹⁷ A partnership is entitled to the benefit of this section of the statute.¹⁸

The General Orders provide: "In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon

¹⁵ *Re Marine Mach. & C. Co.*, 91 Fed. 630.

¹⁶ *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. 444. It has been held that a mining company is not subject to bankruptcy proceedings in the State where it maintains its principal office when its lands and mines are situated, and its sales made, in another district. *Re Tygarts River Coal Co.*, 203 Fed. 178.

¹⁷ 30 St. at L. 544, 554, § 32; *Re Sterne & Levi*, 190 Fed. 70. It was held further that this section and General Order VI applied not only to a case where two or more involuntary petitions were filed, but also to a case where an involuntary petition was filed in one district and a voluntary one in another. *Re Waxelbaum*, 98 Fed. 589.

¹⁸ *Re Sears*, 112 Fed. 58.

the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court."¹⁹ The word "individual" in the General Order is equivalent to persons and includes a corporation. Where a bankrupt corporation has its domicile in one judicial district, and its principal place of business in another, the courts of bankruptcy of both districts have concurrent jurisdiction of involuntary bankruptcy proceedings against it. The proximity of a majority in number and claims of the bankrupt's creditors is not conclusive;²⁰ but the preference of such a majority has great influence with the court.²¹ The term "parties in interest" is not limited to unsecured creditors of the bankrupt, but includes all persons whose pecuniary interests are directly affected by the bankruptcy proceedings.²² Where the debts were all contracted in one district in which the business of the bankrupt obliged him to spend a portion of his time, it was held that it would be "for the greatest convenience of the parties in interest" to proceed there, even if the bankrupt resided elsewhere,²³ and where the only business transacted by a partnership for more than three months before the petition was filed was a winding up of its affairs within the district, it was held that the court there had jurisdiction.²⁴ So when the bankrupt has resided within the district the greater portion of six months prior to the filing of the petition.²⁵

¹⁹ General Orders VI.

²⁰ *Re United Button Co.*, 137 Fed.

²¹ *Ibid.*

668.

²² *Ibid.*

²³ *Re Waxelbaum*, 98 Fed. 589.

²⁴ *Re Blair*, 99 Fed. 76.

²⁵ *Hills v. F. D. McKinniss Co.*,
188 Fed. 1012.

§ 615. Practice in bankruptcy proceedings in general.

Courts of bankruptcy are courts of equity with limited and special powers.¹ "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."² "All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."³ In pursuance of the statute, the Supreme Court of the United States has adopted certain general orders and forms in bankruptcy, which are contained in the appendix of this work. It has been said that these rules and forms have the force and effect of law.⁴ The different courts of bankruptcy have also adopted special rules. Proceedings in bankruptcy are purely equitable in their character, and, in the absence of express provisions in the statutes of rules to the contrary, they must follow the general principles of the practice in equity.⁵ Thus, it has been held that the pleadings and practice prescribed by the general equity rules must be followed in proceedings to set aside preferences;⁶ that there should be no recitals in decrees or orders in controvention of the eighty-sixth equity rule, which then prevailed;⁷ and that, pending a motion to dismiss a petition upon the ground

§ 615. ¹ *Re Gillaspie*, 190 Fed. 88.

² General Order, XXXII.

³ 30. St. at L. 544, § 30.

⁴ *Re Gerber*, C. C. A., 186 Fed. 693. Where, pending a motion to dismiss petitions in bankruptcy upon the ground that all creditors had been paid, an order was entered appointing a special master to hear

proofs as to the validity and amount of unpaid claims; the court followed the analogy of the equity rules. *Cf. supra*, § 388.

⁵ *Westall v. Avery*, C. C. A., 171 Fed. 626.

⁶ *Ibid.*

⁷ *Re Fischer*, C. C. A., 175 Fed. 531.

that all creditors had been paid, an order may be entered appointing a special master to hear proofs as to the validity and amount of unpaid claims and to dismiss all claims of which no proof is presented within a period of three months, prescribed in the petition.⁸ But, it has been held that a court of bankruptcy may, in a proper case, order real or personal property to be sold at private sale,⁹ and that it is not bound by the statute,¹⁰ providing that all sales of real estate made pursuant to the directions of a court of the United States, shall be by public auction after a prescribed notice.¹¹ There is but one continuous term of bankruptcy.¹² An order of the court, except a discharge,¹³ may be vacated at any subsequent time at least before the termination of the proceedings;¹⁴ but, in case of unreasonable delay, an application for that purpose may be denied because of laches.¹⁵

§ 616. Parties in bankruptcy. Proceedings in bankruptcy are either voluntary or involuntary. "Petitions of voluntary bankruptcy may be filed by any person who owes debts except a corporation."¹ This provision is constitutional although it permits persons who are not traders to be adjudged bankrupts.² A resident alien may file the petition.³ It has been held: that a minor may become a voluntary bankrupt if he owes debts upon which he is absolutely bound, and which he cannot disaffirm;⁴ but that he cannot be made an involuntary bankrupt

⁸ *Re A. B. Baxter & Co.*, C. C. A., 152 Fed. 137.

⁹ *Re Edes*, 135 Fed. 595.

¹⁰ 27 St. at L. p. 751; *supra*, § 394.

¹¹ *Re Edes*, 135 Fed. 595.

¹² *Re Ives*, 111 Fed. 495; *Re Jemison*, Mercantile Co., C. C. A., 112 Fed. 966; *Re Henschel*, 114 Fed. 968; *Tucker v. Curtin*, C. C. A., 153 Fed. 91; *supra*, § 65.

¹³ *Infra*, § 658.

¹⁴ See cases in note 12, *supra* and *infra*, § 654. *Contra*, *Re Hoyt & Mitchell*, 127 Fed. 968, holding that an order cannot be set aside after a year. See *Sandusky v. First Nat. Bank*, 23 Wall. 289, 23 L. ed. 155.

¹⁵ *Traub v. Marshall Field & Co.*, C. C. A., 182 Fed. 622.

§ 616. 130 St. at L. 544, 547, § 4.

² *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113.

³ *Re Boynton*, 10 Fed. 277; *Brandenburg on Bankruptcy* (2d ed.), 78, citing *Re Kaiy Chung*, 1 N. B. N. 22.

⁴ *Re Brice*, 93 Fed. 942. See § 617, *infra*. *Contra*, *Re Duguid*, 100 Fed. 274, where the petition was filed by the infant's mother, who was his partner.

where the debts are such as can be repudiated by him.⁵ It is doubtful whether a lunatic can be adjudged an involuntary bankrupt.⁶ He cannot be before a committee or guardian *ad litem* has been appointed;⁷ nor, it has been held, for an act committed after he has become insane.⁸ Married women are subject to bankruptcy proceedings; wherever debts can be collected out of their separate estates by proceedings in equity or otherwise; even in States where a judgment *in personam* cannot be taken against them;⁹ but not, it has been said, where their debts cannot be collected in any manner.¹⁰ Insolvency is not essential to voluntary bankruptcy.¹¹ It has been held that a single debt will support the petition,^{11a} but it must be provable; and that a judgment for a tort which is stayed by security upon an appeal will not.¹² Petitions for involuntary bankruptcy may be filed by or against any natural person, except a wage-earner,¹³ or a person engaged chiefly in farming or the tillage of

⁵ *Re Dunnigan*, 95 Fed. 428; *Re Eidemiller*, 105 Fed. 595.

⁶ *Re Marvin*, 1 Dillon, 178; *Re Funk*, 101 Fed. 244; *Re Burka*, 107 Fed. 674. It has been said that he can be. *Re Kehler*, C. C. A., 159 Fed. 55. A voluntary petition was sustained when filed by a man over whose person and estate, by reason of physical disability a guardian had been appointed upon his own petition in another State. *Re Kingsley*, 160 Fed. 275.

⁷ *Re Burka*, 107 Fed. 674.

⁸ *Re Funk*, 101 Fed. 244; *Re Kehler*; C. C. A., 159 Fed. 55, holding that an answer by his committee setting forth an inquisition, which adjudged him to have been insane with lucid intervals since a date prior to the commission of the acts charged, was *prima facie* evidence that he was insane at the time when such acts were committed, and that the petitioning creditors had the burden to show that these acts were performed during a lucid interval.

⁹ *MacDonald v. Tefft-Weller Co.*, C. C. A., 65 L.R.A. 106, 128 Fed. 381.

¹⁰ *Re Brice*, 93 Fed. 942.

¹¹ *Re Jehu*, 94 Fed. 638; *Re Chiappell*, 113 Fed. 545.

^{11a} *Re Schwaninger*, 144 Fed. 555. But see § 656, *infra*.

¹² *Re Yates*, 114 Fed. 365.

¹³ A wage-earner, within the meaning of the bankruptcy law, is "an individual who works for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 a year." 30 St. at L. 544, § 1. The fact that a person furnishes his own tools or his own team, wagon and plow, does not make him any less a wage-earner, if he otherwise falls within the statutory description. *Re Yoder*, 127 Fed. 894. It has been held that the following persons are not wage-earners: a music teacher, or persons engaged in professional occupations. *First Nat. Bank v. Barnum*, 160 Fed. 245; the holder of a majority of stock in a corporation, who has a

the soil,¹⁴ against any unincorporated company, and any moneyed, business or commercial corporation, except a municipal railroad, insurance or banking corporation; owing debts to the amount of one thousand dollars or over.¹⁵ In deciding whether a debtor belongs to the exempt class, his status is usually determined as of the date of the commission of the act of bankruptcy.¹⁶

nominal salary of \$900 a year, but drew more than that sum from the funds of the company during the year preceding the institution of the proceedings, *Carpenter v. Cudd*, C. C. A., 174 Fed. 603; see, also, *Re Wakefield*, 182 Fed. 247; and one who, while working independently as a manufacturer and trader, earns wages by working for another in a different corporation, *Re Naroma Chocolate Co.*, 178 Fed. 383.

¹⁴ Ownership of a farm leased to another. *Wulbern v. Drake*, C. C. A., 120 Fed. 493; *Re Matson*, 123 Fed. 743; or managed by the party's husband, *Re Johnson*, 149 Fed. 864, 18 Am. B. R. 74; is not sufficient to exempt a person from involuntary bankruptcy. The fact that a person chiefly engaged in farming or tillage of the soil incidentally conducts a small business, such as keeping a dairy, where milk is sold at retail, *Gregg v. Mitchell*, C. C. A., 20 L.R.A. (N.S.) 148, 166 Fed. 725; or buys and sells hogs and cattle, which he has fattened on his farm, *Re Dwyer*, C. C. A., 184 Fed. 880; *Re Thompson*, 102 Fed. 287; at least if he does not buy more feed than is raised on the farm for the use of his cattle, *Bank of Dearborn v. Matney*, 139 Fed. 482, 12 Am. B. R. 482; or keeps a private bank, *Couts v. Townsend*, 126 Fed. 249; or a store, *Re Mackey*, 110 Fed. 355; *Rise v. Bordner*, 140 Fed. 566; or a sale agency, *Rise v. Bordner*, 140 Fed. 566. See *Menke v. Sunder-*

man, C. C. A., 186 Fed. 486; or is in the business of an attorney and collector, *Re Hoy*, 137 Fed. 175; does not deprive him of his exemption. The classes of corporations subject to the statute are considered in the next section. The court will administer the estate of a member of a firm who is principally engaged in farming and not individually subject to adjudication. *Re R. F. Duke & Son*, 199 Fed. 199. The statute does not protect a man who engages in farming after the abandonment of a business in which he has committed an act of bankruptcy. *Re Naroma Chocolate Co.*, 178 Fed. 383; *Re Wakefield*, 182 Fed. 247. See, also, *Re Kehler*, C. C. A., 159 Fed. 55.

¹⁵ 30 St. at L. 544, 547, § 4. As amended, 36 St. at L. 838. It seems that the amount of indebtedness, when determining the right to an exemption, must be determined at the time of the commission of the act of bankruptcy. *Re Jacobson*, 181 Fed. 870. Where, subsequent to an assignment for the benefit of creditors and before the filing of a petition in involuntary bankruptcy, the debtor made a settlement with certain creditors and received a release discharging him, in return for the payment of a percentage of their claims, leaving the amount due those who did not agree to the settlement less than \$1,000; it was held that he might be adjudicated a bankrupt. *Ibid.*

¹⁶ *Re Luckhardt*, 101 Fed. 807;

"The bankruptcy of a corporation shall not release stockholders, as such, from any liability under the laws of a State, of a Territory or of the United States."¹⁷ "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."¹⁸ The burden of proof, that a person is not within one of the exempted classes rests upon the petitioner, who must plead facts that show it.¹⁹ It has been held that the objection that a person is exempt from bankruptcy cannot be waived either by himself,²⁰ or by a creditor;²¹ but the allegation is not essential to the jurisdiction, and its omission may be waived by failure duly to object thereto.²² "The death or insanity of the bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."²³

Re Burgin, 173 Fed. 726, criticised Harv. Law Rev., March 1910; *Re Jacobson*, 181 Fed. 870.

17 32 St. at L. 797.

18 30 St. at L. 544, 547, § 5; *infra*, § 618.

19 *Re Pilger*, 118 Fed. 206. See *Am. Agricultural Chemical Co. v. Brinkley*, C. C. A., 194 Fed. 411. But see *Re Leland*, 185 Fed. 830, where the evidence was held to be insufficient to show an exemption. Ordinarily, the primary burden to show that the alleged bankrupt does not belong to the exempt classes is upon the petitioning creditors. Where it was shown that the debtor had left his farm more than fourteen years previously and engaged in another business, it was held that those opposing the adjudication had the burden to show that he belonged to the exempt class when the acts of bankruptcy were

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committed or the petition filed. *Re Luckhardt*, 101 Fed. 807; *Re Burgin*, 173 Fed. 726, criticised Harv. Law Rev., March 1910; *Re Jacobson*, 181 Fed. 870. The exemption is not forfeited by making a general assignment for the benefit of creditors. *Olive v. Armour & Co.*, C. C. A., 21 L.R.A. (N.S.) 109, 167 Fed. 517.

20 *Re Taylor*, C. C. A., 102 Fed.

21 *Re New England Breeders' Club*, 165 Fed. 517. But see *Re Worsham*, C. C. A., 142 Fed. 121; *Re First Nat. Bank of Belle Fourche*, C. C. A., 152 Fed. 64; *Re Broadway Savings Trust Co.*, C. C. A., 152 Fed. 152.

22 *Re Worsham*, C. C. A., 142 Fed. 121; *Re First Nat. Bank of Belle Fourche*, C. C. A., 152 Fed. 64; *Re Broadway Savings Trust Co.*, C. C. A., 152 Fed. 152.

23 St. at L. 544, 549, § 8.

§ 617. **Corporations who may be bankrupts.** A corporation cannot be a voluntary bankrupt.¹ Any unincorporated company and any moneyed business or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt;² but bankruptcy of a corporation does not release its officers, directors or stockholders, as such, from any liability under the laws of a State or of a Territory or of the United States.³ Incidental occupation in one of the specified pursuits is not sufficient;⁴ where a corporation is engaged in several different occupations, some of which are within the specified classes, and others not, if its principal business is in several occupations, which subject it to the bankruptcy law; it may be adjudged an involuntary bankrupt, although it is not principally engaged in any single one of them.⁵ The test is the actual occupation at the time of the filing of the petition or the commission of the acts of bankruptcy;⁶ not the provisions in the charter upon the subject.⁷ But the burden of proof is upon the parties who contend that the corporation is not principally engaged in the occupations

§ 617. 130 St. at L. 544, § 4a; Remington on Bankruptcy, §§ 37, 44; Brandenburg on Bankruptcy, §§ 113-119.

² 30 St. at L. 544, 547, § 4, as amended 32 St. at L. 797, 36 St. at L. 838. Corporations are subject to involuntary bankruptcy when engaged in leasing their own property and collecting rents, *Re R. L. Radke Co.*, 193 Fed. 735; and, it has been held, when buying and reselling electricity, *Re Charles Town Light & Power Co.*, 183 Fed. 160. *Contra, Re Hudson River El. Power Co.*, 173 Fed. 934, decided before the last amendment, where the corporation had a franchise to use the streets for the transmission of gas and electricity which it manufactured and sold to customers.

³ 30 Stat. 544, 547, § 4, as amended 32 St. at L. 797, 36 St. at L. 838.

⁴ *Re New York & Westchester Water Co.*, 98 Fed. 711, 3 Am. B. R. 508; *Re Chicago-Joplin Lead & Zinc Co.*, 104 Fed. 67, 4 Am. B. R. 712; *Philpot v. O'Brien*, C. C. A., 126 Fed. 167, 11 Am. B. R. 205, affirming 121 Fed. 139, 10 Am. B. R. 424; *McNamara v. Helena Coal Co.*, 5 Am. B. R. 48; Remington on Bankruptcy, § 85.

⁵ *Burdick v. Dillon*, C. C. A., 144 Fed. 737, 16 Am. B. R. 407.

⁶ *Re Interstate Paving Co.*, 171 Fed. 604; *Cate v. Connell*, C. C. A., 173 Fed. 445.

⁷ *Re Chicago-Joplin Lead & Zinc Co.*, 104 Fed. 67, 4 Am. B. R. 712; *Re Tontine Surety Co.*, 116 Fed. 401, 8 Am. B. R. 421; *Cate v. Connell*, C. C. A., 173 Fed. 445; Remington on Bankruptcy, § 87.

therein specified.⁸ The preparation for work in one of the specified classes is equivalent to engagement in the same, although it has not actually begun the transaction of any of the business.⁹ It has been said that, in general, *quasi*-public corporations clothed with the power of eminent domain should not, on grounds of public policy, be adjudged bankrupts.¹⁰ The bankruptcy proceedings are not defeated because the corporation has, before the filing of the petition, for any reason ceased the transaction of the business in which it was engaged when it became indebted to the petitioner;¹¹ although the cease was caused by the appointment of receivers,¹² or by State insolvency proceedings which have decreed the dissolution of the corporation but have not yet terminated.¹³

§ 618. Partnerships and unincorporated associations.

“(a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. (b) The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates. (c) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. (d) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. (e) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine. (f) The net

⁸ *Philpot v. O'Brien*, C. C. A., 126 Fed. 167, 11 Am. B. R. 205; *Remington on Bankruptcy*, § 87.

⁹ *White Mountain Paper Co. v. Morse & Co.*, C. C. A., 127 Fed. 643, 11 Am. B. R. 633; *Remington on Bankruptcy*, § 87.

¹⁰ *Re Bay City Irrigation Co.*, 135 Fed. 850, 14 Am. B. R. 370; *Remington on Bankruptcy*, § 89.

¹¹ *Re Storm*, 102 Fed. 618, 4 Am. B. R. 601; *Scheuer v. Smith & Montgomery Book & Stationery Co.*, C. C. A., 112 Fed. 407, 412; *Re Storck Lumber Co.*, 114 Fed. 860,

8 Am. B. R. 86; *White Mountain Paper Co. v. Morse & Co.*, C. C. A., 127 Fed. 643; *Re International Coal Min. Co.*, 143 Fed. 665, 16 Am. B. R. 309; *Robertson v. Union Pottery Co.*, 177 Fed. 279; *Remington on Bankruptcy*, § 9.

¹² *Re Moench & Sons' Co.*, 123 Fed. 965, 12 Am. B. R. 240; *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. 444.

¹³ *Cresson & Clearfield Coal & Coke Co. v. Stauffer*, C. C. A., 148 Fed. 981.

proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. (g) The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. (h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.”¹ “Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner

§ 618. 130 St. at L. 544, 547, § 5; *Re Levy*, 95 Fed. 812. But see *Re Solomon & Carvel*, 163 Fed. 140.

as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."² "A partnership during the continuance of the partnership business, or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt," in either voluntary³ or involuntary proceedings.⁴ An unincorporated association may also be declared a bankrupt.⁵ Proceedings may be instituted to declare a partnership a bankrupt at any time, so long as there are any undistributed assets,⁶ or unpaid debts of the firm.⁷ A partnership may be adjudged bankrupt after the death or insanity of a partner, when the survivor has committed an act of bankruptcy.⁸ A firm

² General Order VIII. Where a partner files a petition in bankruptcy alleging that another member, whom he makes a partner, has refused to join; and praying that they both be adjudged bankrupts; and afterwards the other partner comes in, confesses himself a bankrupt and is so adjudged; it is a case of involuntary bankruptcy. *Davis v. Stephens*, 104 Fed. 235. As to amendments to petitions in partnership cases, see § 628, notes 2, 27, *infra*.

³ *Re Hirsch*, 97 Fed. 571. It has been said that subdivision "h" contemplates a case where less than all of the members of a partnership are adjudged bankrupt, while the partnership, as such, is not before the court. *Re Junck & Balthazard*, 169 Fed. 481; *Francis v. McNeal*, C. C. A., 186 Fed. 481.

⁴ *Mather v. Coe*, 92 Fed. 333; *Bank v. Meyer*, 92 Fed. 896; *Re Meyer*, C. C. A., 98 Fed. 976.

⁵ *Davis v. Stephens*, 104 Fed. 235; *Re Hercules Atkin Co.*, 133 Fed. 813; *Burkhart v. German-American Bank*, 137 Fed. 958; *Re Seaboard Fire Underwriters*, 137 Fed. 987, 13 Am. B. R. 722. It has been held that an association claiming to act as a corporation, which

has not been legally incorporated, can be forced into involuntary bankruptcy. *Davis v. Stephens*, 104 Fed. 235. The fact that a partnership or unincorporated association was formed under a State statute, to carry on a bank, does not prevent its being adjudged a bankrupt. *Burkhart v. German-American Bank*, 137 Fed. 958.

⁶ *Re Boynton*, 10 Fed. 277; *Brandenburg on Bankruptcy* (2d ed.), 78, citing *Re Kaiy Chung*, 1 N. B. N. 22; *Holmes v. Baker & Hamilton*, C. C. A., 160 Fed. 922.

⁷ *Re Levy & Riichman*, 95 Fed. 812, 2 Am. B. R. 21; *Holmes v. Baker & Hamilton*, C. C. A., 160 Fed. 922. But not, in the case of indebtedness created by estoppel against the partners, because of the transaction of business in the firm name after a dissolution. *Re Pinson & Co.*, 180 Fed. 787. The transfer of the firm property to an assignee for the benefit of creditors more than five months prior to the filing of a voluntary petition in bankruptcy, by one or more of the members, is no defense to such petition. *Re J. M. Ceballos & Co.*, 161 Fed. 445.

⁸ *Re Pierce*, 102 Fed. 977. The death of one of the partners will

in which one partner is a minor may be adjudged a bankrupt where he has taken no action to repudiate the relation.⁹ It has been held that a partnership may be adjudged bankrupt in the name of an ostensible partner, under whose name the firm transacted business.¹⁰ But in the case of an ostensible partnership, where an individual transacted business under a firm name, the proceedings should be against him individually; and the creditors, whose obligations were incurred in that business, share equally in all his assets with those whose obligations were otherwise incurred by him.¹¹ A partnership is not insolvent within the meaning of the bankruptcy law unless the sum of its assets and of the assets of its individual members, in excess of their respective individual indebtedness, is insufficient to pay its debts,¹² but a partnership has been adjudged a bankrupt where one of its members was solvent and the other not¹³ and the solvent partner required to file the schedules and permitted to administer the property.¹⁴

In general, the bankruptcy law treats partnerships as distinct entities.¹⁵ It has been held that the firm alone may be adjudged a bankrupt, without any adjudication against the individual members thereof,¹⁶ but the partnership and the individual members may, in the same proceeding, be adjudicated bankrupts,

not prevent the adjudication of the bankruptcy of the firm, provided, at least, that possession of assets can be obtained from his administrator without force. *Ibid.*; *Re Hirsch*, 97 Fed. 571, 3 Am. B. R. 344. *Contra, Re Evans*, 161 Fed. 590.

⁹ *Jennings v. William A. Stan-nus & Son*, C. C. A., 191 Fed. 347.

¹⁰ *Remington on Bankruptcy*, § 63, citing *Jones v. Burnham*, *Williams & Co.*, C. C. A., 138 Fed. 986, 12 Am. B. R. 453.

¹¹ *Re Stein & Co.*, C. C. A., 127 Fed. 547, 11 Am. B. R. 536; *Re Gibson*, 191 Fed. 665. In such a case, it is within the discretion of the court to permit a petition, filed against such an alleged partnership and its two ostensible members, to

be amended by dismissing it as regards the firm and the defendant who is not actually interested in the business. *Re Richardson*, 192 Fed. 50.

¹² *Re Harris*, 108 Fed. 517, 4 Am. B. R. 132; *Remington on Bankruptcy*, § 62; *Re Perlhefter*, 177 Fed. 299; *Francis v. McNeal*, C. C. A., 186 Fed. 481.

¹³ *Re Solomon & Carvel*, 163 Fed. 140.

¹⁴ *Ibid.*

¹⁵ *Re Perley & Hays*, 138 Fed. 927, 15 Am. B. R. 54. It is treated as distinct from other partnerships composed in part of the same members. *Fidelity Tr. Co. v. Gaskell*, C. C. A., 195 Fed. 865.

¹⁶ *Re Meyer*, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559; *Strause*

and the partners may then receive a discharge, both individually and as members of the firm.¹⁷ It has been said that this cannot be done in an involuntary proceeding, except so far as concerns individual members who have not committed, nor participated in committing, one of the acts of bankruptcy.¹⁸ Where the firm alone is adjudicated a bankrupt, the assets of the individual members are administered in the same proceeding.¹⁹ Where the partners as well as the firm are so adjudged, the respective assets are marshaled in accordance with equitable principles.²⁰ Individual property is first applied to the payment of individual debts and partnership property applied to the discharge of partnership obligations.²¹ If there is any surplus, that is divided among creditors of the class not entitled to a preference, in accordance with their respective rights to the same.²² The trustee in bankruptcy of one of the members of the firm cannot interfere with the firm assets;²³ but it has been held that he may prove against them the amount of the proceeds of his bankrupt's individual property, previously mortgaged for the payment of a firm debt and appropriated for

v. Hooper, 105 Fed. 590, 5 Am. B. R. 225; *Re Sanderlin*, 109 Fed. 859, 6 Am. B. R. 384; *Re Perley & Hays*, 138 Fed. 927, 15 Am. B. R. 54. *Contra, Re Carleton*, 115 Fed. 246, 8 Am. B. R. 270; *contra, Re Forbes*, 128 Fed. 137, 138-140, 11 Am. B. R. 787, a strong opinion by Lowell, J. See *Re Perlhefter*, 177 Fed. 299; *Francis v. McNeil*, 228 U. S. 695.

¹⁷ *Re Springer*, 199 Fed. 294; *Re Meyer*, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559; *Re Grant Bros.*, 106 Fed. 496, 5 Am. B. R. 837; *Re Forbes*, 128 Fed. 137, 11 Am. B. R. 787.

¹⁸ *Re Meyer*, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559.

¹⁹ *Re Meyer*, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559; *Dickas v. Barnes*, C. C. A., 140 Fed. 849, 15 Am. B. R. 566; *Re Perlhefter*, 177 Fed. 299; *Re Lattimer*, 174

Fed. 824; *Menke v. Sunderman*, C. C. A., 186 Fed. 486; *Francis v. McNeil*, C. C. A., 186 Fed. 481, *aff'd* 228 U. S. 695.

²⁰ *Re Filmar*, C. C. A., 177 Fed. 170. A transfer of his interest in the firm by one partner to another does not deprive partnership creditors of their right to a priority in the distribution of the partnership assets. *Re Filmar*, C. C. A., 177 Fed. 170; *Re Terens*, 175 Fed. 495.

²¹ *Re Terens*, 175 Fed. 495; *Re Filmar*, C. C. A., 177 Fed. 170; *Re Telfer*, C. C. A., 184 Fed. 224; *Re Effinger*, 184 Fed. 728. The same principles are applied when the members of a firm are composed of natural persons in another partnership. *Re Knowlton & Co.*, 196 Fed. 837.

²² *Ibid.*

²³ *Re Mercur*, C. C. A., 122 Fed. 384.

that purpose.²⁴ It has been held: that a solvent partner, upon the bankruptcy of his associate, is a creditor to the extent of any balance that would be due him upon an accounting; and that he may prove such a claim,²⁵ but not a claim for reimbursement of the amount expended by him in liquidating the firm debts in excess of his share of the deficiency in the firm assets.²⁶ In the case of an involuntary petition, the act of bankruptcy charged need not have been committed by all the partners.²⁷ All the partners must be made parties to the proceeding,²⁸ if they are known. Secret partners may, when discovered, be subsequently brought in.²⁹ All the partners need not join in a voluntary petition of bankruptcy.³⁰ When they do not, it has been said that no act of bankruptcy or insolvency need be alleged.³¹ It has been held that it is not necessary to allege the insolvency of the individual partners, nor that the solvent

²⁴ *Re Effinger*, 184 Fed. 728. See § 647, *infra*. But see *Sargent v. Blake*, C. C. A., 160 Fed. 57, § 644, *infra*.

²⁵ *Re Stevens*, 104 Fed. 323. Where judgments against a firm, in favor of certain of its creditors, were bought up by one of the partners, who took assignments of the judgments to himself; it was held that he thereby became a creditor of each of his copartners for their respective shares of the money advanced by him in purchasing the judgments, and was entitled to prove a claim for such share against the individual estate of one of the copartners in bankruptcy. *Re Carmichael*, 96 Fed. 594.

²⁶ *Re Walker*, 176 Fed. 455.

²⁷ *Re Forbes*, 128 Fed. 137, 11 Am. B. R. 787; *Yungbluth v. Slipper*, C. C. A., 185 Fed. 773. Where, subsequent to the dissolution of an insolvent partnership, an execution was levied upon the firm's property for a partnership debt, it was held that the failure to discharge such

levy constituted an individual act of bankruptcy by the retiring partner. *Holmes v. Baker & Hamilton*, C. C. A., 160 Fed. 922. The filing of a petition in bankruptcy by one member of a firm against the others is not an act of bankruptcy on the part of the firm. *Re J. M. Ceballos & Co.*, 161 Fed. 445.

²⁸ *Re Altman*; 95 Fed. 263, 2 Am. B. R. 407.

²⁹ *Remington on Bankruptcy*, § 70.

³⁰ *Re Murray*, 96 Fed. 600, 3 Am. B. R. 601; *Re Carleton*, 115 Fed. 246, 8 Am. B. R. 270; *Re J. M. Ceballos & Co.*, 161 Fed. 445.

³¹ *Re Carleton*, 115 Fed. 246, 8 Am. B. R. 270; *Re Forbes*, 128 Fed. 137, 11 Am. B. R. 787, 791; *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. ed. 654, 2 Sup. Ct. 351; *Re Murray*, 96 Fed. 600, 3 Am. B. R. 601; *Re Carleton*, 115 Fed. 246, 8 Am. B. R. 270; *Re Carleton*, 131 Fed. 146, 12 Am. B. R. 475; *Re Junck & Balthazard*, 169 Fed. 481; *Re J. M. Ceballos & Co.*, 161 Fed. 445.

partners, if any, consent to the adjudication.³² It has been said that, in such a case, the petition should be treated as involuntary against the partner who fails to join;³³ but as voluntary so far as the creditors are concerned.³⁴ It has been held that the partners who fail to join can make no defense to the petition, except that of solvency,³⁵ but that they are entitled to a jury trial upon this issue.³⁶ A creditor cannot intervene to resist the adjudication, upon a petition filed by a single partner.³⁷ A creditor of a partnership may join in the petition for involuntary bankruptcy against one of the partners individually.³⁸ The burden of proof as to the existence of a partnership rests upon the petitioners.³⁹

§ 619. Creditors who may petition for involuntary bankruptcy. "Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."¹ "In computing the number of creditors of a bankrupt for the purpose of determining how many credi-

³² *Re Everybody's Grocery & Meat Market*, 173 Fed. 492. When a single partner files a petition in bankruptcy against the firm, he must clearly show; that that is the purpose of the petition; that the other partners, if any are joined; and that he seeks discharge from the firm debts, as well as, if he seeks such relief, from his individual indebtedness. *Re Russell*, 97 Fed. 32, 3 Am. B. R. 91. If the other partners, upon notification, join with the petitioners and confess themselves bankrupt, the proceeding is treated as absolutely voluntary. *Re Murray*, 96 Fed. 600, 3 Am. B. R. 601.

³³ *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. ed. 654, 2 Sup. Ct. 351; *Re Murray*, 96 Fed. 600, 3 Am. B. R. 601; *Re Carleton*, 115

Fed. 246, 8 Am. B. R. 270; *Re Carleton*, 131 Fed. 146, 12 Am. B. R. 475.

³⁴ *Re Murray*, 96 Fed. 600, 3 Am. B. R. 601; *Re Carleton*, 115 Fed. 246, 8 Am. B. R. 270; *Re Carleton*, 131 Fed. 146, 12 Am. B. R. 475.

³⁵ *Re Forbes*, 128 Fed. 137, 11 Am. B. R. 787.

³⁶ *Re Murray*, 96 Fed. 600, 3 Am. B. R. 601; *Re Forbes*, 128 Fed. 137, 11 Am. B. R. 787.

³⁷ *Re Carleton*, 115 Fed. 246, 8 Am. B. R. 270.

³⁸ *Re Mercur*, 95 Fed. 634.

³⁹ *Jones v. Burnham, Williams & Co.*, C. C. A., 138 Fed. 986, 15 Am. B. R. 85. For what is sufficient evidence, see *Remington on Bankruptcy*, § 63, and cases cited.

§ 619, 130 St. at L. 544, 561, § 59b.

tors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.”² Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.³ The date of the filing of the

² 30 St. at L. 544, 562, § 59e. A man's wife, or other members of his family, may join in the petition, if otherwise qualified. *Re Novak*, 101 Fed. 800. Where the bankrupt's father, after the original petition was filed, bought a claim against him, which he assigned to a member of the bar for no consideration except services in its collection; it was held that the latter could not be allowed to intervene as a petitioner. *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 752; *Re Folkstad*, 199 Fed. 363, holding that where the debts were contracted in an occupation that was not exempt from bankruptcy, but the act charged as an act of bankruptcy was committed while the bankrupt was a member of an exempt class, he was not subject to an involuntary adjudication. Directors, officers and stockholders of a corporation, when creditors, may be petitioners against it. *First Nat. Bank v. Wyoming Valley Ice Co.*, 136 Fed. 466. Partnership creditors may petition against the individual partners, as well as against the firm. *Re Mercier*, 95 Fed. 634, 2 Am. B. R. 626; *Re Hee (D. C. Hawaii)*, 13 Am. B. R. 8; *Remington on Bankruptcy*, § 217. The fact that the bankrupt has solicited creditors to file a petition does not make them incompetent petitioners. *Re Duplex Radiator Co.*, 142 Fed. 906, 15 Am. B. R.

324. But see *Re Independent Thread Co.*, 113 Fed. 998, 7 Am. B. R. 704; *Re Moench*, C. C. A., 130 Fed. 685, 12 Am. B. R. 240; *Remington on Bankruptcy*, § 216. It has been held that a creditor's claim may not be split up into several claims, in order to create the requisite number of petitioners. *Re Independent Thread Co.*, 113 Fed. 998; *Re Tribelhorn*, C. C. A., 137 Fed. 3, 14 Am. B. R. 491; *Re Halsey El. Generator Co.*, 163 Fed. 118; *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 744; and that, when a creditor has purchased several claims, he is to be treated as a single petitioner and a single creditor. *Re Worcester Co.*, C. C. A., 102 Fed. 808; *Re Burlington Malt-ing Co.*, 109 Fed. 777, 6 Am. B. R. 369; *Lowenstein v. McShane Mfg. Co.*, 130 Fed. 1007, 12 Am. B. R. 601; *Remington on Bankruptcy*, § 203. But see *Re Bevins*, C. C. A., 165 Fed. 434. A petitioner is not disqualified because he bought his claim after the commission of an act of bankruptcy. *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 745.
³ 30 St. at L. 544, 562, § 59f; *Re Charles Town Light & Power Co.*, 183 Fed. 160. After a petition in involuntary bankruptcy has been filed and before adjudication, other creditors may intervene and join in the petition. *Re John A. Etheridge Furniture Co.*, 92 Fed. 329. Cf.

petition is the time when the number of creditors must be counted, in order to determine how many must join in the petition.⁴ No creditors can join who were not such at the time of the commission of the act of bankruptcy alleged, and did not

Neustadter v. Chicago Dry Goods Co., 96 Fed. 830. It has been said that a creditor who files a petition has a right to ask other creditors to intervene, when such intervention becomes necessary to preserve the proceedings. *Re Smith*, 176 Fed. 426; even if the original petitioners have done nothing after the return of the subpoena indorsed "not found," and the period of four months since the commission of the acts of bankruptcy therein alleged has expired. *Re Stein*, C. C. A., 105 Fed. 749. It has been said that a creditor may intervene and join the original petitioners at any time prior to the dismissal of the petition. *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 744. But, it has been held that they cannot join after the decision of the court upon the issues raised by an answer to the petition. *Re Tribelhorn*, C. C. A., 137 Fed. 3, 14 Am. B. R. 491. It has been held: that, when a petition for involuntary bankruptcy alleged that a creditor has obtained an unlawful preference, he may be allowed to intervene and defend; *Goldman v. Smith*, 93 Fed. 182; and that the adjudication in bankruptcy is then conclusive proof of such a preference, *Re American Brewing Co.*, C. C. A., 112 Fed. 752; but that a petition to vacate an involuntary adjudication of bankruptcy can only be maintained by the bankrupt or by a creditor with a provable claim, not by a mere equitable lienor upon property claimed to belong to the bankrupt's estate. *Re*

Columbia Real Estate Co., C. C. A., 112 Fed. 643. A creditor cannot intervene to oppose a voluntary petition of bankruptcy. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 191, 46 L. ed. 113; *Re Jehu*, 94 Fed. 638, 2 Am. B. R. 498; *Re Ives*, C. C. A., 113 Fed. 911, 7 Am. B. R. 692; *Remington on Bankruptcy*, § 43; and a creditor cannot intervene to oppose a petition by partners for an adjudication of bankruptcy, even when one or more of the partners refuse to join. *Re Carleton*, 115 Fed. 246; *Remington on Bankruptcy*, §§ 43, 76. An intervention may be allowed to a person such as the trustee of another bankrupt who claims an interest in the assets; *Fisher v. Cushman*, C. C. A., 103 Fed. 860; but it has been held that unless he intervenes, a claimant to property held by the trustee cannot upon a motion, accompanied by a special appearance, have it returned to him, *Re Bender*, 106 Fed. 873; and that the court cannot compel creditors to join in a petition, *Re Gillette*, 104 Fed. 769; and is not required to notify those who have not joined of a dismissal of the petition for an insufficiency of petitioners, *Ibid.* But see § 636, *infra*.

⁴ *Re Coburn*, 126 Fed. 218, 11 Am. B. R. 212; *Re Adams*, 130 Fed. 788, 12 Am. B. R. 369; *Moulton v. Coburn*, C. C. A., 131 Fed. 201, 12 Am. B. R. 553. The date of the adjudication is the time to determine whether sufficient creditors have joined. *Moulton v. Coburn*, C. C. A., 131 Fed. 201, 12 Am. B.

hold their rights against the bankrupt at that time,⁵ and whose claims are not payable at the time of filing the petition.⁶ It has been held that the claim must have been provable at the

R. 553; *Re Plymouth Cordage Co.*, C. C. A., 135 Fed. 1000, 13 Am. B. R. 665; *Remington on Bankruptcy*, § 201; *Re Charles Town Light & Power Co.*, 183 Fed. 160. It has been held that small claims of a few dollars or a few cents, upon current accounts with grocers and small tradesmen, purposely left unpaid in order to bring the number of creditors up to twelve, should not be counted. *Re Blount*, 142 Fed. 263, 16 Am. B. R. 97. When an assignee, for the benefit of creditors, bought with the funds of the estate the claims of several creditors, and then reassigned them to others in order to increase the number to more than twelve; it was held that they were extinguished by the purchase and could not be counted. *Leighton v. Kennedy*, C. C. A., 129 Fed. 737, 12 Am. B. R. 229. It has been said that the claims of creditors who have received preferences are to be counted, if necessary, to sustain the jurisdiction, *Remington on Bankruptcy*, § 205, and citations; but are to be excluded if they defeat the same, *Stevens v. Nave-McCord Co.*, C. C. A., 150 Fed. 71, 17 Am. B. R. 610; *Leighton v. Kennedy*, C. C. A., 129 Fed. 737, 12 Am. B. R. 229; *Re Blount*, 142 Fed. 263, 16 Am. B. R. 97; *Remington on Bankruptcy*, § 205.

⁵ *Callison v. Brake*, C. C. A., 129 Fed. 196, affirming *Re Callison*, 130 Fed. 987, 12 Am. B. R. 344; *Remington on Bankruptcy*, § 214. Where an intervening creditor took an assignment of the claim after the petition was filed, it was held that

he could not be counted. *Stroheim v. Lewis F. Perry & Whitney Co.*, C. C. A., 175 Fed. 52.

⁶ 30 St. at L. 544, 561, § 59; *Re Brinckmann*, 103 Fed. 65, 4 Am. B. R. 551; *Re Yates*, 114 Fed. 365. A surety who has paid part of the obligation of his principal may be a petitioner, *Boyce v. Guaranty Co.*, C. C. A., 111 Fed. 138, 7 Am. B. R. 6; but, it has been held, that a surety cannot file a petition before he has paid any part of such obligation, *Phillips v. Dreher Shoe Co.*, 112 Fed. 404, 7 Am. B. R. 326; criticised in *Remington on Bankruptcy*, § 231. It has been held that one of the petitioners may be the holder of a claim for unliquidated damages because of the breach of a contract of sale, when the damages are capable of liquidation, *Re Stern*, C. C. A., 116 Fed. 604, 8 Am. B. R. 569, affirming *Re Manhattan Ice Co.*, 114 Fed. 399, 7 Am. B. R. 408. *Contra, Re Big Meadows Gas Co.*, 113 Fed. 974, 7 Am. B. R. 697; and a claimant for damages because of a breach of warranty upon a sale of personal property. *Contra, Re Morales*, 105 Fed. 761, 5 Am. B. R. 425; *F. L. Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. ed. 591; affirming *Re Frederick L. Grant Shoe Co.*, C. C. A., 130 Fed. 881, 12 Am. B. R. 349. When the claim is provable, liquidation may be ordered subsequent to the filing of the petition, in order to determine whether the petitioner had a right to join in the institution of the proceeding. *F. L. Grant Shoe Co. v. Laird*, 212 U. S. 445; affirming *Re Frederick L. Grant*

time of the commission of the act of bankruptcy.⁷ A creditor who has received an unlawful preference cannot join in the petition unless he offers to surrender the same;⁸ and in the Southern District of New York, such were compelled to deposit the preference with the clerk of the court as an alternative to the dismissal of their petition.⁹ A creditor may be estopped from filing the petition: by participation in the act of bankruptcy;¹⁰ or, when this consists in a receivership or insolvent assignment, by assisting in the application for a receivership;¹¹

Shoe Co., C. C. A., 130 Fed. 881, 12 Am. B. R. 349; a depositor with a claim against the directors of a bank for misappropriation of its funds, *Re Brown*, C. C. A., 164 Fed. 673; the holder of a judgment for negligently causing death, *Re Putnam*, 193 Fed. 464. Upon a demurrer to the petition, the debtor cannot claim that a judgment therein pleaded, is not final because a motion for a new trial is pending. *Re Putnam*, 193 Fed. 464. It has been said that the amount due each petitioner need not be exactly determined so long as it appears that they are creditors to an amount sufficient to satisfy the statute. *Re Hughes*, 183 Fed. 872. But it was held otherwise when the petition did not show the nature and amount of the claim. *Re Crafts-Riordon Shoe Co.*, 185 Fed. 931. It has been held: that the holder of an unliquidated claim for a tort, which has no contractual relation, cannot join in the petition, *Beers v. Hanlin*, 99 Fed. 695, 3 Am. B. R. 745; *Re Brinckmann*, 103 Fed. 65, 4 Am. B. R. 551; *Re Yates*, 114 Fed. 365; and that a judgment, entered subsequent to bankruptcy proceedings, upon a claim therein provable, cannot form a basis for a subsequent proceeding in bankruptcy when no application was made for a discharge in those originally

instituted. *Re Schnabel*, 166 Fed. 383. A claim by the assignee of a bankrupt against a petitioning creditor for damages because of a wrongful attachment, cannot be set off against the latter's claim against the bankrupt, when determining the sufficiency of a petition. *Re Bevins*, C. C. A., 165 Fed. 434.

⁷ *Beers v. Hanlin*, 99 Fed. 695, 3 Am. B. R. 745; *Re Brinckmann*, 103 Fed. 65, 4 Am. B. R. 551. Criticised in *Remington on Bankruptcy*, § 214; *Re Crafts-Riordon Shoe Co.*, 185 Fed. 931.

⁸ *Re Miller*, 104 Fed. 764, 5 Am. B. R. 140; *Stevens v. Nave-McCord Co.*, C. C. A., 150 Fed. 71, 17 Am. B. R. 610.

⁹ *Re Miller*, 104 Fed. 764, 5 Am. B. R. 140; *Re Gillette*, 104 Fed. 769, 5 Am. B. R. 119.

¹⁰ *Re Romanow*, 92 Fed. 510; *Simonson v. Sinsheimer*, C. C. A., 95 Fed. 948; *Clark v. Henne & Meyer*, C. C. A., 127 Fed. 288, 11 Am. B. R. 583; *Lowenstein v. McShane Mfg. Co.*, 130 Fed. 1007, 12 Am. B. R. 601; *Moulton v. Coburn*, C. C. A., 131 Fed. 201, 12 Am. B. R. 553; *Re Hark*, 142 Fed. 279, 15 Am. B. R. 460; *Lowenstein v. McShane Mfg. Co.*, 130 Fed. 1007, 12 Am. B. R. 601.

¹¹ *Re Gold Run Min. & Tunnel Co.*, 200 Fed. 162.

or by assenting to the assignment.¹² It has been held that a corporation is not estopped from joining in the petition by the fact that one of its officers in his individual capacity acted as assignee under the assignment, which is attacked as an act of bankruptcy.¹³ A creditor may withdraw from an involuntary petition by leave of the court; ¹⁴ but, it has been held that this cannot be done when the result would be to compel the dismissal

¹² *Re Romanow*, 92 Fed. 510; *Clark v. Henne & Meyer*, C. C. A., 127 Fed. 288, 11 Am. B. R. 583; *Moulton v. Coburn*, C. C. A., 131 Fed. 201, 12 Am. B. R. 553; *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 745 (where the assent was by a clerk who had given similar assents in previous instances), and by accepting dividends from the assignee, *Simonson v. Sinsheimer*, C. C. A., 95 Fed. 948; and even by delay for four months in opposing the assignment. *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 752; but not when the consent was induced by fraud, *Canner v. Webster Tapper Co.*, C. C. A., 168 Fed. 519; *Re Curtis*, C. C. A., 94 Fed. 630; or the State court had no jurisdiction of the proceedings in insolvency, *Re Weedman Stave Co.*, 199 Fed. 948. Nor by the indorsement of their attorneys under peculiar circumstances of the word "seen" upon an order of the State court for the sale of the property assigned. *Simonson v. Sinsheimer*, C. C. A., 100 Fed. 426, affirming 96 Fed. 579. Nor by selling goods to the assignee. *Ibid.* Nor by appearing in the State court for the purpose of preventing a distribution of the insolvent estate until the time arrived at which proceedings in bankruptcy could be instituted. *Leidigh Carriage Co. v. Stengel*, C. C. A., 95 Fed. 637. Nor by attacking in a State court certain preferences in the assignment. *Ibid.* Nor

by joining with the insolvent and his assignee in a petition to the State court for a decree authorizing the conveyance of land to the creditor in part payment of his claim on the promise that he should receive a bond to indemnify him in case he should be required to pay back for the benefit of other creditors part of the proceeds of the land, which bond was never given. *Re Curtis*, C. C. A., 94 Fed. 630. Nor by prosecuting an action in the State court for the recovery of a debt. *Re Henderson*, 10 Fed. 385. Nor by their submission to the assignee, at his request, of an unverified statement of their claims. *Simonson v. Sinsheimer*, C. C. A., 95 Fed. 948; s. c., C. C. A., 100 Fed. 426. Nor by delaying the institution of proceedings in bankruptcy for about two months at the request of the defendant who represented that he was about to offer a composition to his creditors. *Ibid.* It has been held that a corporation is not estopped from joining in the petition by the fact that one of its officers in his individual capacity acted as assignee under the assignment, which is attacked as an act of bankruptcy. *Re Winston*, 122 Fed. 187, 10 Am. B. R. 171.

¹³ *Re Winston*, 122 Fed. 187, 10 Am. B. R. 171.

¹⁴ *Re Coburn*, 126 Fed. 218, affirmed as *Moulton v. Coburn*, C. C. A., 12 Am. B. R. 553.

of the proceeding;¹⁵ nor does the payment of a claim after the filing of the petition defeat the proceedings by reducing the claims below the jurisdictional amount; provided, at least, that other creditors sufficient to supply the jurisdictional amount subsequently join.¹⁶

§ 620. Acts in bankruptcy. "(a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any party affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. (b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment. (c) It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision

¹⁵ *Re Quincy Granite Quarries Co.*, 147 Fed. 279.

¹⁶ *Re Ryan*, 114 Fed. 373.

of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision 1 the burden of proving solvency shall be on the alleged bankrupt."¹

§ 621. Fraudulent transfers. Concealment or removal of property as acts of bankruptcy. A fraudulent transfer, conveyance, concealment or removal of property by a debtor, or his permitting the same to be concealed or removed, is an act of bankruptcy.¹ The statute provides: that "'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;"² and that "'concealed' shall include secrete, falsify and mutilate."³ The concealment of property differs from a transfer thereof in that the latter is final and complete when once accomplished, while the former is continuous.⁴ Consequently, it has been held that, when an insolvent conceals his property with the intent to hinder, delay or defraud his creditors, they may file a petition against him more than six months after the beginning of the concealment, if it still continues.⁵ It has been said: that the word "removed" signifies an actual or physical change in the position or locality of the property;⁶ and that a man does not "permit" a removal if he has neither the power nor the right to prevent it;⁷ nor where the removal was made without his consent or collusion.⁸ The intent specified in the statute means an actual design in the mind, which must be proved as a question of fact.⁹ It has been

§ 620. 130 St. at L. 544, 546, 547, § 3, as amended by 32 St. at L. 797.

§ 621. 130 St. at L. 544, 546, § 3.

² 30 St. at L. 544, 545, § 1; *Re Shapiro*, 106 Fed. 495; *Re Greenberg*, 106 Fed. 496.

³ *Ibid.*

⁴ *Citizens' Bank of Salem v. De Pauw Co., C. C. A.*, 105 Fed. 926. See *Re Mingo Valley Creamery*

Ass'n, 100 Fed. 282. But see § 656, *infra*.

⁵ *Re Wilmington Hosiery Co.*, 120 Fed. 179, 9 Am. B. R. 581; *Remington on Bankruptcy*, § 108.

⁶ *Re Wilmington Hosiery Co.*, 120 Fed. 179, 9 Am. B. R. 581; *Remington on Bankruptcy*, § 107.

⁷ *Ibid.*

⁸ *Re Belknap*, 129 Fed. 646; *Remington on Bankruptcy*, § 108.

⁹ *Re Drummond*, 1 N. B. R. 231.

held that, in determining whether or not a conveyance is fraudulent, the court of bankruptcy is bound by the decision of the highest court of the State construing the State statute upon the subject.¹⁰ The act, of which complaint is made, must

Langley v. Perry, 2 N. B. R. 596; *Re Goldschmidt*, 3 N. B. R. 164; *Re Wilmington Hosiery Co.*, 120 Fed. 179, 9 Am. B. R. 581; *Lansing Boiler Works v. Ryerson, C. C. A.*, 128 Fed. 701, 11 Am. B. R. 558; *Re Belknap*, 129 Fed. 646. The intent must be determined by looking at what the debtor says and does and the effect of the same. *Ecford v. Greely*, 6 N. B. R. 433. The fraud or innocence of the person to whom the transfer is made is immaterial. *Re Rome Planing Mill*, 96 Fed. 812; *Re Drummond*, 1 N. B. R. 231. The presumption is against fraud, *Davis v. Stevens*, 104 Fed. 235, 4 Am. B. R. 763; *Remington on Bankruptcy*, § 111; but an intent to defraud will be presumed from the commission of an act, the actual or necessary effect of which is to produce it, *Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co.*, C. C. A., 131 Fed. 215, 12 Am. B. R. 610; *Remington on Bankruptcy*, § 112; *Re Glazier*, 195 Fed. 1020. It has been held: that the intent may exist and the transfer be voidable, although full consideration was paid, *Re Pease*, 129 Fed. 446, 12 Am. B. R. 66; and that it is not an intent to hinder, delay or defraud creditors, when the intention is to avoid distribution in the Court of Bankruptcy and bring about its distribution in a court of a State, *Re Wilmington Hosiery Co.*, 120 Fed. 179, 9 Am. B. R. 581; *contra*, *Re Salmon & Salmon*, 143 Fed. 395, 16 Am. B. R. 122; or to use the proceeds of a cash sale of all the vendor's property to pay certain

creditors in preference to others, although this may be a preferential intent, *Githens v. Shiffer*, 112 Fed. 505, 7 Am. B. R. 453; *Re Belknap*, 129 Fed. 646, 12 Am. B. R. 326. It has been held: that a conveyance by a debtor of all his property, which exceeded in value all his debts, in consideration of an agreement that the grantee should pay the debts and support him for the rest of his life, was not *per se* fraudulent, *Re Cornwall*, 9 Blatchf. 114, 6 N. B. R. 305; nor a sale by an insolvent to raise money to pay off a creditor, who threatened criminal proceedings, although the creditor rejected the payment, *Re Belknap*, 129 Fed. 646, 12 Am. B. R. 326; and that permitting the appointment of a receiver of a corporation by a State court is not a transfer of property for the purpose of defrauding creditors, *Re Baker-Ricketson Co.*, 97 Fed. 489. But see *infra*, § 625. Where the debtor gave a fictitious name and procured an attachment thereupon, for the purpose of preventing an attachment by an actual creditor; it was held that a fraud was committed, although his real object was to use the money to pay other creditors. *Re Williams et al.*, 1 Lowell, 406. Where an insolvent firm was dissolved and the assets transferred to one of the partners, who executed a mortgage thereupon to secure a separate debt; it was held that there was a conveyance to hinder and delay creditors. *Re Waite*, 1 Lowell, 207.

¹⁰ *Johansen Bros. Shoe Co. v. Alles*, C. C. A., 197 Fed. 274.

have been committed within four months prior to the filing of the petition.¹¹ In such cases creditors are not obliged to prove insolvency on the part of the debtor at the time of the transfer;¹² but if the debtor proves solvency at the time of the filing of the petition, it will be dismissed.¹³

§ 622. **Transfer of property with the intent to create a preference.** A transfer by a debtor, while insolvent, of any portion of his property to one or more of his creditors, with intent to prefer these over any other creditors, is an act of bankruptcy.¹ A chattel mortgage may be such a trans-

¹¹ 30 St. at L. 544, 546, § 3; quoted *supra*, § 620.

¹² *Re Pease*, 129 Fed. 446, 12 Am. Br. 66; *Re Larkin*, 168 Fed. 100. See *Lansing Boiler Works v. Ryerson*, C. C. A., 128 Fed. 701, 11 Am. B. R. 558.

¹³ 30 St. at L. 544, 546, § 3c; quoted *supra*, § 620.

§ 622. 130 St. at L. 544, 546, § 3. "A preference is a transfer made or seizure by legal proceedings, procured or suffered by an insolvent debtor, of some part of his property, the effect of which is to enable a creditor to obtain a greater proportion of his debt than some other creditor of the same class of priority." *Remington on Bankruptcy*, § 120. It has been held that a transfer of property by an insolvent with intent to prefer a creditor is not an act of bankruptcy unless the transferor has then some other creditor whose claim could be proven in bankruptcy. *Beers v. Hanlin*, 99 Fed. 695. The fact that the transfer was made under a threat of criminal prosecution or other coercion does not prevent its being an act of bankruptcy. *Remington on Bankruptcy*, § 131, citing *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. ed. 542; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235; *Giddings v.*

Dodd, 1 Dillon, 115; *Strain v. Gourdin*, 2 Woods, 380; *Arnold v. Maynard*, 2 Story, 349. Knowledge on the part of the debtor of his insolvency is essential to an intent on his part to make a preference. *Remington on Bankruptcy*, § 131. Such knowledge upon his part may be presumed, *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; *Re Bloch*, C. C. A., 109 Fed. 790, 6 Am. B. R. 300; *Re Gilbert*, 112 Fed. 951, 8 Am. B. R. 101; but the presumption is rebuttable, *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123; *Re Bloch*, C. C. A., 109 Fed. 790, 6 Am. B. R. 300; *Re Gilbert*, 112 Fed. 951, 8 Am. B. R. 101. And if the debtor establishes his want of knowledge and was influenced to believe that he was solvent, he rebuts the presumption. *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123; *Re Gilbert*, 112 Fed. 951, 8 Am. B. R. 101; *Merchants' Nat. Bank v. Cole*, C. C. A., 149 Fed. 708, 18 Am. B. R. 44. The intent may be shown by circumstantial evidence. *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. ed. 832; *John Naylor & Co. et al. v. Christiansen Harness Mfg. Co.*, C. C. A., 158 Fed. 290; *Re Minard*, 156 Fed. 377. The transfer of all a person's property, in order to pay a debt, creates a pre-

sumption of an intent to prefer, where there are other creditors unprovided for; *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; *Boyd v. Lemmon & Gale Co.*, C. C. A., 114 Fed. 647, 8 Am. B. R. 81; *Re Hughes*, 183 Fed. 872; and so may be the transfer for similar purposes of a large part of his property, *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; *Re Pinson & Co.*, 180 Fed. 787. It has been held that the payment of some creditors in full and the failure to pay others, *Johnson v. Wald*, C. C. A., 93 Fed. 640, 2 Am. B. R. 84; *Rex Buggy Co. v. Hearick*, C. C. A., 132 Fed. 310, 12 Am. B. R. 726; or the transfer of property to some creditors without leaving enough to pay others a like proportion of the amounts due them, *Re McGee*, 105 Fed. 895, 5 Am. B. R. 262; when made by a debtor with knowledge of his insolvency is conclusive proof of the intent to prefer. The intent to prefer may also be inferred from the transfer by an insolvent debtor of a large portion of his property to a single creditor, *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123. It was held that a preferential payment first disclosed during the bankruptcy proceedings, nearly seven months after its occurrence, was unavailable as an act of bankruptcy. *Re Perlhefter*, 177 Fed. 299. The payment of small sums to some creditors in the usual course of trade, with the apparent effort to keep the business going, does not raise the presumption of an intent to prefer. *Re Douglas Coal & Coke Co.*, 131 Fed. 769, 12 Am. B. R. 539; *Macon Grocery Co. v. Beach*, 156 Fed. 1009. But see *Re Foley*, 140 Fed. 300. *Re Stovall Grocery Co.*, 161 Fed. 882; *Re Morgan & Williams*, 184 Fed. 938. The

following acts have been held to be transfers with the intent to prefer creditors: A transfer in payment of a debt of personal property sufficient in value to satisfy it in full, *Johnson v. Wald*, C. C. A., 93 Fed. 640. *Of. Re Grant*, 106 Fed. 496, 30 St. at L. 544, § 1; the conveyance to a creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, *Ibid*; the transfer of a merchant's stock in trade to a creditor, part of the consideration being payment by a creditor to a bank to meet the debtor's overdrawn account there, for which the transferee was responsible, *Goldman v. Smith*, 93 Fed. 182; and the payment of a debt, *Re Ft. Wayne El. Co.*, 99 Fed. 400; *Strobel & Wilken Co. v. Knost*, 99 Fed. 409; *First Nat. Bank v. Chicago Title & Tr. Co.*, 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. 693; or a substantial part thereof, *Re Perlhefter*, 177 Fed. 299; but not the sale of property to a person or creditor and the application of part of the proceeds to the defraying of liens upon the same, such as taxes and arrears of rent upon a leasehold and the expenses of the same, *Re Pearson*, 95 Fed. 425. An adjudication that an assignment constituted a preference was held not to estop the bankrupt from proving that the property thereby covered was not acquired until thereafter and consequently did not pass to his trustee. *Re Ghazal*, C. C. A., 174 Fed. 809. It has been held that a mortgage of all a debtor's property to secure a few creditors is not a preference, when the equity of redemption is sufficient to provide for the remainder. *Lansing Boiler & Eng. Works v. Ryerson*, C. C. A., 128 Fed. 701, 11 Am. B. R. 558. "The taking of

fer.² "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."³

unusual steps in the transaction or the failure to take the usual steps may indicate intent." *Re Edelman*, C. C. A., 130 Fed. 700, 12 Am. B. R. 238. Thus, the failure to record a mortgage of real estate until several months after its execution was held to be evidence of an intent to prefer. *Re Edelman*, C. C. A., 130 Fed. 700, 12 Am. B. R. 238. The creditors have the burden of proving the insolvency of the debtor. *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123; *Troy Wagon Works v. Vastbinder*, 130 Fed. 232, 12 Am. B. R. 352. See *Re Donnelly*, 193 Fed. 755. As to the effect of a previous verbal agreement, see *Jones v. Coates*, C. C. A., 196 Fed. 860, where it seems to recognize the validity of the same. *Contra*, *Re Donnelly*, 193 Fed. 755. The possession which will set the four months running must be as notorious, exclusive or continuous as the nature of the property will permit, and no more than as is usual or ordinary when unaccompanied by acts or conduct tending to conceal the ownership. *Jones v. Coates*, C. C. A., 196 Fed. 860, holding that, in the case of notes or insurance policies, the notice of the transfer to the creditors of the assignor was not necessary to prevent the time running when the possession of the papers was actually transferred. See § 656, *infra*.

² *Re Riggs Restaurant Co.*, C. C. A., 130 Fed. 691.

³ 30 St. at L. 544, 545, § 2; May

v. Le Claire, 18 Fed. 164; *Re Borrelli & Callahan*, 142 Fed. 206. *Cf.* *Anshutz v. Hoerr*, 1 Fed. 592; *Re Baumann*, 96 Fed. 946; *Re Rome Planing Mill*, 99 Fed. 937. If the members of a partnership have property worth more than the amount of the firm indebtedness, the partnership does not commit an act of bankruptcy by giving a preference; although the property is less than its debts. *Washington Cotton Co. v. Morgan & Williams*, C. C. A., 192 Fed. 310. But see *Re Morgan & Williams*, 184 Fed. 938. It has been held, that the fair market value of the assets of a corporation, for the purpose of determining its solvency, under the bankruptcy law, is the value which the company might have realized on them for itself. *Re Marine Iron Works*, 159 Fed. 753. It has been held that property, which is exempt from execution, is to be included in the computation. *Re Baumann*, 96 Fed. 946. A judgment against the bankrupt, entered more than four months before the commission of the act of bankruptcy, is admissible upon the proof of insolvency. *Re McGowan*, 134 Fed. 498, which considers other questions concerning the admissibility of evidence upon this issue. For the commission of this act of bankruptcy no fraudulent intent is required; *Re Mingo Valley Creamery Ass'n*, 100 Fed. 282, 4 Am. B. R. 67; *Githens v. Shiffler*, 112 Fed. 505, 7 Am. B. R. 453; *Re Duffy*, 118 Fed. 936, 9

§ 623. Preferences by legal proceedings as acts of bankruptcy. It is an act of bankruptcy to suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings; and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the same.¹ Affirmative action by the debtor is not a requisite to his suffering or permitting a creditor to obtain a preference through legal proceedings.² A failure to prevent or to discharge such a preference is an act of bankruptcy;³ even, it has been held, when judgment is entered and a levy made under execution, without the debtor's knowledge, in pursuance of a warrant of levy given, when he was solvent, more than four months before.⁴ "The debtor's intent is not an

Am. B. R. 358; *Re Belknap*, 129 Fed. 646, 12 Am. B. R. 326; *Remington on Bankruptcy*, § 118. The payment by an insolvent of debts previously incurred for supplies necessary for the support of his family was held to be an act of bankruptcy, although he thought that the exemptions given him by the statutes authorized the same. *Re Condon*, 198 Fed. 947, but there must be an intent to prefer one creditor over another. *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123; *Re Gilbert*, 112 Fed. 951, 8 Am. B. R. 101; *Re Douglas Coal & Coke Co.*, 131 Fed. 769, 12 Am. B. R. 539; *Remington on Bankruptcy*, § 129. The intent of the creditor is immaterial. *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123; *Re Wright Lumber Co.*, 114 Fed. 1011, 8 Am. B. R. 345; *Remington on Bankruptcy*, § 130; *Alter v. Clark*, 193 Fed. 153.

§ 623. 130 St. at L. 544, 546, § 3. It has been held that suffering an execution to be levied is not an act of bankruptcy if no sale has been made. *Re R. L. Radke Co.*, 193 Fed. 735. The term "legal proceedings" covers all process by

which a lien is obtained under State laws, *Re Crafts-Riordon Shoe Co.*, 185 Fed. 931; including an attachment, *Ibid.*; *Folger v. Putnam*, C. C. A., 194 Fed. 793; *Johnson Bros. Shoe Co. v. Alles*, C. C. A., 197 Fed. 274, affirming *Re Putnam*, 193 Fed. 464. The failure of an insolvent debtor to discharge the levy of an execution procured by the attorney for the petitioning creditors, for the purpose of laying the foundation for the bankruptcy proceedings, is not an act of bankruptcy. *Re Weiss*, 142 Fed. 279. For a case where it was held that sufferance of an attachment not followed by a sale did not constitute a preference, see *Re Windt*, 177 Fed. 584.

² *Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. 74; *Re Moyer*, 93 Fed. 188; *Re Cliffe*, 94 Fed. 354; *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123; *Folger v. Putnam*, C. C. A., 194 Fed. 793, affirming *Re Putnam*, 193 Fed. 464.

³ *Ibid.*

⁴ *Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147; 22 Sup. Ct. 74; *Re Moyer*, 93 Fed. 188.

essential element.”⁵ An actual preference must have been gained by the legal proceedings.⁶ Where a person owing the debtor paid what was due to the sheriff holding an execution,⁷ or garnishee process,⁸ it was held that an act of bankruptcy was immediately committed; and that the limitation of five days did not apply. The consummation of the act of bankruptcy under this section is not the date of the execution sale, but the fifth previous day, if the bankrupt then fails to dissolve the levy.⁹ The preference through legal proceedings means any proceeding in a court of justice, whether interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors;¹⁰ such as an attachment,¹¹ and irrespec-

⁵ *Wilson Bros v. Nelson*, 183 U. S. 191, 46 L. ed. 147; *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123.

⁶ *Re Chapman*, 99 Fed. 395. *Re Crafts-Riordon Shoe Co.*, 185 Fed. 931. Where the levy was made only upon property, as to which the judgment creditor had a previously existing contract lien, it was held that no act of bankruptcy was committed. *Ibid.* The preference must be over other creditors of the “same class.” *Re Belknap*, 129 Fed. 646; *Remington on Bankruptcy*, § 138. Thus, it has been held that a distraint by a landlord is not a preference, unless there are several landlords injuriously affected thereby. *Re Belknap*, 129 Fed. 646. It has been said that suffering judgment upon a claim of a laborer, which is preferred by the statute, would not be an act of bankruptcy if there were enough property to pay all similar claims in full, unless it exceeded the limit of the preference, namely, three hundred dollars. *Re Cement Co.*, 17 Am. B. R. 375; *Remington on Bankruptcy*, § 138.

⁷ *Re Miller*, 104 Fed. 764.

⁸ *Re Harper*, 105 Fed. 900.

⁹ *Re National Hotel & Cafe Co.*,

138 Fed. 947. The petition may be then filed, and upon a proper showing the sale may be enjoined; *Re Rome Planing Mill*, 96 Fed. 812, 3 Am. B. R. 123; *Re Elmira Steel Co.*, 109 Fed. 456; but this cannot be done unless some time for the sale has been fixed if it has not taken place. *Re Vetterman*, 135 Fed. 443. Where the sale was advertised for August 22nd, it was held that the judgment debtor had the whole of the 17th of that month in which to discharge the execution, before it would be guilty of an act of bankruptcy. *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, C. C. A., 154 Fed. 662. Where the sale was under a judgment, confessed by the insolvent, it was held that it was equivalent to a transfer of his property, and that the time within which a petition for that act of bankruptcy might be filed did not begin to run until the sale, although the petition might have been filed within five days before. *Re Nusbaum*, 152 Fed. 835.

¹⁰ *Re Reichman*, 91 Fed. 624. Nor it has been held liens acquired by legal proceedings more than four months before the petition in bankruptcy was filed, *Re Ferguson*, 95

tive of the question whether the attachment was made in time to give the attaching creditor a valid lien.¹² Where the sheriff had been instructed by the attorney for the judgment creditors to do nothing until further orders under executions on confessed judgments levied a year before, and the keeper who had been placed in charge was withdrawn, it was held that these executions became dormant and that new executions issued and levied under the same judgments constituted new acts of bankruptcy.¹³ Otherwise the mere failure to prevent the enforcement, within the four months' period, of a lien previously obtained is not an act of bankruptcy.¹⁴ An allegation in the petition that an attachment has been made in a legal proceeding, without any statement of the disposition thereof,¹⁵ or that a confession of judgment has been made, upon which judgment was entered and the goods levied under a *fi. fa.*, without stating that a sale has been had,¹⁶ are insufficient.

§ 624. General assignments for the benefit of creditors as acts of bankruptcy. A general assignment for the benefit of creditors is an act of bankruptcy, irrespective of the insolvency of the assignor or his good faith, or whether or not he intends to prefer any creditors¹ and irrespective of the validity of the conveyance.² So are a general assignment by the officers of a corporation under the authority of a resolution of its board

Fed. 429; *Owen v. Brown*, C. C. A., 120 Fed. 812; and the recovery of judgment for the foreclosure of a lien more than four months old with a levy upon the land covered thereby, even when the judgment is general, provided that no levy is made upon any property not bound by the lien. *Re Ferguson*, 95 Fed. 429.

¹¹ *Parmenter Mfg. Co. v. Stoevers*, C. C. A., 97 Fed. 330. It was held that the surety in attachment proceedings could not force the debtor into bankruptcy because the latter permitted four months, less five days, to expire without removing the lien. *Re Windt*, 177 Fed. 584.

¹² *Ibid.*

¹³ *Re Chapman*, 99 Fed. 395.

¹⁴ *Ibid.* *Colston v. Austin Run*

Min. Co., C. C. A., 194 Fed. 929. But see *Parmenter Mfg. Co. v. Stoevers*, C. C. A., 97 Fed. 330.

¹⁵ *Re Vetterman*, 135 Fed. 443.

¹⁶ *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, C. C. A., 154 Fed. 662.

§ 624. ¹*George M. West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. ed. 1098; 19 Sup. Ct. 836.

² *Griffin v. Dutton*, C. C. A., 165 Fed. 626; *Canner v. Webster Tapper Co.*, C. C. A., 168 Fed. 519; *Re Courtenay Mercantile Co.*, 186 Fed. 352, *aff'd.* C. C. A., 194 Fed. 368; *Re Federal Lumber Co.*, 185 Fed. 926. The preparation of a deed of assignment before its execution is not. *Re Federal Lumber Co.*, 185 Fed. 926.

of directors in pursuance of a vote at a stockholders' meeting, although against the objection of a minority of the stockholders,³ and a confession of judgment to a trustee for all of the confessed creditors.⁴

§ 625. Appointments of receivers or trustees as acts of bankruptcy. A debtor has committed an act of bankruptcy when, being insolvent, he has applied for a receiver or a trustee of his property, or because of insolvency a receiver or a trustee has been put in charge thereof under the laws of a State or Territory of the United States.¹ When the application was made by the debtor, it is not an act of bankruptcy unless he was then insolvent;² but if he was then insolvent, the ground for the appointment of a receiver is material.³ Where the bill upon which the appointment is made alleges insolvency, it will be presumed that that was a ground for such appointment; although other grounds therefor were named, and the decree does not state specifically which influenced the court;⁴ unless insolvency is not a cause for a receivership under the law of

³ *Clark v. American Mfg. & En. Co.*, C. C. A., 101 Fed. 962.

⁴ *Re Green*, 106 Fed. 313. See, also, *Davis v. Stevens*, 104 Fed. 235, 241, 242.

§ 625. 132 St. at L. 797; quoted *supra*, § 620. It has been held that the consent by a corporation to the appointment of a receiver, upon the application of others, is not equivalent to having "applied for a receiver." *Re Gold Run. Min. & Tunnel Co.*, 200 Fed. 162. *Contra*, *Exploration Mercantile Co. v. Pacific H. & S. Co.*, C. C. A., 177 Fed. 825; *Re Pickens Mfg. Co.*, 158 Fed. 894. Such an act of bankruptcy is committed by a firm when performed by one of the partners, although the others do not participate in the same. *Yungbluth v. Slipper*, C. C. A., 185 Fed. 773. Resolutions of the stockholders authorizing the execution of a general assignment by the directors, *Re Hartwell Oil Mills*, 165 Fed. 555, or an officer of the com-

pany, *Re Federal Lumber Co.*, 185 Fed. 926, are not.

² *Re Spalding*, C. C. A., 139 Fed. 244. It seems that he must be insolvent in accordance with the definition in the bankruptcy act; *Re Douglas Coal & Coke Co.*, 131 Fed. 769, 773, 12 Am. B. R. 539; *Re Electric Supply Co.*, 175 Fed. 612, holding that the corporation was insolvent. But when the appointment was made at the application of creditors, because of insolvency, it is immaterial whether the debtor actually was insolvent; *Re Spalding*, C. C. A., 139 Fed. 244.

³ *Exploration Mercantile Co. v. Pacific H. & S. Co.*, C. C. A., 177 Fed. 825.

⁴ *Lowenstein v. McShane Mfg. Co.*, 130 Fed. 1007; *Hooks v. Aldridge*, C. C. A., 145 Fed. 865; *Beatty v. Andersen Coal Min. Co.*, C. C. A., 150 Fed. 293; *Re Kennedy Tailoring Co.*, 175 Fed. 871. Where the definition of insolvency by the State stat-

the State;⁵ but where the decree states the grounds for the appointment, such statement is conclusive.⁶ Where the appointment was made in fact because of insolvency, although there was no such statement in the pleadings or decrees, it was held that there was an act of bankruptcy.⁷ In such a case, the question whether the receiver was appointed on the ground of insolvency might be for the jury.⁸ The appointment of a temporary receiver to preserve the property until it can be determined whether insolvency exists is insufficient.⁹ But the rule is otherwise when the temporary receiver was appointed because of insolvency.¹⁰ Where the application was not made by the debtor, and the appointment was not made on the ground of insolvency, it is not an act of bankruptcy.¹¹ The appointment of a receiver or trustee, if it has taken place under the circum-

ute is broader than that in the Bankruptcy Act, an appointment for the former reason is not a cause for bankruptcy, unless the facts show that the case falls within the latter law. *Re Douglas Coal & Coke Co.*, 131 Fed. 769, 774, 12 Am. B. R. 539; *Re Golden Malt Cream Co.*, C. C. A., 164 Fed. 326. The appointment of a receiver because of mismanagement by the persons in control of the corporation, *Re Boston & Oaxaca Min. Co.*, 181 Fed. 422, or because of its inability to meet its obligations as they mature, *Re Edward Ellsworth Co.*, 173 Fed. 699, or because of the failure of the bank with which it had transacted business, *Schumert & Warfield v. Security Brewing Co.*, 199 Fed. 358; are not acts of bankruptcy when it is not insolvent and the bill expressly so avers, although the corporation unites in the application made by creditors for that purpose, *Re Edward Ellsworth Co.*, 173 Fed. 699.

⁵ *Re Spalding*, C. C. A., 139 Fed. 244. But see *Exploration Mercantile Co. v. Pacific H. & S. Co.*, C. C. A., 177 Fed. 825.

⁶ *Blue Mountain Iron & Steel Co. v. Portner*, C. C. A., 131 Fed. 57; *Re Spalding*, C. C. A., 139 Fed. 244. *Re Edward Ellsworth Co.*, 173 Fed. 699. But see *Re Pickens Mfg. Co.*, 158 Fed. 894.

⁷ *Re Beatty*, C. C. A., 150 Fed. 293; *Re Belfast Mesh Underwear Co.*, 153 Fed. 224.

⁸ *Blue Mountain Iron & Steel Co. v. Portner*, C. C. A., 131 Fed. 57.

⁹ *Zugalla v. Mercantile Agency*, C. C. A., 142 Fed. 927, 16 Am. B. R. 67. See *Re Hudson River El. Power Co.*, 173 Fed. 934.

¹⁰ *Blue Mountain Iron & Steel Co. v. Portner*, C. C. A., 131 Fed. 57.

¹¹ *Re Douglas Coal & Coke Co.*, 131 Fed. 769, 12 Am. B. R. 539; *Moss Nat. Bank v. Arend*, C. C. A., 146 Fed. 351; *Re Spalding*, C. C. A., 139 Fed. 244, for example, when made in a suit to foreclose a mortgage, *Re Douglas Coal & Coke Co.*, 131 Fed. 769, 12 Am. B. R. 539, or to prevent conveyances of property in fraud of a judgment creditor, *Re Spalding*, C. C. A., 139 Fed. 244, or to wind up the affairs of a part-

stances stated in the bankruptcy law, constitutes an act of bankruptcy, although not made by any order or decree of the court.¹² For example, upon the dissolution and liquidation of the assets of a corporation¹³ or joint stock company¹⁴ without any proceeding in the court. Where a sheriff took possession of the personal property of a corporation under a special writ of *fiери facias*, with statutory authority to distribute the proceeds among all of its creditors, it was held that that was in fact the appointment of a trustee because of insolvency and constituted an act of bankruptcy.¹⁵

§ 626. Admission in writing as act of bankruptcy. It is an act of bankruptcy for a debtor to admit in writing his inability to pay his debts and his willingness to be adjudged a bankrupt upon that ground.¹ A written admission of insolvency alone is insufficient.² The insolvency of the debtor is immaterial.³ The admission may be signed by one alone of several partners.⁴ The admission may be made by a corporation through an officer expressly empowered by its board of directors to make the same, when such board is authorized by the charter so to do,⁵ but an officer cannot do so without express author-

nership, there being no insolvency alleged, *Moss Nat. Bank v. Arend*, C. C. A., 146 Fed. 351.

¹² *Re Hercules Atkin Co.*, 133 Fed. 813.

¹³ *Re Bennett Shoe Co.*, 140 Fed. 687.

¹⁴ *Re Hercules Atkin Co.*, 133 Fed. 813.

¹⁵ *Re International Coal Min. Co.*, 143 Fed. 665.

§ 626. 130 St. at L. 544, 547, § 3.

² *Re Wilmington Hosiery Co.*, 120 Fed. 179. But see *Brinkley v. Smithwick*, 128 Fed. 686.

³ *Re Duplex Radiator Co.*, 142 Fed. 906, 15 Am. B. R. 324; *Re Moench*, C. C. A., 130 Fed. 685, 12 Am. B. R. 240; affirming 123 Fed. 965; s. c., 123 Fed. 977, 10 Am. B. R. 656; criticised, XVII Harv. L. Rev. 131.

⁴ *Re Kersten*, 110 Fed. 929.

⁵ *Re Marine & Conveyor Co.*, 91 Fed. 630; *Re Mutual Mercantile Agency*, 111 Fed. 152; *Re Moench*, C. C. A., 130 Fed. 685, 12 Am. B. R. 240. It has been held: that in California, *Re Am. Guarantee & Security Co.*, 192 Fed. 405, and New York, *Re Lisk Mfg. Co.*, 167 Fed. 411; *Re Moench & Sons Co.*, C. C. A., 130 Fed. 685, 66 C. C. A. 37; the corporation may make the admission through a resolution of its board of directors. But an admission signed by a majority of its directors individually is ineffective. *Re Gold Run Min. & Tunnel Co.*, 200 Fed. 162.

The directors of a New York corporation may authorize an officer to make the statutory admission, if not forbidden by any by-law. *Re Lisk Mfg. Co.*, 167 Fed. 411; where

ity.⁶ It has been held that ratification of such an unauthorized admission does not make the same an act of bankruptcy,⁷ and that an answer admitting insolvency with a consent to the appointment of a receiver is not equivalent to a written admission of willingness to be adjudged a bankrupt.⁸ Where the admission was made by the directors in violation of an injunction, it was held to be ineffective.⁹

§ 627. Petitions in bankruptcy. "Petitions shall be filed in duplicate, one copy for the clerk and one copy for service on the bankrupt."¹ They must be filed in the clerk's office; not

there was a failure to notify some of the directors who lived in a distant State, but neither the stockholders, nor a new member subsequently elected, made any attempt for several months to vacate a receivership obtained in the bankruptcy proceedings. See also, *Re Rolins Gold & Silver Min. Co.*, 102 Fed. 982, 985; *Re Moench & Sons Co.*, 123 Fed. 965, aff'd. C. C. A., 130 Fed. 685, 66 C. C. A., 37. It seems that the directors of a California, *Re American Guarantee & Security Co. of California*, 192 Fed. 405; Michigan, *Re Riley, Talbot & Hunt*, 15 Am. B. R. 159; New Jersey, *Re Mutual Mercantile Agency*, 111 Fed. 152; Rhode Island, *Re Marine & Conveyor Co.*, 91 Fed. 630; and Wisconsin, *Re T. L. Kelly Dry Goods Co.*, 102 Fed. 748, 4 Am. B. R. 528; corporation may do the same without the consent of the stockholders. See also *Re Riley, Talbot & Hunt*, 15 Am. B. R. 159. But that a corporation of Massachusetts, *Re Bates Mach. Co.*, 91 Fed. 625; or Oregon, *Re Quartz Gold Min. Co.*, 157 Fed. 243; cannot. In the absence of a by-law, a vote by a majority of the board is sufficient, *Re Marine & Conveyor Co.*, 91 Fed. 630; and it was held that a failure to give notice of the meeting to three nominal

directors, who had never attended since the organization of the board, did not affect the validity of the act, *Re Marine & Conveyor Co.*, 91 Fed. 630.

⁶ *Re Burbank Co.*, 168 Fed. 719; *Re Southern Steel Co.*, 169 Fed. 702, holding that a resolution authorizing an attorney to represent the corporation in any bankruptcy proceedings pending or that might be brought, and, in his discretion, to agree to the appointment of receivers, was insufficient. See *Baker-Ricketson Co.*, 97 Fed. 189.

⁷ *Re Bates Mach. Co.*, 91 Fed. 625; *Re Burbank Co.*, 168 Fed. 719.

⁸ *Re Wilmington Hosiery Co.*, 120 Fed. 179. But see *Brinkley v. Smithwick*, 126 Fed. 686.

⁹ *Re Hudson River El. Power Co.*, 173 Fed. 934.

§ 627. 130 St. at L. 544, 561, § 59. Where upon the filing of the petition without a copy, the clerk made and certified a copy thereof, which was delivered to the marshal and served upon the defendant; it was held that it was a duplicate within the requirement of the statute. *Millan v. Exchange Bank*, C. C. A., 183 Fed. 753. Where only one copy of the petition was filed, it was held that the court could not permit the filing of a second copy

sent immediately to the judge.² The clerk's docket should contain a memorandum of the filing of both copies of the petition.³ The proceedings in bankruptcy are begun by the filing of the petition; not by the service of process upon the respondent.⁴ It has been said that the filing of the petition is notice to all the world, and in effect an attachment and an injunction.⁵ "All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference."⁶ Forms of the petitions are prescribed by the General Orders which must be followed.⁷ The rules of the different District Courts make special requirements concerning petitions in bankruptcy. It has been held that the averments may be made upon information and belief.⁸ The petition must be verified by or on behalf of each petitioner.⁹ It has been held to be sufficient to state therein that the averments in the petition on information and belief

after four months from the commission of the act of bankruptcy therein specified. *Re Stevenson*, 94 Fed. 110. It has been held that such an omission is not waived by a general appearance without objection. *Re Stevenson*, 94 Fed. 110; *Re Dupree*, 97 Fed. 28. *Contra, Re Plymouth Cordage Co.*, C. C. A., 135 Fed. 1000; *Remington on Bankruptcy*, § 284. Where a verified petition accompanied by schedules was, after its filing, in part withdrawn, and a new petition filed with certain portions of the old petition pasted thereon containing also additional schedules and assets it was held that the day when the second petition was filed was the date of filing, and that the filing of the first should be disregarded. *Re Washburn*, 99 Fed. 84.

² *Re Sykes*, 106 Fed. 669.

³ *Re Stevenson*, 94 Fed. 110; *Re Dupree*, 97 Fed. 28.

⁴ *Re Appel*, 103 Fed. 931.

⁵ *Re Breslauer*, 121 Fed. 910. See

Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 22 Sup. Ct. 269; § 643, *infra*.

⁶ General Order V.

⁷ *Mather v. Coe*, 92 Fed. 333; *W. A. Gage & Co. v. Bell*, 124 Fed. 371. In North Carolina the petitions must be set forth in the prescribed printed forms. *Mahoney v. Ward*, 100 Fed. 278.

⁸ *Re Ball*, 156 Fed. 682, 684.

⁹ 30 St. at L. 544, 551, § 18; *Green River Deposit Bank v. Craig*, 110 Fed. 137, 138; *Remington on Bankruptcy*, § 281. In the case of a partnership, the affidavit of one of its members is sufficient. *Walker v. Woodside*, C. C. A., 164 Fed. 680. The affidavit of the attorney for the petitioners might be held to be insufficient, *Re Simonson*, 92 Fed. 904; *Re Nelson*, 98 Fed. 76; *contra, Re Herzikopf*, 118 Fed. 101; *Re Hunt*, 118 Fed. 282; *Re Vastbinder*, 126 Fed. 417; except in the case of natural persons who reside outside of the district,

are made upon the belief of the affiant.¹⁰ A petition in a voluntary bankruptcy must be accompanied by schedules with a reference to the ledger and vouchers showing the names, with their residences, a description of the nature and consideration of the debts of all the creditors, separately specifying those to whom priority is secured by law, those who hold securities with the particulars of the security, and in case of unsecured creditors, whether they hold any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as partner or joint contractor with any other person, and if so, with whom. The schedules must also contain statements of the liabilities of the bankrupt on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers, with specifications of the same; of all accommodation paper signed, accepted, or indorsed by him and unpaid; of all property owned by the bankrupt, with specifications, and separately classified as real estate, personal property, choses in action, property in reversion, remainder, or expectancy, including property held in trust for the debtor, or subject to any power or right to dispose of or to charge; a particular itemized statement of the property claimed as exempt; and a list of all books, papers, deeds and writings relating to the bankrupt business and the

Rogers v. De Soto Placer Min. Co., C. C. A., 136 Fed. 407; or a corporation, *Re Chequasset Lumber Co.*, 112 Fed. 56; *Re R. L. Radke Co.*, 193 Fed. 735. It is the better practice, in the case of a corporation, to have the affidavit sworn to by its president. *Walker v. Woodside*, C. C. A., 164 Fed. 680. Where one of three directors was hostile to the others and endeavoring to secure a preference, it was held that the resolution was not void because passed at a meeting of which he had no notice. *Re Kenwood Ice Co.*, 189 Fed. 525. Where the petition was authorized by a majority of the directors, it was held not to be fatally defective for failure to set forth the resolution. *Re Kenwood Ice Co.*, 189 Fed. 525. But see *Re Jefferson*

Casket Co., 182 Fed. 689. No resolution of the stockholders is necessary. *Re Kenwood Ice Co.*, 189 Fed. 525. It has been said: that the petition will not be dismissed because of a defective verification; but that the remedy is to move for a rule to require a proper verification. *Green River Deposit Bank v. Craig*, 110 Fed. 137. An informality in the verification is waived by a plea or answer to the merits. *Simonson v. Sinsheimer*, 95 Fed. 948; *Leidigh Carriage Co. v. Stengel*, C. C. A., 95 Fed. 637. The omission by a notary to affix his seal to the certificate to the jurat of the petition and the proofs of debt is not a jurisdictional defect. *Re Donnelly*, 5 Fed. 783.

¹⁰ *Re Ball*, 156 Fed. 682, 684.

estate which are in existence, with the names of the persons who hold them in their possession.¹¹ A voluntary petition may in the discretion of the court be dismissed when the schedules show no debts that would be barred by a discharge.¹² "In all cases of involuntary bankruptcy, in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid."¹³ "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt."¹⁴ In cases of both voluntary and involuntary bankruptcy the petitioner must deposit with the clerk before filing the petition thirty dollars to pay the fees of the clerk, referee and trustee¹⁵ "except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money

¹¹ Form 1. See *Sellers v. Bell*, C. C. A., 94 Fed. 801; *Re Colaluca*, 133 Fed. 255; *Re Maples*, 105 Fed. 919. *Of. Re Yates*, 114 Fed. 365.

¹² General Order IX.

¹³ General Order IX.

¹⁴ 30 St. at L. 544, 547, § 3.

¹⁵ General Order X; 30 St. at L. 544, 556, 557, 559, §§ 40, 48, 51, 52. It has been held, when a petition

was filed on behalf of a partnership accompanied by separate petitions on behalf of each partner, that the filing fees should be deposited with each petition, *Re Barden*, 101 Fed. 553; but when a single petition was filed on behalf of the firm and of the individuals, that but one deposit need be made. *Re Gay*, 98 Fed. 870; *Re Langslow*, 98 Fed. 869.

with which to pay such fees.”¹⁶ The filing fee will be returned to petitioning creditors out of the assets of the estate.¹⁷ Different acts of bankruptcy may be joined in the same petition.¹⁸ “Whenever two or more petitions shall be filed by creditors against a common debtor, alleging acts of bankruptcy committed by said debtor on different days, within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.”¹⁹

The same petition in voluntary bankruptcy may be presented on behalf of a partnership and on behalf of each member individually; provided that the schedules contain the individual

¹⁶ It has been held: that the affidavit of the proposed voluntary bankrupt is not conclusive. *Re Collier*, 93 Fed. 191. But see *Sellers v. Bell*, C. C. A., 94 Fed. 801. That when the circumstances, as, for example, the appearance for the petitioner of counsel not shown to act gratuitously, cast doubt upon the truth of the affidavit, the court may direct a reference to determine whether the bankrupt should be relieved from paying the fees. *Re Collier*, 93 Fed. 191. That if the bankrupt has enough exempt property to pay the fees, he will not be excused therefrom. *Ibid. Re Bean*, 100 Fed. 262. But see *Sellers v. Bell*, C. C. A., 94 Fed. 801. That he will not be required to pay the filing fees out of

money subsequently earned by him. *Sellers v. Bell*, C. C. A., 94 Fed. 801. That the necessary fees, in addition to those included in the \$30, must be paid by the pauper before his discharge, unless he can show to the court special circumstances which entitle him to relief. *Re Fees Payable by Voluntary Bankrupts*, 95 Fed. 120. See § 413; *supra*.

¹⁷ *Re J. W. Harrison Mercantile Co.*, 95 Fed. 123. For a case where a witness was required to pay the expenses of a reference, see *Re Scott*, 8 Fed. 420.

¹⁸ *Bradley Timber Co. v. White*, C. C. A., 121 Fed. 779; *Re Nusbaum*, 152 Fed. 835; *Re Ball*, 156 Fed. 682.

¹⁹ General Order VII; *Re McCracken & McLeod*, 129 Fed. 621.

debts and assets, as well as those of the firm.²⁰ A petition cannot join with a prayer for the adjudication of the bankrupt debtor, one for an injunction against third persons, such as attaching creditors;²¹ or a receiver of a State court;²² nor a prayer for the seizure of the property by the marshal.²³ The petition must state the jurisdictional facts.²⁴ A petition for involuntary bankruptcy must show the occupation of the bankrupt,²⁵ or that the bankrupt is not within the exceptions to the statute.²⁶ It should show the nature of the claims of the petitioners, and that they are provable;²⁷ but this need not be stated with the particularity requisite in the proofs of debt.²⁸ It must show the jurisdictional requirements concerning resi-

²⁰ *Re Gay*, 98 Fed. 870. *Cf. Re McFaun*, 96 Fed. 592.

²¹ *Re Ogles*, 93 Fed. 426. As to time of filing amended petition, see *Re R. L. Radke Co.*, 193 Fed. 735.

²² *Re Ogles*, 93 Fed. 426.

²³ *Mather v. Coe*, 92 Fed. 333; *Re Ogles*, 93 Fed. 426.

²⁴ *Re Plotke*, C. C. A., 104 Fed. 964, 5 Am. B. R. 171. *Cf. § 655, infra*. For allegations of the transfer of property with intent to hinder, delay and defraud creditors, which were held to be insufficient, see *Re R. L. Radke Co.*, 193 Fed. 735; *Re Hallin*, 199 Fed. 806. For such as were held to be sufficient, see *Re R. L. Radke Co.*, 193 Fed. 735.

²⁵ *Re Callison*, 130 Fed. 987; *Rise v. Bordner*, 140 Fed. 566.

²⁶ *Re Bellah*, 116 Fed. 69; *Re Mero*, 128 Fed. 630; *Re Callison*, 130 Fed. 987; *Re Brett*, 130 Fed. 981; *Rise v. Bordner*, 140 Fed. 566; *Edelstein v. U. S.*, C. C. A., 9 L.R.A. (N.S.) 236, 149 Fed. 636; *Woolford v. Diamond State Steel Co.*, 138 Fed. 582. *Contra, Re Stern*, C. C. A., § 604; *Conway v. German*, C. C. A., 166 Fed. 67. But it has been held that an omission of such averments is not a jurisdictional defect.

Conway v. German, C. C. A., 166 Fed. 66, a case of an individual; *Re N. Y. Tunnel Co.*, C. C. A., 166 Fed. 284. An involuntary petition must aver that the defendant is insolvent and has committed an act of bankruptcy within the preceding four months, *Re Lachenmaier*, C. C. A., 203 Fed. 32; but in voluntary proceedings it need only aver that the petitioner owes debts which he is unable to meet and that he wishes to take the benefits of the act. *Ibid*. The allegation that a corporation "is engaged in the business and was incorporated for the purpose of building houses" was held to be sufficient to aver that it was engaged in manufacturing. *Re Kingston Realty Co.*, 157 Fed. 299; *Re White*, 135 Fed. 199.

²⁷ In case of a judgment, the nature of the claim that is the foundation thereof should be stated. *Re R. L. Radke Co.*, 193 Fed. 735. It should show that each debt is not barred by the statute of limitations. *Ibid*.

²⁸ *Re Brett*, 130 Fed. 981; *Remington on Bankruptcy*, § 243. See *Re Pangborn*, 185 Fed. 673.

dence.²⁹ In charging acts of bankruptcy, the petition must allege facts; not conclusions of law.³⁰ Allegations, in the words of the statute, are insufficient;³¹ except those concerning a general assignment, or the appointment of a receiver or a trustee, or an admission in writing.³² Where a preference is charged, the names of the creditors and the times, places and circumstances of the preference must be alleged,³³ unless the names³⁴ or circumstances,³⁵ are stated to be unknown. Where the petition alleges that the debtor suffered creditors to obtain a preference through legal proceedings, it must specify the details of the transaction which constitutes such preference.³⁶ In partnership cases, where insolvency is an essential element of the act of bankruptcy, the petition must show the insolvency of each partner, as well as the insolvency of the firm.³⁷ It seems, however, that all such objections are waived by a general denial and a demand for a trial by jury when granted.³⁸ It has been held that a petition of voluntary, filed subsequently

²⁹ *Re Plotke*, C. C. A., 104 Fed. 964.

³⁰ *Re Cliffe*, 94 Fed. 354; *Remington on Bankruptcy*, § 252.

³¹ *Re Cliffe*, 94 Fed. 354.

³² *Remington on Bankruptcy*, § 255.

³³ *Re Nelson*, 98 Fed. 76; reversed on another ground, *Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. 74; *Re Sig. H. Rosenblatt & Co.*, C. C. A., 193 Fed. 638; *Re Pressed Steel Wagon Goods Co.*, 193 Fed. 811; *Re Hallin*, 199 Fed. 806; an averment that the alleged bankrupt had within four months paid money to one or more creditors, with intent to prefer them over other creditors, were held to be insufficient, *Re Pure Milk Co.*, 154 Fed. 682.

³⁴ *Chicago Motor Vehicle Co. v. American Oak Leather Co.*, C. C. A., 141 Fed. 518.

³⁵ *Re Bellah*, 116 Fed. 69; *Re Mero*, 128 Fed. 630.

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³⁶ *Re Cliffe*, 94 Fed. 354; *Re Pressed Steel Wagon Goods Co.*, 193 Fed. 811. The allegations that the defendant committed an act of bankruptcy by confessing a judgment to a certain party, upon which judgment was entered, an execution, attachment and a *fi. fa.* issued, and the goods of the defendant levied upon by the sheriff are insufficient. *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, 154 Fed. 662.

³⁷ *Re Blair*, 99 Fed. 76; *Vaccaro v. Security Bank*, C. C. A., 103 Fed. 436. Form number three of the Appendix to the Bankruptcy Rules should be used *mutatis mutandis* for a petition in involuntary bankruptcy against a partner. *Mather v. Coe*, 92 Fed. 333; *First State Bank of Corwith, Iowa, v. Haswell*, C. C. A., 174 Fed. 209.

³⁸ *Re Cliffe*, 94 Fed. 354.

to one of involuntary, bankruptcy will not be sustained, when the result would be to validate certain procedures complained of under that first filed.³⁹ The filing of a voluntary petition is not in itself an act of bankruptcy and does not justify an involuntary proceeding;⁴⁰ but where, subsequent to the institution of involuntary proceedings against a corporation, its directors passed a resolution consenting to the adjudication, it was held that such proceedings became in substance voluntary, although involuntary in form.⁴¹

§ 628. Amendments to petitions in bankruptcy. "The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."¹

"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction,

³⁹ *Re Dwyer*, 112 Fed. 777.

⁴¹ *Re New Amsterdam Motor Co.*,

⁴⁰ *Re J. M. Ceballos & Co.*, 161 Fed. 445; *Re Lachenmaier*, C. C. A., 203 Fed. 32.

180 Fed. 943.

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shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.”² The grant³ or refusal⁴ of permission to amend a petition in bankruptcy rests largely in the discretion of the Court of Bankruptcy, and will rarely be interfered with by a court of review; but an order permitting an amendment may be set aside by the Circuit Court of Appeals upon a petition to review the same.⁵ In order to obtain leave to amend, there must be in the record as it stands the substance of that which is asked for; the right to amend can go no further than to bring forth and make effective that which is in some shape already there.⁶ But very general language in the original petition will support

² General Order VI. This order does not prevent the allegation of subsequent acts of bankruptcy where only one petition has been filed. *Re Hamrick*, 175 Fed. 279. It has been held: that bankruptcy proceedings against a partnership and its members may properly be consolidated with those against a corporation entirely owned by one of the partners, *Salt Lake Valley Canning Co. v. Collins*, C. C. A., 176 Fed. 91; but that involuntary proceedings against an individual cannot be changed, after testimony has been taken, so as to embrace a proceeding against a partnership of which he was a member, *Re Kaufman*, C. C. A., 176 Fed. 93; that proceedings instituted against individuals, who were also members of a firm, cannot be amended so as to include the partnership, if relief against the firm was not originally prayed; and that the adjudication of a partnership as bankrupt cannot be made *nunc pro tunc* so as to take effect

from the date of the adjudication as such of its individual members as bankrupts; but a joint voluntary petition of two members of a firm was amended so as to specifically pray an adjudication of the partnership a bankrupt, when it originally tended to show that such relief was desired, *Re Mercur*, C. C. A., 122 Fed. 384, 10 Am. B. R. 505; *Remington on Bankruptcy*, § 69; *Re Mercur*, C. C. A., 122 Fed. 384, 10 Am. B. R. 505; *Re Meyers*, 97 Fed. 757, 3 Am. B. R. 260.

³ *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. ed. 514.

⁴ *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, C. C. A., 154 Fed. 662; *Re Sig. H. Rosenblatt & Co.*, C. C. A., 193 Fed. 638.

⁵ *Re Sears*, C. C. A., 117 Fed. 294; *Re Haff*, C. C. A., 136 Fed. 78.

⁶ *Re Mercur*, 116 Fed. 655, 657; affirmed in C. C. A., 122 Fed. 384, 388.

an amendment to the same.⁷ It has been held that even jurisdictional allegations may be inserted or corrected by amendment.⁸ It has been held: that a petition which does not show on its face that the petitioner's claims are five hundred dollars or more may be amended by joining other creditors whose claims are sufficient to make up the jurisdictional amount,⁹ and that the allegation that the creditors are less than twelve may be cured by amendment.¹⁰ Other acts of bankruptcy, which occurred within the first four months before the filing of the application for leave to amend, may be added to the petition;¹¹ provided that they were unknown to the petitioners when the petition was filed;¹² but not, it has been held, acts of bankruptcy which occurred more than four months before the amendment is sought;¹³ except in cases of the consolidation of two petitions;¹⁴ and, it has been held that, in the latter class of cases, an act of bankruptcy cannot be inserted in the first

⁷ *Chicago Motor Vehicle Co. v. American Oak Leather Co.*, C. C. A., 141 Fed. 518; *Re Hark*, 142 Fed. 279; *Re Crenshaw*, 156 Fed. 638; *Ryan v. Hendricks*, C. C. A., 166 Fed. 94; *Re Pangborn*, 185 Fed. 673.

⁸ *Re Plymouth Cordage Co.*, C. C. A., 135 Fed. 1000. Thus, it has been held that amendments may be allowed by inserting the allegations; that the alleged bankrupt is not a wage earner or farmer; *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. ed. 514; *Beach v. Macon Grocery Co.*, C. C. A., 120 Fed. 736; *Re Plymouth Cordage Co.*, C. C. A., 135 Fed. 1000; *Re First Nat. Bank of Belle Fourche*, C. C. A., 152 Fed. 64; *Re Marion Contract & Construction Co.*, 166 Fed. 618; see *Re Crenshaw*, 156 Fed. 638; or the business in which a respondent corporation is engaged, *Re First Nat. Bank of Belle Fourche*, C. C. A., 152 Fed. 64; *Re Broadway Sav. Trust Co.*, C. C. A., 152 Fed. 152; and, where a single creditor filed the petition, that all the creditors are less than twelve in number, *Re Ply-*

mouth Cordage Co., C. C. A., 135 Fed. 1000; *Re Mackey*, 110 Fed. 355; *Re Bellah*, 116 Fed. 69; *Re Plymouth Cordage Co.*, C. C. A., 135 Fed. 1000; *Re Haff*, C. C. A., 136 Fed. 78, 81. *Cf. Millan v. Exch. Bank*, C. C. A., 183 Fed. 753.

⁹ *First State Bank of Corwith, Iowa, v. Haswell*, C. C. A., 174 Fed. 209; *Millan v. Exchange Bank of Mannington*, C. C. A., 183 Fed. 753. *Contra, Re Stein*, 130 Fed. 377; *Re Plymouth Cordage Co.*, C. C. A., 135 Fed. 1000; criticised in *Remington on Bankruptcy*, § 269.

¹⁰ *Re Mackey*, 110 Fed. 355; *Re Bellah*, 116 Fed. 69; *Re Haff*, C. C. A., 136 Fed. 78, 81.

¹¹ *Re Mercur*, 95 Fed. 634; *White v. Bradley Timber Co.*, 116 Fed. 768; *Re Haff*, C. C. A., 136 Fed. 78.

¹² *Wilder v. Watts*, 138 Fed. 426.

¹³ *Re Haff*, C. C. A., 136 Fed. 78; *Re Pure Milk Co.*, 154 Fed. 682. *Contra, Hark v. C. M. Allen Co.*, C. C. A., 146 Fed. 665.

¹⁴ General Order VI; quoted *supra*.

petition by amendment,¹⁵ and that additional acts of bankruptcy cannot be added after the default of the bankrupt.¹⁶

A misnomer of a bankrupt may be corrected by an amendment.¹⁷ Names of creditors who were preferred, when originally unknown, may be added by amendment.¹⁸ The affidavit annexed to the petition may be amended by adding, to the jurat, the name of the place where the verification was taken.¹⁹ It has been held: that the requisite affidavit may be added by amendment.²⁰ Where the evidence admitted proves a different act of bankruptcy from that alleged, the petition may be amended to conform to the facts proved.²¹ It has been held that, in such a case, "the amendment should be deemed made."²² An amendment may be allowed after a new trial, to make the petition conform to the facts developed at the former trial.²³ It has been held that, when eighteen months have elapsed since the discharge of a bankrupt, he cannot have the proceedings opened in order to amend his schedules by including the name and residence of a creditor omitted from the same, who had no notice or knowledge of the proceedings, although there are no assets of the estate.²⁴ The court may refuse leave to amend when it is not clearly in furtherance of justice.²⁵ In general, an amendment takes effect as of the date of the filing of the original petition.²⁶ It is the frequent

¹⁵ *Re Sears*, C. C. A., 117 Fed. 294; criticised in *Remington on Bankruptcy*, § 298.

¹⁶ *Re Harris*, 155 Fed. 216.

¹⁷ *Gleason v. Smith, Perkins & Co.*, C. C. A., 145 Fed. 895.

¹⁸ *Re Hark*, 142 Fed. 279.

¹⁹ *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. ed. 514.

²⁰ *Re Vastbinder*, 126 Fed. 417.

²¹ *Re Miller*, 104 Fed. 764; *Chicago Motor Vehicle Co. v. Am. Oak Leather Co.*, C. C. A., 141 Fed. 518.

²² *Re Lange*, 97 Fed. 197.

²³ *Re Hark*, 142 Fed. 279; s. c., C. C. A., *Hark v. C. M. Allen Co.*, 146 Fed. 665.

²⁴ *Re Hawk*, C. C. A., 114 Fed. 916, where no notice of the appli-

cation was given to the creditor; *Re Spicer*, 145 Fed. 431.

²⁵ *Wilder v. Watts*, 138 Fed. 426; *Woolford v. Diamond State Steel Co.*, 138 Fed. 582. An application by a bankrupt, nearly a year after the adjudication, to amend his schedules so as to bring in an omitted creditor was refused. *Re Kittler*, 176 Fed. 655.

²⁶ *Re Shoesmith*, C. C. A., 135 Fed. 684; *Ryan v. Hendricks*, C. C. A., 166 Fed. 94; *Re Pangborn*, 185 Fed. 673. It was so held of amendments adding creditors to the petition. *First State Bank of Corwith*, *Iowa v. Haswell*, C. C. A., 174 Fed. 209; *Millan v. Exchange Bank of Mannington*, C. C. A., 183 Fed. 753.

practice to have the court direct that the amendments be made *nunc pro tunc*.²⁷

An application to amend a petition in bankruptcy will be denied where the petitioner fails to state a reason for the former omission of the matter which he wishes to add to his petition.²⁸ "It must be shown that the petitioners or their attorney had no knowledge of, and could not have ascertained with reasonable diligence, the facts sought to be added by the amendments at the time the original petition was filed, or that the facts were omitted by inadvertence, mistake or other reason which would excuse such omission."²⁹ But, in such a case, leave to renew the application may be allowed.³⁰

The bankrupt should be allowed a reasonable time within which to answer the amendment to the petition.³¹ A single day is insufficient.³²

§ 629. Process and notices to creditors. "Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then

Consequently, when the court thus corrected a misnomer of the alleged bankrupt in an involuntary proceeding, it was held that the proceedings took precedence of those on a voluntary petition, subsequently filed, and invalidated an adjudication upon the latter, made before the amendment and before service of process upon the bankrupt. *Gleason v. Smith, Perkins & Co.*, C. C. A., 145 Fed. 895.

²⁷ *Hark v. C. M. Allen Co.*, C. C. A., 146 Fed. 665. Leave to amend, *nunc pro tunc*, a petition for the adjudication of the members of a partnership as bankrupts, so as to include a prayer for the adjudication of the partnership also as a bankrupt *nunc pro tunc* as of the

date of the original petition was denied. *Re Mercur*, C. C. A., 122 Fed. 384. See *supra*, § 618. But, it was held otherwise where the original petition showed that the petitioners intended to have the firm also adjudicated a bankrupt. *Re Meyers*, 97 Fed. 757, 3 Am. B. R. 260.

²⁸ *White v. Bradley Timber Co.*, 116 Fed. 768; *Wilder v. Watts*, 138 Fed. 426; *Re Portner*, 149 Fed. 799; *Re Pure Milk Co.*, 154 Fed. 682.

²⁹ *White v. Bradley Timber Co.*, 116 Fed. 768.

³⁰ *Re Portner*, 149 Fed. 799.

³¹ *Lockman v. Lang*, C. C. A., 132 Fed. 1; *Wilder v. Watts*, 138 Fed. 426.

³² *Lockman v. Lang*, C. C. A., 132 Fed. 1.

notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two successive weeks, and the return shall be ten days after the last publication unless the judge shall for cause fix a longer time."¹ The manner of serving subpoenas in suits of equity both personally² and by publication³ has been described in a preceding chapter of this book. It has been held that, where service is made upon the alleged bankrupt without the district, the court acquires no jurisdiction over his person.⁴ The failure to serve the subpoena before the return day does not terminate the proceedings; but the court has the power to grant an alias subpoena.⁵ "Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices

§ 629. 130 St. at L. 544, 551, § 18; 32 St. at L. 797.

² *Supra*, §§ 163, 165.

³ *Supra*, § 166. A subpoena may thus be served when the bankrupt has been a resident of the district for the greater part of six months before the filing of the petition and cannot then be found therein. *Hills v. F. D. McKinniss Co.*, 188 Fed. 1012. Service by publication is void when the order does not designate a time for appearance and such order is not published, although there is a publication of the citation. *Sidney L. Bauman Diamond Co. v. Hart, C. C. A.*, 192 Fed. 498. Where service is made by leaving a copy of the petition and subpoena with an adult, who is a member of, or resident in, the bankrupt's family,

that is sufficient. *Re Norton*, 148 Fed. 301. Where the alleged bankrupt is a hotel keeper and usually resides there, it is sufficient service to leave the subpoena and petition with the clerk at the hotel. *Re Risteen*, 122 Fed. 732. In such cases, there is no need of publication. *Re Norton*, 148 Fed. 301. A foreign corporation may be served by service upon the State commissioner of corporations within the district, where he is duly appointed attorney to receive service for the corporation. *Re Magid Hope Silk Co.*, 110 Fed. 352.

⁴ *Re Appel*, 103 Fed. 931. But see § 611, *supra*.

⁵ *Re Stein, C. C. A.*, 105 Fed. 749; *Gleason v. Smith, Perkins & Co., C. C. A.*, 145 Fed. 895.

and orders in such case shall be published.”⁶ “All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.”⁷ “Formal service of the subpoena may be waived, by a proper and authorized acceptance of service being entered thereon by the alleged bankrupt; but in the case of corporations, actual service of the writ obviates all question upon the right of a corporate official to accept service of process in a case attacking the existence of the corporation. The return-day having been thus fixed, then the case must remain in the clerk’s office until the expiration of the ten days allowed to the bankrupt or any creditor to appear and contest the facts averred in the petition. A waiver on the part of the bankrupt of this period of time cannot deprive creditors of the right to appear in opposition to the petition, and until that time has elapsed it cannot be known whether a contest will or will not be made on behalf of creditors.”⁸ “a. Creditors shall have at least ten days’ notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waived notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days’ notice of all applications for the discharge of bankrupts. b. Notice to creditors of the first meeting shall be published at least once and may

⁶ 30 St. at L. 544, 554, § 28.

⁷ General Order III. For the proof requisite for an order of service by publication of notice to creditors, see *Re Dvorak*, 107 Fed. 76.

⁸ *Re L. Humbert Co.*, 100 Fed. 439, 440, per Shiras, J. It has been held that, when the bankrupt files

an answer upon the merits and takes the stand to prove facts, therein alleged, he waives all objections to the manner of service although a motion to dismiss the petition for a defect in service has previously been filed. *Re Smith*, 117 Fed. 961.

be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices shall be published as the court shall direct. c. All notices shall be given by the referee, unless otherwise ordered by the judge."⁹ "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition has been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in case of debtors against whom adjudication of bankruptcy shall be made."¹⁰

§ 630. Pleadings by the respondents in bankruptcy. In involuntary bankruptcy, "the bankrupt, or any creditor,¹ may appear and plead to the petition within five days after the return date, or within such further time as the court may allow."²

It has been held that the creditors of a voluntary bankrupt

⁹ 30 St. at L. 544, 561, § 58a, as amended 36 St. at L. 838. Where after a petition of involuntary bankruptcy was filed one of voluntary bankruptcy was presented it was held that notice of the latter should be given to the former petitioners before an adjudication. *Re Dwyer*, 112 Fed. 777.

¹⁰ General Order VIII. See *Re Murray*, 96 Fed. 600; *Re Russell*, 97 Fed. 32; *Re Altman*, 95 Fed. 263.

§ 630. ¹ For a case where the status of the respondent as a cred-

itor was held to be conceded, see *Johansen Bros. Shoe Co. v. Alles*, C. C. A., 197 Fed. 274. A receiver appointed by a State court and in possession of the property of a corporation may resist proceedings to have it adjudged a bankrupt. *Re Gold Run Min. & Tunnel Co.*, 200 Fed. 162.

² 30 St. at L. 544, 551, § 18; 32 St. at L. 797. In computing the time, the first day must be excluded and the last day included, *Day v. Beck & Gregg Hardware Co.*, C. C.

cannot file answers to his petition;³ nor dispute the insolvency.⁴ It has been held that an answer must follow the prescribed form, and that if it responds to multifarious matter in the petition or is unnecessarily defensive, it must be prepared in the official form and refiled as of the original date; the original answer, however, remaining on file.⁵ "All pleadings setting up matters of fact shall be verified under oath." "If it be

A., 114 Fed. 834; and the previous filing of a defective pleading does not cut off the right to file a proper pleading within the time. *Ibid.* It has been held that one day's time, when allowed by the court for the filing of an answer to an amended petition, was insufficient. *Lockman v. Lang*, C. C. A., 132 Fed. 1. The default of the bankrupt does not make the proceeding voluntary. *Mattoon Nat. Bank v. First Nat. Bank*, C. C. A., 102 Fed. 728.

³ *Re Jehu*, 94 Fed. 638; *Re Carleton*, 115 Fed. 246.

⁴ *Ibid.*; *supra*, § 619.

⁵ *Mather v. Coe*, 92 Fed. 333. *Contra, Re Paige*, 99 Fed. 538. *Cf. Bray v. Cobb*, 91 Fed. 102. The respondent may demur to the petition. *W. A. Gage & Co. v. Bell*, 124 Fed. 371. Judge Hammond said: that it was doubtful whether any answer could be filed which did not exactly follow the language of the prescribed form. Form No. VI; namely, "a brief and simple denial (1) that the defendant debtor has committed the act of bankruptcy, or (2) that he is insolvent, and (3) an averment that he should not be declared a bankrupt for any cause in said petition alleged," *W. A. Gage & Co. v. Bell*, 124 Fed. 371, 374. But lengthy answers are not unusual. *Ibid.* It has been said: that, when the bankrupt admits his insolvency, his willingness to be adjudged upon that ground may be

inferred, *Brinkley v. Smithwick*, 126 Fed. 686; and that, in such a case, his reservation of a right to move to dismiss the proceedings for irregularities and want of notice is too indefinite to be considered. *Ibid.* An allegation in an answer that the petitioners at the time of the commission of the alleged act of bankruptcy did not have provable claims which amounted, in excess of the value of securities held by them, to five hundred dollars, does not traverse an allegation in the petition, in accordance with the official form, that the petitioners have provable claims to that amount. *Re John A. Etheridge F. Co.*, 92 Fed. 329. Where the answer simply denied "that within four months next preceding the date of the filing of said petition . . . he transferred while insolvent a portion of his property . . . for the use of the Bank of Commerce & Trust Company," &c., it was held to be a negative pregnant and insufficient, but that a motion to strike it out was waived by the filing of a replication thereto. *Cummins Grocer Co. v. Talley*, C. C. A., 187 Fed. 507. It is no defense to a petition in involuntary bankruptcy that the petitioners had previously agreed to release the debtor upon payment of one-half of their claims, when they have not been paid, and one-half of their claims exceed the jurisdictional amount. *Simonson v. Sinsheimer*,

averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.”⁶

§ 631. Warrants of seizure. “A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which

C. C. A., 95 Fed. 948. Nor is the motive of the creditors material. *Re Simonson*, 92 Fed. 904. But see *Re Harper & Bros.*, 100 Fed. 266. A plea was held to be sufficient which set forth that, since the institution of the proceeding, two of the petitioners had colluded to compel the respondent to pay the claim of the third, and that that reduced the number of petitioners to less than was required to sustain the jurisdiction. *Cummins Grocer Co. v. Talley*, C. C. A., 187 Fed. 507. An

answer signed in the name of a corporation by its president is presumed to be filed by the authority of the corporation; and it has been held that none but the corporation, its stockholders and its creditors can claim that it was not authorized. *Re Columbia R. E. Co.*, 101 Fed. 965.

⁶ 30 St. at L. 544, 551, § 59: As to amendments to answers, see *Re Cleary*, 179 Fed. 990; *Re Harris*, 155 Fed. 216.

shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.”¹ “Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.”² Upon the receipt of the certificate of the clerk stating that the judge is absent, the referee may issue such a warrant.³ It has been said that such an application is a proceeding in bankruptcy and not a controversy in law or equity.⁴ The proceedings should be instituted by a petition,⁵ which should be a separate petition from that for the adjudication in bankruptcy.⁶ It must be supported by an affidavit containing satisfactory proof of the act of bankruptcy and the neglect and danger of deterioration of the property which it is sought to seize.⁷ It has been held that, in a suit in

§ 631. 130 St. at L. 544, § 69. Property claimed adversely, while in the possession of the bankrupt, may be thus seized, although he claims to act as agent or custodian of the adverse claimant. *Re Bender*, 106 Fed. 873; *Re Moody*, 131 Fed. 525. It has been held that property, which is in the actual possession of an adverse claimant, may thus be seized. *Re Knopf*, 144 Fed. 245. *Contra*, *Re Rockwood*, 91 Fed. 363; *Re Kelly*, 91 Fed. 504; *Beach v. Macon Grocery Co.*, C. C. A., 116 Fed. 143; *Re Master Spencer*, C. C. A., 203 Fed. 210.

² 30 St. at L. 544, § 3e.

³ *Re Knopf*, 144 Fed. 245, 246.

⁴ *Re Knopf*, 144 Fed. 245.

⁵ *Re Knopf*, 144 Fed. 245.

⁶ *Re Kelly*, 91 Fed. 504.

⁷ *Re Kelly*, 91 Fed. 504. It has been held that an application supported merely by the affidavit of the bankrupt, stating that he waived proof of these facts and waived the required bond and consented to the issue of the warrant, was insufficient. *Re Sarsar*, 120 Fed. 40. The bond protects only the respondents to the application. *Re Spalding*, C. C. A., 150 Fed. 120.

equity by a trustee in bankruptcy, the court may issue a writ of sequestration to prevent the removal of the property from the district where the case does not warrant the appointment of a receiver.⁸

§ 632. Arrest of bankrupt. "The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court, or a judge thereof, that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto."¹ "Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited from one district within which a District Court has jurisdiction to another."² This does not authorize the extradition of a bank-

If any person subsequently becomes respondent to the same and desires to be protected, he must move for an additional bond. *Re Spalding*, C. C. A., 150 Fed. 120. The costs, counsel fees and other damages covered under the bond are only those which are strictly incident to the seizure. *Selkregg v. Hamilton Bros.*, 144 Fed. 557. Counsel fees for resisting the petition for bankruptcy are not allowed. *Re Smith*, 113 Fed. 993. Where the property is not seized, but its removal is en-

joined, counsel fees are not allowed upon any bond given to secure such injunction. *Re Hines*, 144 Fed. 147; *supra*, § 236. Search of a third person's premises is only permitted as regards specific property charged to belong to the bankrupt. *Re Iron Clad Mfg. Co.*, 193 Fed. 781.

⁸ *Horskins v. Sanderson*, 132 Fed. 415.

§ 632. 130. St. at L. 544, 549, § 9.

² 30 St. at L. 544, 549, § 10a.

rupt, who removed from the district more than four months before the beginning of the proceedings in bankruptcy, nor the issue of a warrant to serve as a basis for such extradition.³ The warrant of arrest, authorized by these statutes, is analogous to the writ of *ne exeat*.⁴ It has been held that a writ⁵ or order,⁶ in the nature of a *ne exeat*, may also be issued. This is the better practice when there is danger of the bankrupt absconding with assets.⁷ It has been held that the warrant of arrest need not state that the bankrupt is to be brought before the court for examination.⁸ It should be issued upon a sworn petition setting forth the necessary facts.⁹

§ 633. Injunctions in aid of bankruptcy proceedings. The Bankruptcy Act authorizes courts of bankruptcy to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."¹ "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."² A court of bankruptcy has no power to enjoin a stranger to the proceeding who resides outside the jurisdiction and who is not served with process within the same.³ Under its ancillary jurisdiction, such an injunction can be obtained from the Court of Bankruptcy in the district where such stranger resides

³ *Re Hassenbusch*, C. C. A., 108 Fed. 35.

⁴ *Re Hassenbusch*, C. C. A., 108 Fed. 35, 38. This writ is described *supra*, §§ 326-328. See § 471.

⁵ *Re Cohen*, 136 Fed. 999.

⁶ *Re Lipke*, 98 Fed. 970.

⁷ *Re Lipke*, 98 Fed. 970, 971.

⁸ *Re Lipke*, 98 Fed. 970.

⁹ *Re Lipke*, 98 Fed. 970.

§ 633. 130 St. at L. 544, as amended 32 St. at L. 279, 34 St. at L. 267, 36 St. at L. 838.

² *Ibid.*, § 11, subd. a; *Re Mustin*, 165 Fed. 506. The denial of a stay by the State court does not prevent an injunction by the Court of Bankruptcy. *New River Coal Land Co. v. Ruffner Bros.*, C. C. A., 165 Fed. 831.

³ *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 311, 56 L. ed. 208, 215; *Re Isaac Harris Co.*, 173 Fed. 735.

or can be served.⁴ A Court of Bankruptcy has jurisdiction upon a summary application to issue an injunction in aid of its jurisdiction.⁵ In a single case, it was held that a Court of Bankruptcy might, before a petition in bankruptcy was filed, issue an injunction to preserve the *status quo* until the filing of such petition.⁶ It has been held that a State court cannot grant such an injunction.⁷ It seems that this doctrine does not prevent the issue of such an injunction in a suit where the State or Federal court has jurisdiction upon other grounds.⁸ Between the time of the filing of the petition and the adjudication in bankruptcy, the Court of Bankruptcy may enjoin all persons within its jurisdiction from committing any act that will interfere with the due administration of the estate.⁹

⁴ *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 311, 56 L. ed. 208, 215. Prior to the amendment of 1910 (36 St. at L. 838), it was held that a Court of Bankruptcy had no ancillary jurisdiction to issue an injunction in aid of bankruptcy proceedings in another district, except in a plenary suit, of which it otherwise had jurisdiction. *Re Williams*, 120 Fed. 38, 9 Am. B. R. 741; *Remington on Bankruptcy*, § 1812. Compare *Horskins v. Sanderson*, 132 Fed. 415, 13 Am. B. R. 101. But see *Re Peiser*, 115 Fed. 199, 7 Am. B. R. 690.

⁵ *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845; *Remington on Bankruptcy*, §§ 359, 1901; *Brandenburg on Bankruptcy*, § 683.

⁶ *Blake v. Francis-Valentine Co.*, 89 Fed. 691. But see *Re Ogles*, 93 Fed. 426. For the dissolution of an injunction for laches, see *Re Lederer*, 125 Fed. 96; *Re Latimer*, 141 Fed. 655. It has been said that whether a judgment against the bankrupt is discharged should be raised by pleading the discharge in a proceeding to enforce the same, rather than by a petition in the court of bank-

ruptcy for an injunction against the judgment creditor. *Hellman v. Goldstone*, C. C. A., 161 Fed. 913. Where it is necessary in order to enforce security not affected by the bankruptcy proceedings, the creditor will be allowed to proceed to judgment, although he may be enjoined from enforcing the same except against such security. *Re Mercedes Import Co.*, C. C. A., 166 Fed. 427; *Re Maaget*, 173 Fed. 232. The court refused to enjoin the enforcement of an interlocutory judgment directing a bankrupt to account for the infringement of a patent which had been entered prior to his adjudication, and refused to direct the receiver or trustee to appear or take any action in the same. *Am. Graphophone Co. v. Leeds & Catlin Co.*, 174 Fed. 158; *Re Leeds & Catlin Co.*, 175 Fed. 309.

⁷ *Victor v. Lewis*, 38 App. Div. (N. Y.) 316, 1 Am. B. R. 667; *Clothing Co. v. Hazle*, 126 Mich. 262, 6 Am. B. R. 265; *Ellis v. Hays Saddlery & Leather Co.*, 65 Kan. 174, 8 Am. B. R. 109.

⁸ *Remington on Bankruptcy*, § 917.

⁹ *Re Hornstein*, 122 Fed. 266, 10

Such an injunction may be issued against the bankrupt.¹⁰ The court may enjoin litigation in the State court by one who has applied to the Court of Bankruptcy for relief in connection therewith.¹¹ It has been held that an adverse claimant in

Am. B. R. 308; *Re Krinsky Bros.*, 112 Fed. 972, 7 Am. B. R. 535; *Beach v. Macon Grocery Co.*, C. C. A., 116 Fed. 143, 8 Am. B. R. 751; *Re Goldberg*, 117 Fed. 692, 9 Am. B. R. 156; *Re Weinger, Bergman & Co.*, 126 Fed. 875, 11 Am. B. R. 424; *Re Hines*, 144 Fed. 147, 16 Am. B. R. 538; *Remington on Bankruptcy*, § 359. Concerning injunctions against the prosecution of suits in the State courts it was said by Judge Hand, in a case in which the author was counsel: "To stay the suit could only be because of some distrust in the ability of the State court or its loyalty to the act of Congress. Undoubtedly the very existence of any Federal court does presuppose that State courts will not be free from local bias, but it is one thing to provide means to litigants for avoiding that bias and another to intervene for that reason in the very operation of a court already begun. Even the latter power does exist (*Re Hecox*, 164 Fed. 823; *Hooks v. Aldridge*, 145 Fed. 865; *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881), but its existence does not mean it ought always to be exercised, and in fact it ought to be very sparingly exercised, rather after the analogy of habeas corpus (*Ex parte Royall*, 117 U. S. 254, 29 L. ed. 872). Indeed, nothing more quickly makes contempt for law than to have judges each catching at jurisdiction, and nothing more quickly breeds confidence than if judges really trust in each other. It shows rather a martial than a judicial vigor to assert such a jurisdiction and, unless it be unavoidable, it ought

not to be used." *Re United Wireless Tel. Co.*, 196 Fed. 153. Since the court of bankruptcy has jurisdiction to marshal liens upon land within its possession and to sell the same free of encumbrances, it may, in aid thereof, enjoin the prosecution of suits in State courts for the foreclosure of liens brought within four months before the institution of the bankruptcy proceedings, *Re Dana*, C. C. A., 167 Fed. 529; but such an injunction should not extend to the State court or judge, unless in case of imperative necessity, the power to enjoin such court or judge even then being doubtful, *Ibid.* *Of Virginia I. C. & C. Co., v. Olcott*, C. C. A., 197 Fed. 730. For cases in which the court refused to enjoin sales by State receivers, see *Re Sterlingworth Ry. Supply Co.*, 165 Fed. 267; *Re Edward Ellsworth Co.*, 173 Fed. 699. The court refused an injunction against the conveyance by the bankrupt and his wife of real estate of which they were seized as tenants of the entity, since it had no jurisdiction over the wife and a conveyance by the bankrupt could not affect the title of the trustee. *Re Beihl*, 197 Fed. 870. A Court of Bankruptcy has enjoined replevin proceedings brought in a State court, at about the same hour of the day when the petition in bankruptcy was filed. *Re Weinger, Bergman & Co.*, 126 Fed. 875, 11 Am. B. R. 424.

¹⁰ *Re Hines*, 144 Fed. 147, 16 Am. B. R. 538; *Remington on Bankruptcy*, § 364.

¹¹ *Mitchell Storebuilding Co. v. Carroll*, C. C. A., 193 Fed. 616.

possession of the property may be enjoined from interfering with the *status quo* prior to the adjudication in bankruptcy.¹² In an extraordinary case, secured creditors may be enjoined from selling property pledged to them;¹³ but not in the absence of clear proof of fraud or oppression.¹⁴ The court will rarely enjoin: the foreclosure of a lien obtained by mortgage;¹⁵ the prosecution of a cause of action not dischargeable in bankruptcy;¹⁶ the enforcement of any lien obtained by judicial process more than four months before the institution of the bankruptcy proceedings,¹⁷ or covering exempt property;¹⁸ or a suit against the bankrupt and strangers to the proceedings.¹⁹ Injunctions will usually be granted against the enforcement of liens which, it is claimed, are vacated by the bankruptcy proceedings.²⁰ After the adjudication in bankruptcy, restraining orders may be issued, under circumstances similar to those which would authorize the issue of an injunction in proceedings prior to such adjudication, and also in aid of the collection and sale of the assets.²¹ It has been held that injunctions may thus

¹² *Re Currier*, Referee Hotchkiss, 5 Am. B. R. 639; *Remington on Bankruptcy*, § 365. See *Re Hornstein*, 122 Fed. 266.

¹³ *Re Mertens*, C. C. A., 144 Fed. 818, 15 Am. B. R. 362, 134 Fed. 101, 14 Am. B. R. 226, 231; *Remington on Bankruptcy*, § 365; *John Matthews, Inc. v. Knickerbocker Tr. Co.*, C. C. A., 192 Fed. 557.

¹⁴ *Hiscock v. Varnick Bank*, 206 U. S. 28, 51 L. ed. 945, 18 Am. B. R. 9; s. c., as *Re Mertens*, C. C. A., 144 Fed. 818, 15 Am. B. R. 362, 134 Fed. 101, 14 Am. B. R. 226, 231; *Re Mayer*, C. C. A., 157 Fed. 836; *Remington on Bankruptcy*, §§ 365, 765, 1913; *Re Ironclad Mfg. Co.*, C. C. A., 192 Fed. 318.

¹⁵ *Re Lattimer*, 174 Fed. 824; *Re Rohrer*, 177 Fed. 381.

¹⁶ *Re Monroe*, 195 Fed. 817.

¹⁷ *Re Shinn*, 185 Fed. 990; *Re Arden*, 188 Fed. 475. See *New River Fed. Prac.* Vol. II.—132.

Coal Land Co. v. Ruffner Bros., C. C. A., 165 Fed. 881.

¹⁸ *Re Driggs*, 171 Fed. 897; *Re Sims*, 176 Fed. 645; wages previously earned. In the latter case, an injunction was granted against the collection by the judgment creditor of wages earned subsequent to the proceeding. See *Re Monroe*, 195 Fed. 817.

¹⁹ *Re Bluestone Bros.*, 174 Fed. 53; *Re United Wireless Tel. Co.*, 196 Fed. 153, a stockholders' suit against the bankrupt corporation and its directors, in which the writer was counsel.

²⁰ *Re Hornstein*, 122 Fed. 266, 10 Am. B. R. 308, a judgment within four months; *Re Donnelly*, 188 Fed. 1001, a preferential mortgage; *Re Ransford*, C. C. A., 194 Fed. 658.

²¹ *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845; *Re Pittel-*

be issued against adverse claimants, forbidding them from transferring property in their possession, in order to preserve the *status quo* until proper proceedings or applications can be instituted in the appropriate tribunals, although the Court of Bankruptcy might not itself have jurisdiction over such proceedings.²² The provision of the Revised Statutes forbidding injunctions to stay proceedings in a court of a State expressly excepts "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."²³ A District Court may enjoin the prosecution of an action of replevin,²⁴ or sequestration,²⁵ instituted after the adjudication in bankruptcy and the appointment of a referee; and an action of replevin before the adjudication to recover property in the possession of a receiver in bankruptcy.²⁶ It has enjoined interference with the property of the alleged bankrupt by himself;²⁷ by his assignee in insolvency;²⁸ by the vendee of his assignee in insolvency, who had bought after the adjudication in bankruptcy;²⁹ by the vendee of his assignee in insolvency, who had bought under suspicious circumstances within four months before the petition in bankruptcy was filed, and who had thereafter obtained a writ of sequestration from a State court;³⁰ by a State sheriff, who had made a levy within four months before the filing of the petition;³¹ by a receiver appointed by

kow, 92 Fed. 901, 1 Am. B. R. 472; *Re Kimball*, 97 Fed. 29, 3 Am. B. R. 161; *Bear v. Chase*, C. C. A., 99 Fed. 920, 3 Am. B. R. 746; *Re Russell & Birkett*, 101 Fed. 248, 3 Am. B. R. 658; *Re Emslie*, C. C. A., 102 Fed. 292, 4 Am. B. R. 126; *Remington on Bankruptcy*, § 1901.

²² *Re Jackson*, 94 Fed. 797, 2 Am. B. R. 501; *Re Smith*, 113 Fed. 993, 8 Am. B. R. 55; *Re Miller*, 118 Fed. 360, 9 Am. B. R. 274; *Re Jersey Island Packing Co.*, C. C. A., 2 L.R.A. (N.S.) 560, 138 Fed. 625, 14 Am. B. R. 689; *Re Norris*, 177 Fed. 598. *Remington on Bankruptcy*, § 1905. *Contra, Re Ward*, 5 Am. B. R. 215.

²³ U. S. R. S., § 720. See *supra*, §§ 211, 268, 270.

²⁴ *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183.

²⁵ *Re Whitener*, C. C. A., 105 Fed. 180.

²⁶ *Murphy v. John Hofman Co.*, 211 U. S. 562, 53 L. ed. 327.

²⁷ *So. L. & Tr. Co. v. Benbow*, 96 Fed. 514.

²⁸ *Re Sievers*, 91 Fed. 366; *Davis v. Bohle*, C. C. A., 92 Fed. 325; *Re Gutwillig*, C. C. A., 92 Fed. 337; *Rumsey & Sikemier Co. v. Novelty & Mach. Mfg. Co.*, 99 Fed. 699.

²⁹ *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845.

³⁰ *Re Whitener*, C. C. A., 105 Fed. 180.

³¹ *Clarke v. Larremore*, 188 U. S. 486, 47 L. ed. 555, 3 Sup. Ct. 363;

a State court in proceedings supplementary to execution, several years before the institution of the bankruptcy proceedings, but who had not previously taken possession;³² by a chattel mortgagee, who had taken possession before the bankruptcy proceedings;³³ but not by municipal officers engaged in collecting taxes.³⁴ Injunctions have also been granted against the prosecution in a State court of summary proceedings to oust a tenant in possession,³⁵ or a suit of ejectment by a landlord;³⁶ of proceedings supplementary to execution by a creditor;³⁷ and of an action of trover against a trustee for selling property in obedience to the order of the court of Bankruptcy.³⁸

affirming *Re Kenney*, C. C. A., 105 Fed. 897; *Re Michel*, 6 Fed. 706; *Re Gutwillig*, 90 Fed. 481; *Re Vastbinder*, 132 Fed. 718. *Contra*, *Re Easley*, 93 Fed. 419. It was held, however, that attaching creditors and a receiver appointed at their instance by State court should not be enjoined before they had been served with process or voluntarily appeared. *Re Ogles*, 93 Fed. 426. And see *Tennessee Producer Marble Co. v. Grant*, C. C. A., 135 Fed. 322.

³² *So. L. & Tr. Co. v. Benbow*, 96 Fed. 514.

³³ *Re Nathan*, 92 Fed. 590. It was held otherwise, when the chattel mortgagee had taken possession before the filing of the petition in bankruptcy, and thereafter brought a foreclosure suit against the bankrupt and his trustee in bankruptcy in a State court. *Heath v. Shaffer*, 93 Fed. 647. See, also, *Re Rockwood*, 91 Fed. 363. Where a mortgagee of real property had obtained a judgment of foreclosure and sale in a State court before the institution of the proceedings in bankruptcy, and it appeared that there was no surplus, an injunction was refused. *Re Holloway*, 93 Fed. 638.

³⁴ *Re Duryee*, 2 Fed. 68.

³⁵ *Re Schwartzman*, 167 Fed. 399; *Re Kimmel*, 183 Fed. 665.

³⁶ *Re Chambers, Calder & Co.*, 98 Fed. 865.

³⁷ *Re Kletchka*, 92 Fed. 901; *Re William E. De Lany & Co.*, 124 Fed. 280. But see *Re Monroe*, 195 Fed. 817. But the continuance of such proceedings so far as they relate to exempt property has been allowed. *Re Driggs*, 171 Fed. 897; *Re Sims*, 176 Fed. 645. In *Re Van Buren*, 164 Fed. 883, such proceedings against a bankrupt's salary were enjoined, but the court impounded the percentage to which a creditor would otherwise have been entitled until the right to a discharge had been determined.

³⁸ *Re Mertens*, 131 Fed. 507. A Court of Bankruptcy has jurisdiction: to determine whether a debt is of such a character as is released by a discharge in bankruptcy; and to grant an injunction against a prosecution in a State court pending bankruptcy proceedings to collect such a debt; and to enjoin the execution of process issued before or after judgment in such a suit, *Knott v. Putnam*, 107 Fed. 907, and of contempt proceedings to enforce a judgment that would be nullified by a discharge in bankruptcy. *Re Adler*,

A Court of Bankruptcy cannot enjoin a sale under a judgment of a State court, entered more than four months before the adjudication in bankruptcy, where the execution was levied before such adjudication.³⁹ It has been held that a Court of Bankruptcy cannot enjoin, even in a plenary suit, an action by a stranger to the proceedings against the marshal for a seizure under a warrant of a Court of Bankruptcy, when the plaintiff at law files an answer disclaiming any interest in the goods held by the trustee and alleging an election to rely upon his remedy in the State court.⁴⁰ It has been held: that an action of replevin, instituted before the filing of the petition, cannot be enjoined;⁴¹ that the plaintiff cannot be obliged to try his title before the referee in bankruptcy;⁴² and that an action of replevin begun while the goods are in the possession of the bankrupt, after the filing of the petition, but before adjudication, cannot be enjoined⁴³ when no receiver has been appointed.⁴⁴ It has been held: that an action for damages against a receiver individually should not be enjoined, although it is founded upon acts committed by him in his official capacity;⁴⁵ that the Court of Bankruptcy will not enjoin an action brought

C. C. A., 144 Fed. 659. The determination of the State court upon the question is not conclusive; *Knott v. Putnam*, 107 Fed. 907, and even if the District Court errs in granting such an injunction, its order is not void. It must be respected, and will be enforced until it is reversed or set aside. *Wagner v. U. S.*, C. C. A., 104 Fed. 133. Creditors of an insolvent New Jersey corporation, who claim to have causes of action against certain stockholders by virtue of Laws N. J. 1896, c. 185, §§ 21, 48, 49, which, if the insolvency had not intervened, could only have been enforced by a creditors' bill after a judgment at law had been obtained against the corporation, execution issued, and returned unsatisfied, ought not to be restrained from prosecuting their claims against the corporation to

judgment after proceedings in bankruptcy begun, but before adjudication, it being uncertain whether the trustee in bankruptcy, when appointed, could enforce the liability of the stockholders until the creditors had reduced their claims to judgments; but proceedings on the judgments will be enjoined, and only one proceeding allowed for the benefit of all, with the trustee a party thereto. *Remington Automobile & Motor Co.*, 119 Fed. 441.

³⁹ *Re Shoemaker*, 112 Fed. 648.

⁴⁰ *McLean v. Mayo*, 113 Fed. 106.

⁴¹ *Re Neely*, C. C. A., 113 Fed. 210.

⁴² *Ibid.* See *Re Rudnick & Co.*, 158 Fed. 223.

⁴³ *Re Wells*, 114 Fed. 222.

⁴⁴ *Re Briskman*, 132 Fed. 201.

⁴⁵ *Re Kalb & Berger Mfg. Co.*, C. C. A., 165 Fed. 895.

against its receivers, without its permission, for an act or transaction of his in carrying on the business connected with the property in charge;⁴⁶ but that, when the receiver does not carry on any business connected with the property in his charge, an action against him, in his official capacity, for an act done in connection with the same should be enjoined;⁴⁷ and that such is an act which relates solely to the care and preservation of the property by an arrangement for the storage of machinery of the bankrupt's estate.⁴⁸

The referee may issue such an injunction or restraining order in ordinary cases;⁴⁹ but he cannot enjoin the proceedings of a court or of an officer thereof.⁵⁰ It has been intimated that a referee cannot enjoin persons from proclaiming their adverse claims to bidders at a sale under the orders of a Court of Bankruptcy, or from threatening proceedings against such purchaser.⁵¹ Such an injunction should be prayed in a petition filed in the proceedings in bankruptcy, which, after adjudication, is usually filed with the referee, except in cases where a court or an officer thereof is to be restrained. Before adjudication, it should be filed with the clerk of the Court of Bankruptcy.⁵²

It has been held that, if the petition is properly entitled, it need contain no allegations to show that the proceedings in bankruptcy are pending within the district.⁵³ It should be verified; but the verification may be made by an attorney, where the papers show that the residence of the petitioners is distant and state the reason for the attorney so verifying the same.⁵⁴

⁴⁶ *Re Kelly Dry Goods Co*, 102 Fed. 747; *Re Kanter & Cohen*, 121 Fed. 984, 58 C. C. A. 260; *Re Smith*, 121 Fed. 1014; Act of March 3, 1887, c. 373, § 2, 24 St. at L. 554; *supra*, § 314.

⁴⁷ *Re Kalb & Berger Mfg. Co.*, C. C. A., 165 Fed. 895.

⁴⁸ *Ibid.*

⁴⁹ *Re Booth*, 96 Fed. 943, 2 Am. B. R. 770; *Re Adams*, 134 Fed. 142, 14 Am. B. R. 23; *Remington on Bankruptcy*, § 207. But see *Re Benjamin*, 140 Fed. 320.

⁵⁰ General Order XII; *Re Steuer*, 104 Fed. 976, 5 Am. B. R. 209; *Re Siebert*, 133 Fed. 781, 13 Am. B. R. 348.

⁵¹ *Re Rochford*, C. C. A., 124 Fed. 182, 10 Am. B. R. 608.

⁵² *Remington on Bankruptcy*, § 1919.

⁵³ *Re Goldberg*, 117 Fed. 692, 9 Am. B. R. 156.

⁵⁴ *Re Goldberg*, 117 Fed. 692, 9 Am. B. R. 156.

Under ordinary circumstances, notice of the filing of the petition and of the application should be given to the parties against whom the injunction is sought;⁵⁵ but to avoid irreparable injury, the injunction may be issued without notice.⁵⁶

§ 634. Receivers in bankruptcy. A Court of Bankruptcy has power to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified," and to "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for said services, but not at a greater rate than in this Act allowed trustees for similar services."¹ "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."² Receivers in Bankruptcy are usually appointed by the court through a judge thereof.

⁵⁵ *Re Steuer*, 104 Fed. 976, 5 Am. B. R. 209; *Beach v. Macon Grocery Co.*, C. C. A., 116 Fed. 143, 8 Am. B. R. 751.

⁵⁶ *Re Steuer*, 104 Fed. 976, 5 Am.

B. R. 209; *Beach v. Macon Grocery* 12 Am. B. R. 626; *Remington on Bankruptcy*, § 1921.

§ 634. 130 St. at L. 544, 545. 230 St. at L. 544, § 3e.

The referee may appoint the receiver after the general order of reference to him has been made,³ and also upon the receipt of the certificate of the clerk that the judge is absent or unable to act.⁴ The appointment of a receiver is an extraordinary remedy, and it was the intention of the statute that it should be rarely made.⁵ Ordinarily, notice of the appointment should be given to the bankrupt⁶ and to a receiver of his property who has been appointed by the State court.⁷ In an extraordinary case, the appointment may be made without notice to the bankrupt.⁸ Notice to the creditors is not necessary.⁹ Where property is in the custody of a receiver appointed by a State court, the court of bankruptcy should not, before an adjudication, appoint a receiver of the same.¹⁰ Where the property is in the custody of an assignee appointed in insolvency proceedings under a State statute, no receiver should be appointed over the same, except under extraordinary circumstances.¹¹ After an adjudication of bankruptcy, it has been held that a receiver appointed by the State court may be ordered to deliver possession to a receiver in bankruptcy.¹² It has been held that

³ *Re Floerken*, 107 Fed. 241. The courts should not appoint receivers who are selected by the alleged bankrupt; and if named at his instance, upon the discovery of that fact, they should be removed; but, it has been held that that is no ground for the dismissal of the petition. *Birmingham Coal & Iron Co. v. Southern Steel Co.*, 160 Fed. 212.

⁴ *Re Kelly Dry Goods Co.*, 102 Fed. 747.

⁵ *Re Rosenthal*, 144 Fed. 548; *T. S. Faulk & Co. v. Steiner, Lobman & Frank*, C. C. A., 165 Fed. 861. After adjudication, the necessity for the appointment of a receiver is more easily demonstrated. *Re Hudleston*, 167 Fed. 428.

⁶ *T. S. Faulk & Co. v. Steiner, Lobman & Frank*, C. C. A., 165 Fed. 861, 866. Where all the parties in interest are before the court and the case is a proper one for a receivership, an *ex parte* order appointing a

receiver will not be vacated. *Re Standard Cordage Co.*, 184 Fed. 166. See § 317, *supra*.

⁷ *Sidney L. Bauman Diamond Co. v. Hart*, C. C. A., 192 Fed. 498.

⁸ *Re Francis*, 136 Fed. 912; affirmed as *Latimer v. McNeal*, C. C. A., 142 Fed. 451. See *supra*, § 315.

⁹ *Re Abrahamson & Bretstein*, 1 Am. B. R. 44, Referee Moss, New York; *Remington on Bankruptcy*, § 381.

¹⁰ *Re Spalding*, (C. C. A. Second Circuit) May, 1905, reported in *Re Oakland Lumber Co.*, C. C. A., 174 Fed. 634, 637; *Re Desrochers*, 183 Fed. 991; *Re Standard Cordage Co.*, 184 Fed. 156. See §§ 52, 55, 59, *supra*.

¹¹ *Re Rosenthal*, 144 Fed. 548, 549; *Re Oakland Lumber Co.*, C. C. A., 174 Fed. 634; *Re Wentworth Lunch Co.*, C. C. A., 191 Fed. 821.

¹² *Re J. W. Zeigler Co.*, 189 Fed. 259. In that case, the court refused

a referee has no power to appoint a receiver without a finding as to its necessity.¹³ The petition for the appointment must show such necessity.¹⁴ Facts which show the necessity must be therein stated,¹⁵ and the petition must be sworn to.¹⁶ An affidavit merely as to belief was, in one case, held to be insufficient.¹⁷ The consent of the bankrupt to the appointment of a receiver is not sufficient.¹⁸ The receiver's rights date from the time of the appointment.¹⁹ It is customary to require a bond of the receiver.²⁰ A receiver in bankruptcy is a mere custodian and has no title to the property of the bankrupt.²¹ Such a receiver cannot sue to recover a preference;²² nor to set aside a fraudulent transfer of the bankrupt's property;²³ nor can he institute proceedings to take property held adversely by a stranger to the proceeding.²⁴ It has been said, however, "that

to punish the State receiver for refusal to deliver possession of the property to the receiver in bankruptcy, when he acted under the advice of counsel. See *Re Hecox*, C. C. A., 164 Fed. 823.

¹³ *Re Rosenthal*, 144 Fed. 548.

¹⁴ *Re Rosenthal*, 144 Fed. 548; *T. S. Faulk & Co. v. Steiner*, *Lobman & Frank*, C. C. A., 165 Fed. 861. A showing of an application for a voluntary dissolution of the corporation with the division of its assets among the creditors and stockholders and that the plant and factory had been closed to save cost and running expenses when the company was still selling its products in the customary way, was held to be insufficient. *Re Standard Cordage Co.*, 184 Fed. 156.

¹⁵ *Re Rosenthal*, 144 Fed. 548; *T. S. Faulk & Co. v. Steiner*, *Lobman & Frank*, C. C. A., 165 Fed. 861.

¹⁶ *Re Rosenthal*, 144 Fed. 548. *T. S. Faulk & Co. v. Steiner*, *Lobman & Frank*, C. C. A., 165 Fed. 861, 867.

¹⁷ *Re Rosenthal*, 144 Fed. 548.

¹⁸ *T. S. Faulk & Co. v. Steiner*,

Lobman & Frank, C. C. A., 165 Fed. 861.

¹⁹ *Re Erie Lumber Co.*, 150 Fed. 817; *Re Alton Mfg. Co.*, 158 Fed. 367.

²⁰ *Re Alton Mfg. Co.*, 158 Fed. 367.

²¹ *Re Kelly Dry Goods Co.*, 102 Fed. 747; *Boonville Nat. Bank v. Blakey*, 107 Fed. 891, 47 C. C. A. 43; *Re J. C. Winship Co.*, C. C. A., 120 Fed. 93; *Re Kolin*, C. C. A., 134 Fed. 557; *Re Benedict*, 140 Fed. 55.

²² *Boonville Nat. Bank v. Blakey*, 107 Fed. 891, 47 C. C. A. 43; *Frost v. Latham & Co.*, 181 Fed. 866.

²³ *Guaranty Title & Trust Co. v. Pearlman*, 144 Fed. 550. But see *Re Fixen & Co.*, 96 Fed. 748. It has been held that he may, in defensive proceedings, attack the validity of a chattel mortgage, because of a failure to file the same as required by the State statute. *Re Schmidt*, C. C. A., 181 Fed. 73, 76. But see *Re Dempster*, C. C. A., 172 Fed. 353, 357.

²⁴ *Re Kolin*, C. C. A., 134 Fed. 557; *Beach v. Macon Grocery Co.*, C. C. A., 116 Fed. 143. But see *Re Dempster*, C. C. A., 172 Fed. 353.

it is clearly within the jurisdiction of the court appointing a receiver in bankruptcy to authorize him to institute necessary actions for the recovery of the bankrupt's property."²⁵ In one case, he has been authorized to take possession of property held adversely pending a plenary suit to be subsequently instituted by the creditors or trustee to recover the same.²⁶ The court will grant an application by him for the surrender of property not held adversely in cases similar to those in which such relief is given to the trustee.²⁷ Relief of this character will not be granted to a receiver in a case where a trustee would not be entitled to the same.²⁸ A dispute between a receiver in bankruptcy and a stranger to the proceeding as to whether a contract was made between them for the purchase by the latter of property of the estate, is a "controversy arising in bankruptcy proceedings," and an order made therein is reviewable by appeal.²⁹ Where a receiver had deposited money in a designated depository, it was held that the court of bankruptcy had no summary jurisdiction to compel repayment of the same.³⁰ The receiver may be authorized to borrow money for the purposes of any business which he has been directed to continue.³¹ Where the court has authorized him to borrow a

²⁵ *Re Fixen & Co.*, 96 Fed. 748, 754; per Wellborn, J.

²⁶ *Re Haupt Bros.*, 153 Fed. 239. See *Dokken v. Page*, C. C. A., 147 Fed. 438. See *Re Schoenfield*, 190 Fed. 53.

²⁷ *Re Muncie Pulp Co.*, C. C. A., 139 Fed. 546; *Re Rosenblatt*, 143 Fed. 663; *infra*, § 635. It was held that an alleged bankrupt could not, by the mere claim that they would tend to incriminate him without averring any facts tending to support the same, prevent an order for the delivery of his account books to a receiver appointed to carry on his business. *Re Rosenblatt*, 143 Fed. 663. Contempt proceedings for refusal to surrender property to an agent of the receiver will ordinarily be dismissed, unless the demand is made by a person who presents writ-

ten evidence of his authority. *Skubinsky v. Bodek*, C. C. A., 172 Fed. 340.

²⁸ *Re Greenberg*, C. C. A., 175 Fed. 1020.

²⁹ *Re J. Jungmann Inc.*, C. C. A., 186 Fed. 302. *Cf. Re C. M. Burkhalter & Co.*, 179 Fed. 403. But see *Re Vogt*, 159 Fed. 317. Where a receiver took possession of goods, which it was claimed that the bankrupt had transferred to a third person, it was held that the Court of Bankruptcy might, by consent, take jurisdiction of an intervention by the claimant and determine his title to the goods. *Dokken v. Page*, C. C. A., 147 Fed. 438.

³⁰ *Re Bologh*, 185 Fed. 825.

³¹ *Re C. M. Burkhalter & Co.*, 182 Fed. 353. See §§ 307, 309, *supra*.

specific sum and he borrows more, it has been said that creditors for the excess are not entitled to any preference and are bound to show that the proceeds of the loan were used for the purposes of the receivership.³² It has been held that a receiver is not an officer who may have a summary examination of the bankrupt or any other person concerning the former's acts, conduct or property.³³ In the southern district of New York, such examinations have frequently been granted.³⁴ It has been said that receivers in bankruptcy, prior to an adjudication, cannot adjust claims nor properly defend suits upon the same;³⁵ but, it has been held that a receiver may reject a lease.³⁶ By permission of the court he may adjust a controversy concerning the title to property claimed to belong to the estate.³⁷ Where property is wrongfully surrendered by the receiver, the court of bankruptcy has summary jurisdiction to compel the return of the same.³⁸ A receiver in bankruptcy may be sued in a State court for trover, without the permission of the court of bankruptcy;³⁹ but, without such permission, an action of replevin cannot be maintained against him.⁴⁰ A suit against the receiver or bankrupt upon a claim provable in bankruptcy

³² *Re C. M. Burkhalter & Co.*, 182 Fed. 353. Where a receiver in bankruptcy, in order to prevent the abandonment of work, paid employees of a sub-contractor with the bankrupt their wages less the amounts they owed another for supplies, which it was the custom of the sub-contractor to withhold and pay to the supply man; it was held that he did not thereby incur any liability to the latter for the amounts due him. *Re Ferguson Contracting Co.*, C. C. A., 187 Fed. 940.

³³ *Skubinsky v. Bodek*, (C. C. A. Third Circuit) 172 Fed. 332. *Contra*, *Re Fixen & Co.*, 96 Fed. 748.

³⁴ *U. S. v. Liberman*, 176 Fed. 161.

³⁵ *Re Heim Milk Product Co.*, 183 Fed. 787.

³⁶ *Plaut v. Gorham Mfg. Co.*, 174 Fed. 852. In an action by the clerk

of the court upon the bond running to him as payee, for the benefit of an estate in bankruptcy, it is immaterial whether the recovery is for the benefit of a receiver, as alleged in the declaration, or of some other person representing the estate. *American Bonding Co. v. Allison*, C. C. A., 182 Fed. 810.

³⁷ *Ommen v. Talcott*, 175 Fed. 261.

³⁸ *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778; *Re Schermerhorn*, C. C. A., 145 Fed. 341; *Re McMahon*, C. C. A., 147 Fed. 684; *infra*, § 635.

³⁹ *Re Kanter & Cohen*, C. C. A., 121 Fed. 984; *Re Spitzer*, C. C. A., 130 Fed. 879; *Re Spechler Bros.*, 185 Fed. 311; 25 St. at L. p. 436; *supra* § 314.

⁴⁰ *Re Russell and Birkett*, 104 Fed. 248.

will ordinarily not be authorized,⁴¹ but, it has been held, that the owner of a chattel mortgage should be allowed the right to foreclose the same, although the property must remain in the possession of the receiver pending the litigation.⁴² And where a receiver had not been made a party to a suit against the bankrupt for an infringement of a patent, he was not required to furnish an account, which had been decreed prior to his appointment, although it was said that he might be required by subpoena to produce the books before the master.⁴³ A receiver may be ordered to sell perishable assets.⁴⁴ Such an order may be made by the referee upon the certificate by the clerk of the judge's absence or disability.⁴⁵ A receiver cannot sell property which is not perishable or rapidly depreciating in value, unless he is authorized to conduct the business of the bankrupt.⁴⁶ The receiver may be authorized by the court, at least after adjudication, to consent to a sale of the property held by an adverse claimant with a stipulation concerning the ultimate determination of their respective claims to the proceeds of the same.⁴⁷ The Court of Bankruptcy may, by summary proceedings, compel the completion by the purchaser of the contract of sale.⁴⁸ Upon the determination of the claim of a stranger to a certificate of stock in the possession of the receiver, the court ordered the latter to examine the books of the bankrupt and see whether there were any preferred customers, to whom he was obligated to deliver certificates of the same stock, and that they and no other creditors should be given an opportunity

⁴¹ *Re Heim Milk Product Co.*, 183 Fed. 787.

⁴² *Re Victor Color & Varnish Co.*, 175 Fed. 1023.

⁴³ *Am. Graphophone Co. v. Leeds & Catlin Co.*, 174 Fed. 158.

⁴⁴ General Order XVIII.

⁴⁵ *Re Kelly Dry Goods Co.*, 102 Fed. 747.

⁴⁶ *Re Becker*, 98 Fed. 407; *Re Kelly Dry Goods Co.*, 102 Fed. 747, 749; *Re Desrochers*, 183 Fed. 991. The sale of a transfer after a liquor license has been authorized. *Re Becker*, 98 Fed. 407. It was held

that an order authorizing the receiver of a bankrupt to sell perishable property, consisting of produce in storage, "at public or private sale within his discretion, at current rates without notice," was broad enough to justify a sale in bulk of all of the property in the hands of a warehouse company after it had been offered in car load lots. *Smithson v. Emmerson*, C. C. A., 166 Fed. 96.

⁴⁷ *Ommen v. Talcott*, 175 Fed. 261.

⁴⁸ *Mason v. Wolkowich*, C. C. A., 10 L.R.A.(N.S.) 765, 150 Fed. 699.

to be heard upon the application.⁴⁹ It has been said that a temporary receiver of a bankrupt is a mere custodian with authority only to inventory and receive and retain the assets, and that he cannot employ an expert accountant to examine the books, nor employ an attorney, without special permission of the court.⁵⁰ It has been held that the attorney for one of the petitioners in a proceeding in involuntary bankruptcy should not be employed as attorney for the receiver, except under special circumstances.⁵¹ Ordinarily, the court will not interfere with the discretion of the receiver in the selection of his attorney.⁵² The receiver may be authorized to carry on the business of the bankrupt for a limited period;⁵³ but, it has been held, that the expense of continuing the business may not be paid out of the fund in preference to a lienor thereupon,⁵⁴ unless the latter consented to the continuance of the business.⁵⁵

Receivers may be authorized to borrow money and to issue receivers' certificates.⁵⁶ It has been held that such permission should not be granted by a referee.⁵⁷ Under the amendment of 1910, he might apply to the court of another district for ancillary relief.⁵⁸ Before that statute, it was held that a receiver in bankruptcy had no power outside of the jurisdiction which ap-

⁴⁹ *Re A. O. Brown & Co.*, 171 Fed. 254.

⁵⁰ *Re Leonard*, 177 Fed. 503.

⁵¹ *Re Strobel*, 160 Fed. 916; *Re T. E. Hill Co.*, C. C. A., 159 Fed. 73, 77.

⁵² *Re Champion Wagon Co.*, 193 Fed. 1004. It was held: that the sale of a lease by a receiver without the direction of the court conveyed no title; and that the defect could not be cured by a motion to confirm the sale and the equity of the adverse claimants to the property sold. *Re Fulton*, 153 Fed. 664.

⁵³ *Re Richards*, 127 Fed. 772. It has been held that such an order is administrative, and to a large extent discretionary, and should not be collaterally attacked. *Re Isaacson*, C. C. A., 174 Fed. 406.

⁵⁴ *Re Bourlier Cornice & Roof-*

ing Co., 133 Fed. 958; *Re Clark Coal & Coke Co.*, 173 Fed. 658. For a case where a receiver was charged with part of the loss, see *Re Consumers' Coffee Co.*, 162 Fed. 786.

⁵⁵ *Re Erie Lumber Co.*, 150 Fed. 817. It was held that a lienor was not estopped where it had no notice of the order, although its attorney acted for the receiver and trustee in procuring the same, and its officers had knowledge that the business was being continued, but not that it was being continued at a loss. *Re Clark Coal & Coke Co.*, 173 Fed. 658.

⁵⁶ *Edinburgh Coal Co. v. Humphreys*, C. C. A., 134 Fed. 839; *Re Erie Lumber Co.*, 150 Fed. 817.

⁵⁷ *Bray v. Johnson*, C. C. A., 166 Fed. 57.

⁵⁸ 36 St. at L. 838. See § 612, *supra*.

pointed him.⁵⁹ Whether without an ancillary appointment he can sue in another district is a doubtful question. It has been held that he cannot do so before adjudication.⁶⁰ It has been held: that exceptions to a receiver's account should be verified; but that such an omission may be cured by amendment.⁶¹ An order passing the accounts of receivers, in which they have credited themselves with property surrendered to third persons, who claimed the same, is not an adjudication which will prevent the trustee from recovering the property from such persons.⁶² It has been said, that upon the election or appointment of a trustee, the receiver may properly retain a sufficient sum to cover the probable expenses of the receivership, but any sur-

⁵⁹ *Re Schrom*, 97 Fed. 760; *Re Benedict*, 140 Fed. 55.

⁶⁰ *Re Schrom*, (E. D. Ia.) 97 Fed. 760; *Re Benedict*, (E. D. Wisconsin) 140 Fed. 55; *Re Dunseath & Son Co.*, 168 Fed. 973. See *Re National Mercantile Agency*, (E. D. Pa.) 128 Fed. 639; *Remington on Bankruptcy*, Supp. 1910, § 1708, p. 1055. *Contra*, *Re Dempster*, C. C. A., 172 Fed. 353.

⁶¹ *Re Ketterer Mfg. Co.*, 156 Fed. 719. In the absence of evidence as to value, it was held that a receiver's account should not be surcharged with the difference between the appraisal of property and the amount for which the same was sold. *Re Consumers' Coffee Co.*, 162 Fed. 786. And that a receiver should not be surcharged with a loss upon a sale, caused by the purchase of claims of the creditors, which prevented them from bidding at the sale. *Re Schoenfeld*, C. C. A., 183 Fed. 219. The receiver's counsel should only be paid for services rendered for the benefit of the entire estate and not for those rendered in the interest of creditors whom they represented. *Re Ketterer Mfg. Co.*, 156 Fed. 719. Where two petitions in involuntary bank-

ruptcy were successively filed in different districts, a receiver appointed in the former and an adjudication made in the latter, to which the proceedings were transferred because the bankrupt was there domiciled; it was held that the court in the former district had jurisdiction to fix the compensation of the receiver and his counsel, although payment could only be made on order of the court in the latter district, which had custody of the estate. *Re Isaacson*, C. C. A., 174 Fed. 406. A court of bankruptcy may, of its own motion, direct that the net proceeds of a sale under its decree be paid to a receiver in bankruptcy appointed in the same district, who had not appeared in admiralty, for the satisfaction of his allowance and expenses, and that the libellant should share only in what was left; although they who were the sole parties to the proceeding had stipulated that the money be divided between them. *Hudson Oil & Supply Co. v. Booraem*, 216 U. S. 604, 54 L. ed. 636.

⁶² *Whitney v. Wenman*, 140 Fed. 959; s. c., 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778.

plus should be immediately turned over to the trustee.⁶³ Ordinarily, when a receivership is dissolved by the reversal of the order of appointment, or by the dismissal of the bankruptcy proceedings, the costs and expenses of the receivership should be charged against the petitioning creditors,⁶⁴ and payment of the same may be enforced by contempt proceedings.⁶⁵ But an adjudication in voluntary proceedings does not avoid the appointment of a receiver upon a prior involuntary application, and all rights under such prior proceedings, including the liability for costs and expenses, may be fully protected by an order of the court.⁶⁶

§ 635. Summary orders for the payment of money or delivery of property. The Court of Bankruptcy may by summary proceedings, without the institution of a suit, compel the delivery of property,¹ or the payment of money,² which has been taken from a person whom the proceedings have subjected to its jurisdiction,³ including what has been taken from the possession of an officer of the court,⁴ or has been

⁶³ *Matter of College Clothes Shop*, 192 Fed. 80. He may be allowed the expense of an appraisal, although the trustee was dissatisfied therewith and ordered another one made. *Re Kyte*, 158 Fed. 121. Premiums paid by him for fire insurance should be allowed him; but not, it has been held, unpaid premiums upon policies issued to him, since those must be settled by the trustee. *Ibid.*

⁶⁴ *Beach v. Macon Grocery Co.*, C. C. A., 125 Fed. 513; *Re Lacov*, C. C. A., 142 Fed. 960; *Re Desrochers*, 183 Fed. 991. *Contra*, *Re De Lancey Stables Co.*, 170 Fed. 860; *Re Wentworth Lunch Co.*, 189 Fed. 831. See §§ 659, 664, *infra*. It has been held, that where the receiver was not connected with the application for his appointment his fees may be paid, in the first instance, out of the fund, with a reservation of the right subsequently to charge the same against the petitioners. *Re T. E. Hill Co.*, C. C. A.,

159 Fed. 73; *Re Wentworth Lunch Co.*, C. C. A., 191 Fed. 821.

⁶⁵ *Re Lacov*, C. C. A., 142 Fed. 960. Criticized in *Remington on Bankruptcy*, § 398.

⁶⁶ *Re New Chattanooga Hardware Co.*, 190 Fed. 241.

§ 635. ¹*Re Briskman*, 132 Fed. 201. See *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778.

² *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269; *Re D. Levy & Co.*, C. C. A., 142 Fed. 442; *Re Friedman*, 153 Fed. 939.

³ *Mound Mines Co. v. Hawthorne*, C. C. A., 173 Fed. 882; *Rathman v. Booth*, C. C. A., 183 Fed. 913; *Re Denson*, 195 Fed. 854; *Re Weedman Stave Co.*, C. C. A., 199 Fed. 948. See § 608, *supra*.

⁴ *Murphy v. John Hofman Co.*, 211 U. S. 562, 53 L. ed. 327; where the fact that it was claimed that the receiver, after his appointment, had accepted possession as bailee of an-

wrongfully surrendered by its receiver,⁵ or is in the possession⁶ or control⁷ of the bankrupt,⁸ or that of his agent,⁹ attorney¹⁰ or bailee,¹¹ or assignee in insolvency in proceedings invalidated by the bankruptcy,¹² or of a sheriff or other officer

other claimant to the property, was held not to oust the Federal court of jurisdiction; *Re Briskman*, 132 Fed. 201; *Re Alton Mfg. Co.*, 158 Fed. 367; where chattels were replevied between the appointment and qualification of the receiver. *Re Walsh Bros.*, 159 Fed. 560; where a sheriff holding property under an attachment, who had been requested by the referee to hold the property for him until a trustee could be appointed, the attachment having been dissolved by the adjudication, was held to be a custodian of the court, so that a seizure from him was an interference with the court's custody of the property. It has been held that the court had no power to compel a depository, which has passed into the hands of a State officer for liquidation upon a summary application, to pay deposits made by receivers and trustees in bankruptcy. *Re Bologh*, 185 Fed. 825.

⁵ *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778; *Re Schermerhorn*, C. C. A., 145 Fed. 341; *Re McMahon*, C. C. A., 147 Fed. 684.

⁶ *Re Purvine*, C. C. A., 96 Fed. 192; *Re Smith*, 100 Fed. 795; *Re Alexander*, 193 Fed. 749.

⁷ *Re Cole*, C. C. A., 144 Fed. 392, 16 Am. B. R. 302. The bankrupt may be ordered to execute such assignments, *Re Loveland*, C. C. A., 200 Fed. 136, or applications to a stock exchange, *Re Granite City Bank*, C. C. A., 137 Fed. 818, 14 Am. B. R. 407; *O'Dell v. Boyden*, C. C. A., 150 Fed. 751, 17 Am. B. R. 751;

Re Wiesel, 173 Fed. 718; or other papers or licenses necessary to confer the title to his property. Neither a bankrupt, nor any other party, can be ordered to deliver the manual possession of property which is not in his physical control. *Re Nisenson*, 182 Fed. 912; *Re Denson*, 195 Fed. 854; *Re Loveland*, C. C. A., 200 Fed. 136.

⁸ *Re Purvine*, C. C. A., 96 Fed. 192; *Re Smith*, 100 Fed. 795; *Re Rosser*, C. C. A., 101 Fed. 562; *Rip-on Knitting Works v. Schreiber*, 101 Fed. 810; s. c., C. C. A., 104 Fed. 1006; *Re Miller*, 105 Fed. 57; *Re Muncie Pulp Co.*, C. C. A., 139 Fed. 546.

⁹ *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269; *Re Fogelman*, 188 Fed. 755; *Re Kernit Mfg. Co.*, 192 Fed. 392. So of officers of bankrupt corporations. *Re Alphin & Lake Cotton Co.*, 131 Fed. 824; *Re Royce Dry Goods Co.*, 133 Fed. 100; *Re Muncie Pulp Co.*, C. C. A., 139 Fed. 546; *Re Weber Co.*, C. C. A., 200 Fed. 404, the director of a bankrupt corporation; *Re Famous Clothing Co.*, 179 Fed. 1015.

¹⁰ *Re Ellis Bros. Printing Co.*, 156 Fed. 430; *Re Alexander*, 193 Fed. 749.

¹¹ *Re Rodgers*, C. C. A., 125 Fed. 169; *Re Muncie Pulp Co.*, C. C. A., 139 Fed. 546; *Re Holbrook Shoe & Leather Co.*, 165 Fed. 973; *Re Famous Clothing Co.*, 179 Fed. 1015; *Re Belfast Mesh Underwear Co.*, 185 Fed. 834; *Johnston v. Spencer*, C. C. A., 195 Fed. 215.

¹² *Bryan v. Bernheimer*, 181 U. S.

of a State court in proceedings thus abrogated,¹³ or even when in the possession of a stranger, who asserts a claim of right to the same, which is frivolous or merely colorable.¹⁴ When an adverse claim is asserted, the court has jurisdiction to determine whether it is merely colorable.¹⁵ It has been held that it may, and in a proper case should, take evidence for that purpose, and if the only disputed question is one of law, to determine the same.¹⁷ When, however, a party in possession sets up a claim of right, which is not merely colorable,¹⁸ or as trustee or assignee in insolvency asserts a claim to compensation,¹⁹ or a court officer asserts a claim for fees,²⁰ and he resists the

188, 45 L. ed. 814, 21 Sup. Ct. 557; *Davis v. Bohle*, C. C. A., 92 Fed. 325; *Re Stewart*, C. C. A., 179 Fed. 222.

¹³ *Clark v. Larremore*, 188 U. S. 486, 47 L. ed. 555, affirming *Re Kenney*, C. C. A., 105 Fed. 897; *Re Francis-Valentine Co.*, C. C. A., 94 Fed. 793; *Re Hecox*, C. C. A., 164 Fed. 823; *Orr v. Tribble*, 158 Fed. 897; *Staunton v. Wooden*, C. C. A., 179 Fed. 61. But see *Re Andre*, C. C. A., 135 Fed. 736.

¹⁴ *Re Moore*, 104 Fed. 869 (the bankrupt's wife); *Re Kane*, 131 Fed. 386 (a bank deposit); *Re Briskman*, 132 Fed. 201; *O'Dell v. Boyden*, C. C. A., 150 Fed. 731 (a stock exchange holding the proceeds of the sale of the bankrupt's seat); *Re Friedman*, 153 Fed. 939. For cases where the formation of a corporation to which the assets had been transferred was held to be merely colorable and it was directed to transfer them to the receiver or trustee in bankruptcy, see *Re Berkowitz*, 173 Fed. 1013; *Re Shaffer & Stern*, 185 Fed. 549. See, also, *Re Muncie Pulp Co.*, C. C. A., 139 Fed. 546; *Re Iron Clad Mfg. Co.*, C. C. A., 191 Fed. 831; S. C., 194 Fed. 906; *Re Kernit Mfg. Co.*, 192 Fed. 392; *Re Holbrook Shoe & Leather*

Co., 165 Fed. 973.

¹⁵ *Re Ellis Bros. Printing Co.*, 156 Fed. 430; *Re Holbrook Shoe & Leather Co.*, 165 Fed. 973; *Re Friedman*, C. C. A., 161 Fed. 260; *Re Norris*, 177 Fed. 598; *Re Logan*, 196 Fed. 678; *Re Franklin Suit & Skirt Co.*, 197 Fed. 591.

¹⁶ *Re Iron Clad Mfg. Co.*, C. C. A., 191 Fed. 831, s. c., 194 Fed. 906; *Re Logan*, 196 Fed. 678; *Re Franklin Suit & Skirt Co.*, 197 Fed. 591.

¹⁷ *Re Michaelis & Lindeman*, 196 Fed. 718.

¹⁸ *Re Andre*, C. C. A., 135 Fed. 736; *Re Teschmacher & Mrazay*, 127 Fed. 728; *Re Scherber*, 131 Fed. 121; *Re New York Car Wheel Works*, 132 Fed. 203; *Re Davis Tailoring Co.*, 144 Fed. 285; *Re Sunseri*, 156 Fed. 103; *Re Bertenshaw*, C. C. A., 17 L.R.A.(N.S.) 886, 157 Fed. 363.

¹⁹ *Louisville Trust Co. v. Com-ingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. 293; *Re Stewart*, C. C. A., 179 Fed. 222.

²⁰ *Re Andre*, C. C. A., 135 Fed. 736. It has been so held of a receiver not appointed because of insolvency. *Loveless v. Southern Grocer Co.*, C. C. A., 159 Fed. 415. But see § 649, *infra*.

jurisdiction of the court; the Court of Bankruptcy will not interfere, except by a plenary suit in cases where it has jurisdiction thereof.²¹ Consent will give jurisdiction of the court to determine the validity of such an adverse claim;²² but it is doubtful whether an appearance, without objection, will waive the objection that the proceedings should be instituted by a plenary suit, instead of a summary proceeding.²³ It has been held, that, without his consent, the individual assets of a member of a firm, who is not in bankruptcy, cannot be thus summarily obtained for administration by the trustee of the bankrupt partnership.²⁴ Where the respondent, prior to notice of the application, has spent the money or the proceeds of the property, the application will be denied.²⁵ It has been held that a preference can only be set aside by a plenary suit;²⁶ unless the property is in the possession or control of the bankrupt, or in the possession of the Court of Bankruptcy when that court, upon a summary application, may determine the validity of all claims against it.²⁷ There is no right to a trial

²¹ *Re Horgan*, C. C. A., 158 Fed. 774; *Re L. Rudnick & Co.*, C. C. A., 160 Fed. 903; *Re Squier*, 165 Fed. 515; *Re Rosnek*, 167 Fed. 574; *Re Driggs*, 171 Fed. 897; *Re Hersey*, 171 Fed. 998; *Cooney v. Collins*, C. C. A., 176 Fed. 189; *Re Mills*, 179 Fed. 409; *Copeland v. Martin*, C. C. A., 182 Fed. 805; *Re Lineberry*, 183 Fed. 338; *Re L. B. Pickens & Bro.*, 184 Fed. 954; *Re Tarbox*, 185 Fed. 985; *Re Iron Clad Mfg. Co.*, 193 Fed. 781; s. c., 194 Fed. 906; *Johnston v. Spencer*, C. C. A., 195 Fed. 215; *Re Bacon*, 196 Fed. 986; *First Nat. Bank v. Hopkins*, C. C. A., 199 Fed. 873. *Supra*, § 608. *Re Rathman*, C. C. A., 183 Fed. 913. It has been held that the trustee cannot, in a summary proceeding, collect an unpaid stock subscription. *Re Howe Mfg. Co.*, 193 Fed. 524. *Contra*, *Re Monarch Corporation*, 196 Fed. 252, and citations *infra*, § 643, note 5.

²² *Re Alexander*, 193 Fed. 749; Fed. Prac. Vol. II.—133.

Re Banzai Mfg. Co., C. C. A., 183 Fed. 298, an assignee in insolvency; *supra*, § 609.

²³ *Re Teschmacher & Mrazay*, 127 Fed. 728; *supra*, § 609. *Cf. Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293. But see *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557.

²⁴ *Re Bertenshaw*, C. C. A., 157 Fed. 363; *Boyd v. Glucklich*, C. C. A., 116 Fed. 131.

²⁵ *American Trust Co. v. Wallis*, C. C. A., 126 Fed. 464; *Re Smith Longbottom & Sons*, 142 Fed. 291; *Re Barton Bros.*, 149 Fed. 620; *Re Weinreb*, C. C. A., 146 Fed. 243. *Cf. Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269. See *Re Banzai Mfg. Co.*, C. C. A., 183 Fed. 298.

²⁶ *Re Knickerbocker*, 121 Fed. 1004.

²⁷ *Re Rosenberg*, 116 Fed. 402; *Chauncey v. Dyke Bros.*, C. C. A., 119 Fed. 1; *Re D. H. McBride &*

by jury upon such an application.²⁸ The referee has jurisdiction to make such an order against the bankrupt or others in a proper case;²⁹ even, it seems, although the respondent is an officer of another court.³⁰

Where the property is in the custody of the receiver of a State court, the trustee should ordinarily apply to the State court before he petitions the Court of Bankruptcy.³¹

An application for an order for the payment of money or delivery of property should be instituted by a petition in writing³² in the name of the trustee,³³ which fairly apprises the respondent of the nature of the claim,³⁴ although an accurate description of the property is not essential.³⁵ When the property is in the possession of a stranger to the proceeding, the petition should show that his claim is merely colorable.³⁶ It has been said that a bill in equity cannot be sustained as a petition.³⁷ But it seems to be the opinion of the Supreme Court that a plenary suit may be brought in a case where a summary application might have been sustained;³⁸ and, in one case, a

Co., 132 Fed. 285; *Re Noel*, 137 Fed. 694; *Re McMahon*, C. C. A., 147 Fed. 684; *Re Eppstein*, C. C. A., 17 L.R.A.(N.S.) 465, 156 Fed. 42. See *Re Mertens*, 131 Fed. 507.

²⁸ *Ripon Knitting Works v. Schreiber*, 101 Fed. 810, 4 Am. B. R. 299; *Remington on Bankruptcy*, § 1834.

²⁹ *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405; *Re Mayer*, 98 Fed. 839, 3 Am. B. R. 533; *Re Miller*, 105 Fed. 57, 5 Am. B. R. 184; *Re Kane*, 131 Fed. 386, 12 Am. B. R. 444. See *Re Corn*, C. C. A., 179 Fed. 841.

³⁰ *Re Geiser*, 129 Fed. 237, 12 Am. B. R. 208; *Remington on Bankruptcy*, § 1836; *Re Weedman Stave Co.*, 199 Fed. 948.

³¹ *Carling v. Seymour Lumber Co.*, C. C. A., 113 Fed. 483, 490.

³² *Louisville Trust Co. v. Comings*, 184 U. S. 18, 46 L. ed. 413, 7 Am. B. R. 421; *Boyd v. Glucklich*, C. C. A., 110 Fed. 131, 8 Am. B. R.

393; *Remington on Bankruptcy*, § 1837.

³³ *Re Rothschild*, 5 Am. B. R. 587.

³⁴ *Remington on Bankruptcy*, § 1837. A demurrer is waived by an answer to the whole petition. *Re Koplin*, 179 Fed. 1013. Where the allegations in the petition are not sufficiently precise, the proper remedy is a motion to make the same more definite and certain. *Re Frank*, C. C. A., 182 Fed. 794; *Re Greer*, 189 Fed. 511; *Re Ruos*, 164 Fed. 749. Such an objection is waived by answering and offering testimony without raising the same. *Re Alexander*, 193 Fed. 749.

³⁵ *Ripon Knitting Works v. Schreiber*, 101 Fed. 810, 4 Am. B. R. 299, 303.

³⁶ *Re Scherber*, 131 Fed. 121.

³⁷ *Havens & Geddes Co. v. Pierek*, C. C. A., 120 Fed. 244, 245. But see *supra*, § 259.

³⁸ *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778.

summary petition was sustained apparently because "it contained all the substantial allegations of a bill in equity."³⁹ The party against whom the order is sought must have reasonable notice of the proceedings.⁴⁰ The respondent is entitled to a hearing.⁴¹ "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."⁴² Depositions taken in the absence of the bankrupt and his counsel, without notice to him, cannot be offered in evidence,⁴³ unless they have made no objection to the trial of the issue upon affidavits. Testimony taken in other proceedings in the Bankruptcy Court is not ad-

³⁹ *Re Steuer*, 104 Fed. 976. See *Re Scherber*, 131 Fed. 121.

⁴⁰ *Re Pearson*, 95 Fed. 425, 2 Am. B. R. 819; *Re Oliver*, 96 Fed. 85, 2 Am. B. R. 783; *Re Rosser*, C. C. A., 101 Fed. 562, 4 Am. B. R. 153; *Re Miller*, 105 Fed. 57, 5 Am. B. R. 184; *Boyd v. Glucklich*, C. C. A., 116 Fed. 131, 8 Am. B. R. 393. *Re Wood & Henderson*, 210 U. S. 246, 52 L. ed. 1046.

⁴¹ *Boyd v. Glucklich*, C. C. A., 116 Fed. 131, 140, 8 Am. B. R. 393.

⁴² 32 St. at L. 279, § 60*d*. It seems that this section should be enforced by a summary proceeding, begun by an order to show cause, served upon the attorney, or by some other notice to him. *Re Wood & Henderson*, 210 U. S. 246, 52 L. ed. 1046. But see *Re Raphael*, C. C. A., 192 Fed. 874. The notice may be served on the attorney outside the jurisdiction of the court. *Re Wood & Henderson*, 210 U. S. 246, 52 L. ed. 1046. See *Re Lewin*, 103

Fed. 850; *supra*, § 611. The appearance of the attorney without objection to the jurisdiction, although a consent to the entertainment of the suit by the court of bankruptcy, does not justify an order requiring him to pay back money which he has received when there is no allegation that he was paid more than was reasonable. *Re Raphael*, C. C. A., 192 Fed. 874. It has been held that this section does not apply to a note and chattel mortgage to secure payment to the attorney for his services in arranging a composition with creditors in order to prevent bankruptcy. *Re Stolp*, 199 Fed. 488; *infra*, § 644. The attorney is an officer of the court, and, as such, is always subject to its orders in matters connected with his professional conduct. *Re Alexander*, 193 Fed. 749.

⁴³ *Re Frank*, C. C. A., 182 Fed. 794; *Re Friedman*, C. C. A., 161 Fed. 260.

missible,⁴⁴ except as an admission by the respondent,⁴⁵ or to confront a witness with former contradictory statements by him.⁴⁶ The respondent to the application may introduce evidence on his own behalf.⁴⁷ The order will not be granted unless facts sufficient to support the same are proved by clear and convincing evidence;⁴⁸ and, according to a large number of cases, not unless they are proved beyond a reasonable doubt.⁴⁹ The sworn denial of the bankrupt or other respondent is not conclusive.⁵⁰ The order may be supported by circumstantial evidence.⁵¹ When recent possession is proved, it is ordinarily presumed that the respondent still has the money or property, unless he affords reasonable proof of its disposition.⁵² It has

⁴⁴ *Re Alphin & Lake Cotton Co.*, 131 Fed. 824, 12 Am. B. R. 653, 655; *aff'd* 134 Fed. 477, 14 Am. B. R. 194. *Re Kornit Mfg. Co.*, 192 Fed. 392.

⁴⁵ *Re Alphin & Lake Cotton Co.*, 131 Fed. 824, 12 Am. B. R. 653; *aff'd* 134 Fed. 477, 14 Am. B. R. 194; *Re Wiesen Bros.*, 135 Fed. 442, 14 Am. B. R. 347; *Remington on Bankruptcy* § 1839. *Re Greer*, 189 Fed. 511.

⁴⁶ *Remington on Bankruptcy*, § 1839.

⁴⁷ *Re Miller*, 105 Fed. 57, 5 Am. B. R. 184; *Boyd v. Glucklich*, C. C. A., 116 Fed. 131, 140, 8 Am. B. R. 393, 397; *Re Lasch, Referee (Pa.)*, 12 Am. B. R. 158; *Remington on Bankruptcy*, § 1839.

⁴⁸ *Re Gilroy & Bloomfield*, 140 Fed. 733; *Re Berman*, 165 Fed. 383; *Re Adler*, 170 Fed. 634; *Re Dickens*, 175 Fed. 808; *Re Jackier*, 179 Fed. 720; *Re Nisenson*, 182 Fed. 912; *Re Chamelin*, 184 Fed. 553; *Re Kreuger*, 197 Fed. 124. See *Re Jablin*, 194 Fed. 228.

⁴⁹ *Re Sax*, 141 Fed. 223; *Samel v. Dodd*, C. C. A., 142 Fed. 68, 16 Am. B. R. 167; *Re D. Levy & Co.* C. C. A., 142 Fed. 442, 15 Am. B.

R. 169; *Remington on Bankruptcy*, § 1842; *Re Nisenson*, 182 Fed. 912; *Re Kreuger*, 197 Fed. 124. See *Re Dickens*, 175 Fed. 808.

⁵⁰ *Re Rosser*, C. C. A., 101 Fed. 562; *Ripon Knitting Works v. Schreiber*, 101 Fed. 810; *Boyd v. Glucklich*, C. C. A., 116 Fed. 131; *Re Feldser*, 134 Fed. 307; *Re Goldfarb Bros.*, 131 Fed. 643. *Contra*, *Re Alphin & Lake Cotton Co.*, 134 Fed. 477, 14 Am. B. R. 194, 197; *Re Cole*, C. C. A., 144 Fed. 392, 16 Am. B. R. 302; *Re Lasky* 163 Fed. 99; *Seigel v. Cartel*, C. C. A., 164 Fed. 691; *Re Cramer*, 175 Fed. 879; *Re Holland*, 176 Fed. 624; *Re Robert Greenberg & Bro.*, 179 Fed. 413; *Re Krall*, 182 Fed. 191; *Re Meier*, C. C. A., 182 Fed. 799; *Re Lippman*, 184 Fed. 551; *Re Cummings*, 186 Fed. 1020; *Stern v. U. S.*, C. C. A., 193 Fed. 888; *Re Stokes*, 185 Fed. 994.

⁵¹ *Re Shachter*, 119 Fed. 1010, 9 Am. B. R. 499; *Schweer v. Brown*, C. C. A., 130 Fed. 328; *Re Goldfarb Bros.*, 131 Fed. 643, 12 Am. B. R. 386; *Re Frankfort*, 144 Fed. 721.

⁵² *Re Felson*, 124 Fed. 288, 10 Am. B. R. 716; *Re D. Levy & Co.*,

been said that proof of possession of the assets at the time of the filing of the petition for the summary order, together with proof of a subsequent disposition of the same, is not sufficient to support the order, when it appears that the respondent has no control over them or their proceeds.⁵³ Where third parties have interfered with property which was in the bankrupt's possession when the petition in bankruptcy was filed, the burden is upon them to show that they had a right to remove the same.⁵⁴ Payment of interest will not be ordered unless it appears that interest has been received.⁵⁵ The order must definitely describe

C. C. A., 142 Fed. 442; *Re Cole*, C. C. A., 144 Fed. 392, 16 Am. B. R. 302; *Waters v. Davis*, C. C. A., 145 Fed. 912. The finding by a referee, that at the time of his bankruptcy the bankrupt had under his control money or property of his estate which he has never surrendered, will not, without further proof, support an order, seven years later, requiring him to turn the same over to the trustee. *Re Ruos*, 164 Fed. 749.

⁵³ *Re Cotton Co.* (Alphin & Lake Cotton Co.), 134 Fed. 477, 14 Am. B. R. 194; *Re McCormick*, 97 Fed. 566, 3 Am. B. R. 340; *Re D. Levy & Co.*, C. C. A., 142 Fed. 442, 15 Am. B. R. 166; *Re Royce Dry Goods Co.*, 133 Fed. 100, 13 Am. B. R. 257; *Ripon Knitting Works v. Schreiber*, 101 Fed. 810, 4 Am. B. R. 299; affirmed in 104 Fed. 1006; *Re Gerstel*, 123 Fed. 166, 10 Am. B. R. 411; *Re Kane*, 125 Fed. 984, 10 Am. B. R. 478. Compare *Re Adler*, 129 Fed. 502, 12 Am. B. R. 19; *Re Shachter*, 119 Fed. 1010, 9 Am. B. R. 499; *Re Epstein*, 15 Am. B. R. 711. Instance, *Re Deuell*, 100 Fed. 633, 4 Am. B. R. 60; *Re Felson*, 124 Fed. 288, 10 Am. B. R. 716; *Re Schlesinger*, 97 Fed. 930, 3 Am. B. R. 342; affirmed; C. C. A., 102 Fed. 117, 4 Am. B. R. 361; *Re Finkelstein*, 101 Fed.

418, 3 Am. B. R. 800; *Re Greenberg*, 106 Fed. 496, 5 Am. B. R. 840; *Obiter*, *Re Mayer*, 98 Fed. 839, 3 Am. B. R. 533; *Re Anderson*, 103 Fed. 854, 4 Am. B. R. 640; *Re Goldfarb Bros.*, 131 Fed. 643, 12 Am. B. R. 386; Instance, *Re Wilson*, 116 Fed. 419, 8 Am. B. R. 612; *Re Rossier*, C. C. A., 101 Fed. 562, 4 Am. B. R. 153; *Re De Gottardi*, 114 Fed. 328, 7 Am. B. R. 723; *Obiter*, *Re Laplume C. M. Milk Co.*, 145 Fed. 1013, 16 Am. B. R. 729; *Re Hershkowitz*, 136 Fed. 950, 14 Am. B. R. 86; *Re Frankfort*, 144 Fed. 721, 15 Am. B. R. 210; *Re Levin*, 113 Fed. 498, 6 Am. B. R. 743; *Re Henderson*, 130 Fed. 385, 12 Am. B. R. 351; *Re Friedman*, 2 Am. B. R. 301; *Re Weinreb*, C. C. A., 146 Fed. 243, 16 Am. B. R. 702; *Re Feldser*, 134 Fed. 307, 14 Am. B. R. 216; *Remington on Bankruptcy*, § 1850. See *Re Jablin*, 194 Fed. 228. But see *Re Idzall*, 96 Fed. 314, 2 Am. B. R. 741; *Re Sax*, 141 Fed. 223, 15 Am. B. R. 455; *Re Switzer*, 140 Fed. 976, 15 Am. B. R. 468.

⁵⁴ *Re Iron Clad Mfg. Co.*, 193 Fed. 781.

⁵⁵ *Re Rosser*, C. C. A., 101 Fed. 562, 4 Am. B. R. 153. See also *Remington on Bankruptcy*, § 1848, and cases cited. *Contra*, *Re Kurtz*, 125 Fed. 992, 11 Am. B. R. 129.

the property to be surrendered.⁵⁶ It has been held that an order directing the return of the "value" of the goods is erroneous.⁵⁷ The order may be enforced by imprisonment for contempt.⁵⁸ The order directing the return of property or the payment of money is at least presumptive evidence that the bankrupt or other person against whom the same is directed is able to obey the same,⁵⁹ and according to some authorities it is conclusive of the facts at the time of its entry.⁶⁰ It has been held that the bankrupt may show inability to comply with the order, which accrued subsequently to its entry.⁶¹ Subsequent proof of inability to comply with the order may justify a discharge from such imprisonment.⁶² An order in such a proceeding, of which the Court of Bankruptcy had jurisdiction, will in a subsequent proceeding in bankruptcy,⁶³ or a plenary suit,⁶⁴ be conclusive evidence of the respondent's liability. An order denying a summary application is not *res adjudicata* against a plenary suit.⁶⁵

§ 636. Dismissal of petitions. The act of 1910, provides: "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or

⁵⁶ *Re Davis*, 119 Fed. 950, 9 Am. B. R. 670; *Remington on Bankruptcy*, § 1847; *Re Rogowski*, 166 Fed. 165. See *Re Iron Clad Mfg. Co.*, 193 Fed. 781.

⁵⁷ *Samel v. Dodd*, C. C. A., 142 Fed. 68, 16 Am. B. R. 163. *Miller v. Carlton*, C. C. A., 194 Fed. 1022.

⁵⁸ *Samel v. Dodd*, C. C. A., 142 Fed. 68, 16 Am. B. R. 163; *Re Petteiger*, 181 Fed. 640; *Re Iron Clad Mfg. Co.*, 193 Fed. 781. The referee has no power to make the commitment. *Re Haring*, 193 Fed. 168. See § 638, *infra*.

⁵⁹ *Re Stavrah*n, C. C. A., Second Ct., 174 Fed. 330.

⁶⁰ *Re Marks*, (E. D. Pa.) 176 Fed. 1018; *Re Richards*, (W. D. Ark.) 183 Fed. 501; *Re Frankel*, (S. D. N. Y.) 184 Fed. 539. *Contra*, *Re Reynolds*, (M. D. Ala.) 190 Fed. 967; *Re Haring*, 193 Fed. 168.

⁶¹ *Re Mize*, 173 Fed. 945; *Re Marks*, 176 Fed. 1018; *Re Richards*, 183 Fed. 501; *Re Reynolds*, 190 Fed. 967; *Re Haring*, 193 Fed. 168.

⁶² *Schweer v. Brown*, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. 15; affirming 130 Fed. 328; *Re Schlesinger*, C. C. A., 97 Fed. 930, 4 Am. B. R. 361; *Re Rosser*, C. C. A., 101 Fed. 562, 4 Am. B. R. 153, 157; *Samel v. Dodd*, C. C. A., 142 Fed. 68, 16 Am. B. R. 163; *Moody v. Cole*, 148 Fed. 295.

⁶³ *Re Taylor*, 114 Fed. 607, 7 Am. B. R. 410. Criticized in *Remington on Bankruptcy*, § 1841.

⁶⁴ *Re Lemmon & Gale Co.*, C. C. A., 112 Fed. 296; *Henderson v. Denious*, C. C. A., 186 Fed. 100. See *Re Wood & Henderson*, 210 U. S. 246, 52 L. ed. 1046.

⁶⁵ *Murray v. Joseph*, 146 Fed. 260.

by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."¹ Before that enactment, it had been held that a petition in involuntary bankruptcy might be dismissed for want of prosecution when called for trial.² Notice to the creditors who had not joined in the petition was not required.³ It was further held that a petition of voluntary bankruptcy may be withdrawn at any time before a creditor had proved a claim,⁴ provided all costs and fees of officers are paid;⁵ and that permission to withdraw was not void for failure to give notice to the other creditors;⁶ but that it was error to grant such an application when other creditors then appeared and opposed the same.⁷ It was held that the mere fact that a corporation adjudged a bankrupt might pay its creditors in full, was no ground for a dismissal of the proceedings, although a creditor had attempted to use the bankruptcy court in an improper way.⁸ Where all but one of the creditors, who exceeded twelve in number, consented to a dismissal, a motion by the bankrupt therefor was granted.⁹

§ 637. Trials. "If the bankrupt, or any of his creditors, shall appear within the time limited and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleading, without the intervention of jury, except in cases where a jury trial is given by this act, and makes the adjudication or dismiss the petition."¹

§ 636. 136 St. at L. 838, 841.

² *Re Levi & Klauber*, C. C. A., 142 Fed. 962.

³ *Ibid.* *Contra*, *Remington on Bankruptcy*, § 419, and cases there cited.

⁴ *Re Hebbart*, 104 Fed. 322; *Moulton v. Coburn*, C. C. A., 131 Fed. 201.

⁵ *Re Salaberry*, 107 Fed. 95.

⁶ *Re Jemison Mercantile Co.*, C. C. A., 112 Fed. 966, 968, 972.

⁷ *Re Plymouth Cordage Co.*, C. C. A., 135 Fed. 1000, 1007.

⁸ *Re Jamaica Slate Roofing & Supply Co.*, 197 Fed. 240.

⁹ *Re Sig. H. Rosenblatt & Co.*, C. C. A., 193 Fed. 638.

§ 637. 130 St. at L., 544, 551, § 18. The issues cannot be referred for trial. *Re King*, C. C. A., 179

"If, on the last day within which pleading may be filed, none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition."² "If the judge is absent from the district or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee."³ "Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district or the division of the district in which the petition is filed, at the time of the filing, the clerk shall forthwith refer the case to the referee."⁴ "A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived. If a jury is not in attendance upon the court, one may be especially summoned for the trial, or the case may be postponed, or, * * * * * it may be certified for trial to the District Court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such * * * Court has or is to have a jury first in attendance. The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force, or such as may be hereafter enacted in relation to trials by jury."⁵ Intervening creditors

Fed. 694. When the facts are complicated, they may be referred to the referee to take testimony and report his opinion upon the same. They may be referred by consent, and in that case the court has no power to set aside the report except in case of misconduct by the referee. *Re Senoia Duck Mills*, 193 Fed. 711.

The adjudication should not be delayed in order to afford the creditors an opportunity for a reorganization. *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 309.

² 30 St. at L. 544, 551, § 18.

³ 30 St. at L. 544, 551, § 18.

⁴ 30 St. at L. 544, 551, § 18.

⁵ 30 St. at L. 544, 551, § 19. See

who contest allegations in the petition are not entitled to a trial by jury.⁶ A creditor by filing his claim in bankruptcy acquiesces in the adjudication.⁷ It has been held that claimants whose claims are not provable have no standing to contest the adjudication,⁸ but the court will consider any objection to the jurisdiction which they may raise.⁹

Receivers appointed by another court and in possession of property can contest the proceedings.¹⁰ Stockholders cannot except under circumstances that would justify their intervention in a suit in equity.¹¹ The only issues on which a person against whom an involuntary petition in bankruptcy has been filed is entitled of right to a jury trial are with respect to his insolvency and the acts of bankruptcy with which he is

Carpenter v. Cudd, C. C. A., 174 Fed. 603. Where no demand is made nor answer filed until after the return day of the subpoena the right is waived. *Bray v. Cobb*, 91 Fed. 102; *Re Neasmith*, C. C. A., 147 Fed. 160. A voluntary appearance and answer admitting bankruptcy, when made by the respondent, is a waiver of process and authorizes an immediate adjudication. *Re Western Inv. Co.*, 170 Fed. 677.

⁶ *Re Herzikopf*, C. C. A., 121 Fed. 544. Where the bankrupt admitted its inability to pay its debts and its willingness to be adjudged a bankrupt upon that ground, it was held that creditors could not object to the adjudication. *Re Northampton Portland Cement Co.*, 179 Fed. 726. In such a case, where the bankrupt fails to appear for examination and to produce his books, it will be presumed that he is insolvent. *Re Perlheffer*, 17 Fed. 299. The validity of the adjudication cannot be collaterally attacked in another court by a creditor where the jurisdiction of the court appears upon the record. *Re Marion Contract & Construction Co.*, 166 Fed. 618; *Re*

Dempster, C. C. A., 172 Fed. 353. See *Re N. Y. Tunnel Co.*, C. C. A., 166 Fed. 284. Laches on the part of the creditor may be a ground for denying him leave to contest the adjudication. *Re Marion Contract & Construction Co.*, 166 Fed. 618.

⁷ *Re N. Y. Tunnel Co.*, C. C. A., 166 Fed. 284.

⁸ *Re N. Y. Tunnel Co.*, C. C. A., 166 Fed. 284.

⁹ *Re Hudson River El. Power Co.*, 173 Fed. 934.

¹⁰ *Re Eureka Anthracite Coal Co.*, 197 Fed. 216. See § 322, *supra*.

¹¹ The accounts due the bankrupt cannot be considered as assets, unless they are such as would be available to meet his liabilities within a reasonable time. Ten months was held to be such a reasonable time. *Louisiana Nat. Life Assur. Soc. v. Segen*, 196 Fed. 903. Where, although the books showed an excess of assets over liabilities, the president and sole stockholder of the bankrupt testified to errors therein, which, if corrected, would make them show an access of liabilities, the adjudication was affirmed. *Re Iron Clad Mfg. Co.*, C. C. A., 197 Fed. 280. Upon writ of error in

charged;¹² including the questions, whether he has made an assignment for the benefit of his creditors,¹³ and in the case of a corporation, whether a receiver has been appointed because of its insolvency.¹⁴ The question, who are the members of a copartnership is involved in that as to the firm's insolvency.¹⁵ He is not entitled to a trial by jury upon the issue whether the petitioners are in fact creditors, so as to be entitled to maintain the proceedings,¹⁶ nor whether they are estopped from prosecuting the proceedings;¹⁷ nor whether the alleged bankrupt belongs to a class subject to the act.¹⁸ The court has discretionary power to submit to a jury any other question in the case;¹⁹ but the verdict thereupon is like that upon a feigned issue,²⁰ merely advisory.²¹ Where the case is submitted upon the pleadings the allegations of the answer must be taken as true; and if a material allegation in the petition is denied, an adjudication of bankruptcy cannot be made in the absence of evidence in support of the petition.²² If the bankrupt fails to appear upon the return day, an adjudication may be made in his absence.²³ In such a case creditors or receivers previously appointed by a State court may move to vacate the adjudication if made without notice to them and they have a defense thereto.²⁴ The trial court is conducted like any ordinary trial at common law.²⁵ The unsuccessful party is entitled to a bill of

the same case, the Circuit Court of Appeals considered the schedules filed by the bankrupt after the adjudication.

¹² *Morss v. Franklin Coal Co.*, 125 Fed. 998.

¹³ *Day v. Beck & Gregg Hardware Co.*, C. C. A., 114 Fed. 834.

¹⁴ *Blue Mountain Iron & Steel Co. v. Portner*, C. C. A., 131 Fed. 57.

¹⁵ *Re Neasmith*, C. C. A., 147 Fed. 160; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, 159 Fed. 319.

¹⁶ *Morss v. Franklin Coal Co.*, 125 Fed. 998. See *Re San Miguel Gold Min. Co.*, 197 Fed. 126.

¹⁷ *Simonsoon v. Sinsheimer*, C. C. A., 100 Fed. 426.

¹⁸ *Carpenter v. Cudd*, C. C. A., 174 Fed. 603. The petitioners have the

burden of proof upon this point. *Re Hudson River El. Power Co.*, 173 Fed. 934.

¹⁹ *Re Rude*, 101 Fed. 805; *Oil Well Supply Co. v. Hall*, C. C. A., 128 Fed. 875; *Re Neasmith*, C. C. A., 147 Fed. 160.

²⁰ *Supra*, §§ 380-383.

²¹ *Oil Well Supply Co. v. Hall*, C. C. A., 128 Fed. 875; *Re Neasmith*, C. C. A., 147 Fed. 160.

²² *Re Taylor*, C. C. A., 102 Fed. 728.

²³ *Young & Holland Co. v. Brande Bros.*, C. C. A., 162 Fed. 663.

²⁴ *Re Hudson River Electric Co.*, 167 Fed. 986; *Re New England Breeders' Club*, C. C. A., 169 Fed. 586.

²⁵ *Elliott v. Toepfner*, 187 U. S.

exceptions.²⁶ The review, except where the verdict is merely advisory, must be by writ of error and not by appeal.²⁷ Where there is a right to trial by jury, the verdict cannot be set aside in a case that would not justify a new trial at common law.²⁸ When both a voluntary and an involuntary petition affecting the same alleged bankrupt are filed the adjudication should ordinarily be made in the voluntary one with proper protection of the rights of those who have filed the other.²⁹ Where a petition for involuntary bankruptcy has been previously filed, notice should be given to the former petitioners before an adjudication upon the voluntary petition.³⁰ Notice to creditors of the filing of an involuntary petition is not required.³¹ Laches may debar them from attacking the adjudication, at least upon grounds that are not jurisdictional.³²

§ 638. References. Referees are appointed by the Courts of Bankruptcy within the territorial limits of their jurisdiction, each for a term of two years, subject to removal because their services are not needed, or for other cause.¹ "Whenever the office of a referee is vacant, or its occupant is absent, or disqualified to act, the judge may act, or may appoint another referee; or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy."² "a. After a person has been adjudged a bankrupt

327, 47 L. ed. 200, 23 Sup. Ct. 133; *Duncan v. Landis*, C. C. A., 106 Fed. 839; *Bean-Chamberlain v. Standard Spoke & Nipple Co.*, 131 Fed. 215, 65 C. C. A. 201, 12 Am. B. R. 610; *supra*, § 473.

²⁶ *Duncan v. Landis*, C. C. A., 106 Fed. 839.

²⁷ *Re Neasmith*, C. C. A., 147 Fed. 160.

²⁸ *Elliott v. Toepfner*, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. 133; *supra*, § 530.

²⁹ *Re New Chattanooga Hardware Co.*, 190 Fed. 241; See *Re Lachenmaier*, C. C. A., 203 Fed. 32.

³⁰ *Re Dwyer*, 112 Fed. 777.

³¹ *Re Billing*, 145 Fed. 395.

³² *Re Billing*, 145 Fed. 395 (two years); *Re First Nat. Bank of*

Belle Fourche, C. C. A., 152 Fed. 64; *Re Marion Contract & Construction Co.*, 166 Fed. 618.

§ 638. 130 St. at L. 544, 555, § 34.

² *Ibid.*, § 43. See *Bray v. Cobb*, 91 Fed. 102. The limits of the districts of the referees are designated by the courts that appoint them, which have power to change the same from time to time, so that each county, where the services of a referee are needed, may constitute at least one district. 30 St. at L. 544, 555, § 34. Each court of bankruptcy has discretion as to the number of referees which it shall appoint. 30 St. at L. 544, 555, § 37. When there are two District Judges

the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues;³ or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district. *b.* The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another."⁴ It has been said, that the referee "is, in fact, the judge of the Bankrupt Court,"⁵ Their jurisdiction is as follows: "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;"⁶ "(2) exercise the powers vested in court of bankruptcy for the

in the same district, it seems that either, when holding a Court of Bankruptcy, may appoint as many referees as he deems proper. *Birch v. Steele*, C. C. A., 165 Fed. 577; affirming *Ex parte Steele*, 156 Fed. 854; s. c., 161 Fed. 886; overruling *Ex parte Steele*, 162 Fed. 694. "Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the Courts of Bankruptcy or Circuit Courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or

have their offices in, the territorial districts for which they are to be appointed. 30 St. at L. 544, 555, § 35.

³ The powers of a special referee previously appointed are superseded by an adjudication and an order of general reference. *Re Ruos*, 164 Fed. 749. But see *U. S. v. Liberman*, 176 Fed. 161, *infra*, § 639.

⁴ 30 St. at L. 544, § 22. It has been held that this authorizes the judge to refer the proceedings to any referee within the territorial jurisdiction. *Re Western Inv. Co.*, 170 Fed. 677.

⁵ *Jackson J., Re Tebo*, 101 Fed. 419, 427.

⁶ The clerk cannot refer a petition in involuntary bankruptcy to a referee for adjudication where an issue is made upon the allegations in the petition by the bankrupt or any other creditor. *Re L. Humbert Co.*, 100 Fed. 439. Where, after the reference of a petition by part of a firm, the other partners appeared

administration of oaths to and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them,⁷ except the power of commitment;⁸ (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act;⁹ (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.”¹⁰

The duties of referees are thus prescribed: “Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom pay-

and contested the adjudication, it was held that the referee must certify the issue to the judge. *Re Murray*, 96 Fed. 600. A deputy clerk has no power to refer a petition in bankruptcy. *Bray v. Cobb*, 91 Fed. 102. But an order of reference made by the judge, and attested by the deputy, is valid. *Bray v. Cobb*, 91 Fed. 102. The clerk cannot refer a petition, whether voluntary or involuntary, unless the judge is absent from the division of the district where the proceeding is pending at the time when the reference may be made. *Re L. Humbert Co.*, 100 Fed. 439. Where an answer to an involuntary petition in bankruptcy is filed, the judge may refer the proceeding to a special commissioner to take the testimony upon the issues and to report the

same with his opinion, where no jury trial has been demanded; although the judge has determined the issues, upon a former petition by other creditors, in favor of the alleged bankrupt. *Re Lacov*, C. C. A., 134 Fed. 237.

⁷ The order for the production of books of account need not specify their importance. *Re Soloway & Katz*, 195 Fed. 103.

⁸ *Re Magen*, 179 Fed. 572.

⁹ In case of the disability or absence of the judge, upon the certificate of the clerk to that effect a referee may, before adjudication, appoint a receiver. *Re Kelly Dry Goods Co.*, 102 Fed. 747; *supra*, § 634; and order a receiver to sell assets, *Re Kelly Dry Goods Co.*, 102 Fed. 747.

¹⁰ 30 St. at L. 544, 555, § 10.

able; (2) examine all schedules of property and list of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest;¹¹ (4) give notices to creditors as herein provided;¹² but it has been held that the bankrupt cannot complain of an omission to serve a few creditors with notice of the first meeting;¹³ "(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them; whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken, or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities as towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practise as attorneys and counselors at law in any bankruptcy proceedings;¹⁴ or (3) purchase, directly or indirectly, any property of an estate in bankruptcy."¹⁵ It has been held that a referee who is a debtor to the bankrupt is not disqualified: but that the court

¹¹ A creditor of a bankrupt is a "party in interest" although he has not formally proved his claim. *Re Samuelsohn*, 174 Fed. 911.

¹² 30 St. at L. 544, 556, § 39.

¹³ *Re Schiller*, 96 Fed. 400.

¹⁴ Whether it is proper for their partners to do so has not been decided.

¹⁵ 30 St. at L. 544, 556, § 39.

upon being apprised of that fact may revoke the order of reference and send the case to another referee.¹⁶ Each referee must account to the judge under oath with vouchers on the first Tuesday of each month.¹⁷ "The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in Circuit Courts of the United States. A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case. The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court."¹⁸ The General Orders provide as follows: "1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."^{18a} After the general order of reference the referee may grant injunctions and restraining orders;¹⁹ but he is without power to enjoin the proceedings of a court or officer;²⁰ he may marshal liens upon property in the custody of the court and determine their validity and priority;²¹ he may order the sale

¹⁶ *Bray v. Cobb*, 91 Fed. 102.

¹⁷ General Order XXVI.

¹⁸ 30 St. at L. 544, 556, 557, § 42.

The record should be so kept that a full and fair review of the proceedings can be had. *Re Romine*, 138 Fed. 837.

^{18a} General Order XII.

¹⁹ *Re Steuer*, 104 Fed. 976, 980; *Re Martin*, 105 Fed. 753; *Re Adams*, 134 Fed. 142; *supra*, § 633.

²⁰ General Order XII. *Re Siebert*, 133 Fed. 781; *supra*, § 633.

²¹ *Re Kellogg*, C. C. A., 121 Fed. 333; *Re Rochford*, 124 Fed. 182, 59 C. C. A. 388, 10 Am. B. R. 608.

of assets,²² free of liens,²³ and appoint appraisers,²⁴ but not before the adjudication in bankruptcy.²⁵ He may determine the priority of claims and direct the payment of such as have a preference.²⁶ He may make summary orders for the surrender of money or property held by the bankrupt,²⁷ or by the bankrupt's agent, or other persons not claiming adverse interests therein.²⁸ He may disapprove of a trustee elected by the creditors.²⁹ He may conduct the examination of the bankrupt,³⁰ and that of any other person, concerning the acts, conduct, or property of the bankrupt, when ordered by the court.³¹

"2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform. 3. Applications for a discharge, or for the approval of a composition; or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."³² "All accounts of trustees shall be referred at once to the referee for audit, unless otherwise specially ordered by the court."³³ Special questions arising in bankruptcy proceedings are often referred to the official referees or others for reports as special masters.³⁴ It is the practice in

²² *Re* Sanborn, 96 Fed. 551; *Re* Styer, 98 Fed. 290; *Re* Matthews, 109 Fed. 603.

²³ *Re* Pittelkow, 92 Fed. 901; *Re* Sanborn, 96 Fed. 551; *Re* Styer, 98 Fed. 220; *Re* Matthews, 109 Fed. 603; *Re* Kellogg, 113 Fed. 120, 122; *Re* Waterloo Organ Co., 118 Fed. 904; *Re* Granite City Bank, C. C. A., 137 Fed. 818.

²⁴ *Re* Styer, 98 Fed. 290; *Re* Fisher & Co., 135 Fed. 223.

²⁵ *Re* Styer, 98 Fed. 290.

²⁶ *Re* Tilden, 91 Fed. 500.

²⁷ *Re* Oliver, 96 Fed. 85; *Re* Rosser, C. C. A., 101 Fed. 562; *Re* Miller, 105 Fed. 57; *supra*, § 635.

²⁸ *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269; *supra*, § 635.

²⁹ General Order XIII. *Re* McGill, C. C. A., 106 Fed. 57; *infra*, § 640.

³⁰ 30 St. at L. 544, 559, 560, § 55b.

³¹ 30 St. at L. 544, 552, § 21.

³² General Order XII.

³³ General Order XVII. General Order XII. It seems that the referee cannot surcharge the account on another ground as to which there was no exception or hearing. *Re* Schoenfeld, C. C. A., 183 Fed. 219, a receiver's accounts.

³⁴ *Re* Herskovitz, 152 Fed. 316.

the Second Circuit to refer petitions for the reclamation of property,³⁵ as well as other matters.^{35a} to a special master, who is often also a referee in bankruptcy, with authority to hear and determine the questions thereupon arising. Although there is considerable doubt about the validity of such references, the Circuit Court of Appeals has refused to interfere with the same.³⁶ It has been held to be no objection to the action of a referee in presiding at the examination of a person charged with indebtedness to the bankrupt, that he is judge in his own cause, since the discovery of such indebtedness will increase his fees.³⁷

"Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk."³⁸ "In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests."³⁹

It has been held: that a petition requesting a referee to review an order previously made by him after hearing is in the nature of a review in equity and is governed by the same rules of procedure;⁴⁰ that it can only be filed by his permission;⁴¹ and for error in law apparent upon the face of the order, or because of

The practice is criticized by Referee Remington in his *Bankruptcy*, § 517, note 29. The referee may be directed to report: Should there be a call upon the shareholders of unpaid stock, and, if so, to what amount? *Re Munger Vehicle Tire Co.*, 168 Fed. 910.

³⁵ *Re Tracy*, C. C. A., 179 Fed. 366.

^{35a} *Ibid.*

³⁶ *Ibid.*

³⁷ *Re Abbey Press*, C. C. A., 134 Fed. 51, in which the writer was counsel. In *Matter of Higley v. Novark*, 145 App. Div. (N. Y.) 7, it was held that an attorney-at-law holding an unsatisfied judgment
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against a debtor should not be appointed referee to take evidence in supplementary proceedings against the latter by another creditor.

³⁸ General Order XI.

³⁹ General Order XXIII.

⁴⁰ *Re McIntire*, 142 Fed. 593. See *supra*, §§ 393, 447-450. It has been held that it may be filed within the time limited for the review of his decision. *Re Brenner*, (M. D. Pa., Sept. 13, 1911) 190 Fed. 209. *Contra*, *Re Greek Mfg. Co.*, (E. D. Pa.) 164 Fed. 211, holding that the referee has no power to review his own orders on exception to the same.

⁴¹ *Re McIntire*, 142 Fed. 593.

the discovery of new evidence since the hearing;⁴² and, in the latter case, that the new evidence must be relevant, material, and such as would have produced a different result, and must have been unknown to the petitioner at the time of the previous hearing, and such as he could not have known by the exercise of reasonable diligence.⁴³ "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."⁴⁴ The referee's certificate should present specific questions upon which the opinion of the judge is desired.⁴⁵ It has been said that a general review of the proceedings before the referee is not permitted.⁴⁶ The order, if within the jurisdiction of the referee, can only be reviewed in

⁴² *Re McIntire*, 142 Fed. 593.

⁴³ *Re McIntire*, 142 Fed. 593.

⁴⁴ General Order XXVII. Findings of fact made by the referee upon conflicting evidence will ordinarily be affirmed. *Re San Miguel Gold Min. Co.*, 197 Fed. 126; *Re Charles Town Light & Power Co.*, 199 Fed. 846; *Re Cox*, 199 Fed. 952. See § 393, *supra*. But the court is not bound by his findings on a question of fact based upon inferences drawn from uncontradicted evidence. *Baumhauer v. Austin*, C. C. A., 186 Fed. 260. The court refused to consider the question whether there was sufficient evidence to satisfy the referee that an order should be made directing the production by the bankrupt of missing books of account. *Re Soloway & Katz*, 195 Fed. 103. A finding that there was "a good delivery" under a contract of sale was held to be sufficient upon the issue that the seller had waived its right to return unmerchantable goods. *Re Nathan*, C. C. A., 200 Fed. 379. Where the record showed

no request that the master state, in his report, the character of the evidence upon which certain findings were based, or whether his findings were based on evidence received under objection, it was held that his omission of such was no error. *Re Graves*, 182 Fed. 443. Where the issues were referred to a special master by consent, it was held that the court had no discretionary power to set aside his report. *Re Senoia Duck Mills*, 193 Fed. 711.

⁴⁵ *Re T. L. Kelly Dry Goods Co.*, 102 Fed. 747; *Re Kurtz*, 125 Fed. 992.

⁴⁶ *Ibid*. Where no party asked that an order be certified to the court for review, it was not reviewed on a report by the referee of his entire proceedings, including such order. *Re Kimmel*, 183 Fed. 665. *Re Stokes*, 185 Fed. 994. *Contra*, *Re Monongahela Distillery Co.*, 186 Fed. 220. In the absence of a rule of court upon the subject, no formal exceptions are required. *Re People's Department Store Co.*, 159

the manner above specified.⁴⁷ But, it has been held that, when the court reviews an order or report of a referee, it may properly consider any point presented by the record before it, although the same was not discussed by or before the referee.⁴⁸ A petition to review an order of the referee may be denied for laches.⁴⁹ A motion to set aside an order by a referee for lack of jurisdiction may be made at any time.⁵⁰ But the delay of thirty days is not unreasonable in the absence of any rule of court, when no prejudice has resulted from the same.⁵¹ Where, subsequent to the confirmation of an order disallowing claims, the Circuit Court of Appeals in another case so construed the statute as to permit such claims to be proved, the case was sent back to the referee more than five months after such confirmation.⁵² The proceedings for review suspend the operation of the order of the referee.⁵³ "A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, that no person shall be required to attend as a witness before a

Fed. 286. A question not involved in the issues made before the referee will rarely, if ever, be considered. *Re Sam Z. Lorch & Co.*, 199 Fed. 944. *Contra, Re Kellar*, C. C. A., 192 Fed. 830.

⁴⁷ *Re Home Discount Co.*, 147 Fed. 538.

⁴⁸ *Re Samuel Wilde's Sons*, C. C. A., 144 Fed. 972.

⁴⁹ *Re Scherr*, 138 Fed. 695; *Re Grant*, 143 Fed. 661, a delay of three months: *Re Verdon Cigar Co.*, 193 Fed. 813, more than four months, pending an appeal by another party from an order disallowing part of another claim. The matter is often regulated by a rule of court. In S. D. N. Y., ten days, unless the time is extended by the

referee or the court. S. D. N. Y. B'k'cy. Rule 15. See *Re Nichols*, 166 Fed. 603. In E. D. Pa., ten days. *Re T. M. Leshner & Son*, 176 Fed. 650. In the Western District of Washington, ten days. *Re Nippon Trading Co.*, 182 Fed. 959, where the petition by inadvertence was filed with the clerk, instead of with the referee, and the mistake was corrected after the expiration of the time allowed by the rule for filing the same.

⁵⁰ *Re Willis W. Russell Card Co.*, 174 Fed. 202.

⁵¹ *Re Foss*, 147 Fed. 790.

⁵² *Re Keyes*, 160 Fed. 763.

⁵³ *Brown v. Detroit Tr. Co.*, C. C. C., 193 Fed. 622.

referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the Court of Bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."⁵⁴

§ 639. Evidence and examinations. "Whenever a person against whom a petition has been filed as hereinbefore pro-

⁵⁴ 30 St. at L. 544, 556, § 41. When the contempt consists in disobedience to the order of the referee, it seems that the certificate should contain a summary of the evidence and the finding and order of the referee upon the same. General Order XXVII; *Craddock-Terry Co. v. Kaufman*, 175 Fed. 303; *McNeil v. McCormack*, C. C. A., 182 Fed. 808. The bankrupts are entitled to notice of the proceeding before the court, *Re Magen*, 179 Fed. 572. *Of. supra*, § 429; but not of the application to the referee for the certificate, *Re Magen*, 179 Fed. 572. Where the certificate made no specific finding of contemptuous acts, the application was denied. *Re Iron Clad Mfg. Co.*, 193 Fed. 781. There will be no punishment if the order of the referee was beyond his jurisdiction. *Re Soloway & Katz*, 195 Fed. 100. An order of commitment for contempt is not void so that it can be questioned collaterally because it was not preceded by a certificate of the referee. *U. S. v. Henkel*, 185 Fed. 553. There may be a question

as to whether there will be a commitment, before the final report of the referee, when no party to the proceeding has requested the referee to make such a certificate. See *Re Kimmel*, 183 Fed. 665. The court cannot authorize the referee to carry an order or judgment into effect by the commitment of a person for contempt. *Smith v. Belford*, C. C. A., 106 Fed. 658. It has been held that a rule requiring the bankrupt to show cause why he should not be punished for contempt for refusing to answer "sundry questions" put to him, during his examination before the referee, is sufficient, although it does not set out the questions, where it refers to the transcript filed with the certificate of the referee, in which they fully appear. *U. S. v. Goldstein*, 132 Fed. 789. The propriety of the order by the referee, which has been disobeyed, cannot then be considered, provided that it was within his jurisdiction. *Re Home Discount Co.*, 147 Fed. 538.

vided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."¹ The burden of proof is otherwise upon the creditors to support the allegations of their petition.² "A Court of Bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. Provided, that the wife may be examined only touching business transacted by her, or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."³ The

§ 639. 130 St. at L. 544, 547, § 3. In determining presumptions and the burden of proof, the Federal courts are not bound by the State decisions. *Young v. Lowry*, C. C. A., 192 Fed. 825. The failure of the person charged with bankruptcy to appear for examination and produce his books creates a presumption of his insolvency when his creditor opposes the adjudication. *Re Perlhefter*, 177 Fed. 299. For a case where his failure to produce the papers relating to certain items on his schedules was held not to justify an instruction to disregard the value thereof when determining the issue of insolvency, see *Cummins Grocer Co. v. Talley*, C. C. A., 187 Fed. 507.

² *Re Rome Planing Mill*, 96 Fed. 812. But where the bankrupt alleged that a note held by a petitioner was void because given in consideration of a gambling transaction, it was held that the respondent had the burden of proof to show that

fact. *Hill v. Levy*, 98 Fed. 94. A letter by the respondent stating his inability to pay his debts and calling a meeting of his creditors for the purpose of compromising his indebtedness is *prima facie* evidence of his insolvency, *Re Lange*, 97 Fed. 197. Voluntary bankruptcy creates no presumption of previous insolvency. *Re Chappell*, 113 Fed. 545. It was held to be no evidence of insolvency that a corporation made an arrangement with the bank to overdraw its account. *McDonald v. Clearwater Shortline Ry. Co.*, 164 Fed. 1007. A judgment against the bankrupt, entered more than four months before the commission of the act of bankruptcy, is admissible upon the proof of insolvency. *Re McGowan*, 134 Fed. 498, which considers other questions concerning the admissibility of evidence upon this issue.

³ It was held that a preference was not established when the on-

right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided. Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim, notice shall also be served upon the claimant, and when in opposition to a discharge, notice shall also be served upon the bankrupt. Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of District Courts of the United States are now or may hereafter be admitted as evidence. A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.”⁴

ly evidence was that of the bankrupt's wife that, during the four months before the filing of the petition, he had given her certain sums of money for household and family expenses which she had so used. *Neumann v. Blake*, C. C. A., 178 Fed. 916. For a case where an omission was made by a wife to include her claim for a salary for services in a statement to a banker, made by her for her husband, and to include it in the index of the book containing the same where the

other accounts were indexed, see *Re Cox*, 199 Fed. 952.—*Cf.* § 644, *infra*.

⁴ 30 St. at L. 544, 552, § 21; as amended by 32 St. at L. 797. An adjudication in bankruptcy is conclusive in that proceeding of all the jurisdictional facts and cannot be collaterally attacked. *Re Hecox*, C. C. A., 164 Fed. 823; *Re V. & M. Lumber Co.*, 182 Fed. 231; *Cook v. Robinson*, C. C. A., 194 Fed. 785; all cases of insolvency. It has been said that between his adjudication and the appointment of a trustee,

A verified proof or petition for the allowance of a claim is *prima facie* evidence of its validity;⁵ but not, it has been held, of any facts therein alleged to establish its priority.⁶

Creditors must have at least ten days' notice by mail of all examinations of the bankrupt unless they waive the same in writing.⁷ It was held that a person adjudged a bankrupt upon an involuntary petition may be ordered to attend before the referee for examination, before the first meeting of his creditors and the appointment of a trustee; and, if the examination is limited to obtaining information on which to prepare the schedules, that it is not essential to the validity of the proceedings that ten days' notice thereof by mail should have been given to creditors.⁸

At the first meeting of the creditors, any one whose name appears in the schedule of creditors,⁹ and it seems that, at any time, any person who gives to the referee *prima facie* evidence of his claim, may obtain an order for the examination of the bankrupt, even if the debt has not been regularly proved.¹⁰ But it seems that a preferred creditor cannot conduct an examination unless he relinquishes his preference.¹¹ It seems that no formal order is required for the examination of the bankrupt at the first meeting of his creditors,¹² nor perhaps at the time and place to which the same is adjourned;¹³ but, if his examination is de-

he is not to be regarded as civilly dead. *Plaut v. Gorham Mfg. Co.*, 174 Fed. 852. Findings in a proceeding before the same referee that has been finally dismissed for want of jurisdiction cannot be the basis of findings in a subsequent proceeding before him. *Re Rosenberg*, 116 Fed. 402.

⁵ *Whitney v. Dresser*, 200 U. S. 532, 50 L. ed. 584, *infra*, § 645. Where the claimant did not rest on his proof of claim, but offered evidence which was insufficient to establish its allegations, it was held that he could not, upon appeal, use the allegations, in the proof to supply the deficiencies in his testimony. *Re T. A. McIntyre & Co.*, C. C. A., 174 Fed. 627. Upon an issue as to

the validity of a claim, a claim against another debtor for the same debt, which was previously allowed, is inadmissible in support of objections. *Re James Dunlap Carpet Co.*, 171 Fed. 532.

⁶ *Re Jones*, 151 Fed. 108.

⁷ *Re Franklin Syndicate*, 101 Fed. 402.

⁸ *Re Walker*, 96 Fed. 550.

⁹ *Re Jehu*, 94 Fed. 638.

¹⁰ *Re Price*, 91 Fed. 635; *Re Schenkein*, 113 Fed. 421; *Re Kuffer*, 153 Fed. 667; *Re Samuelsohn*, 174 Fed. 911.

¹¹ *Re Schenkein*, 113 Fed. 421. See *Re Price*, 95 Fed. 655.

¹² *Re Price*, 91 Fed. 635.

¹³ *Ibid*

sired at another creditors' meeting, an order must be obtained and ten days' notice given to all the creditors.¹⁴ Upon an examination of a bankrupt at a creditors' meeting fixed by statute, a *subpoena duces tecum* is not required to justify an order directing him to produce books of account.¹⁵ Such an order may be supported by testimony presented at the creditors' meeting;¹⁶ but an application for such an order, when not made at the meeting, must be made upon notice to the bankrupt,¹⁷ although the petition for the same need not be verified.¹⁸ Under ordinary circumstances such an examination should be had once for all the creditors. If no examination has previously been had, the notice to creditors to attend in opposition to the discharge should embrace also a notice of the examination of the bankrupt; and the testimony thereupon should be taken at the expense of the creditors.¹⁹ A further examination of the bankrupt, his wife, or any other person, may be directed at any time before the final disposition of the case, although his previous examination has been adjourned without a day.²⁰ His second examination can only be obtained for cause shown by an order, the application for which should be upon notice to him.²¹ It has been held that an order may be obtained for his examination after his discharge.²² It has been held in the Second Circuit: that an order may be obtained for the examination of an alleged bankrupt or a stranger to the proceeding before an adjudication in bankruptcy;²³ that a receiver may obtain such an

¹⁴ *Re Peters*, 1 Am. B. R. 248; *Re Westfall Bros.*, 8 Am. B. R. 431; *Remington on Bankruptcy*, § 1542.

¹⁵ *Re Soloway & Katz*, 195 Fed. 103.

¹⁶ *Ibid.*

¹⁷ *Re Soloway & Katz*, 195 Fed. 100.

¹⁸ *Ibid.*

¹⁹ *Re Price*, 91 Fed. 635; *Re Schenkein*, 113 Fed. 421; *Re Kuffier*, 153 Fed. 667.

²⁰ *Re Bryant*, 188 Fed. 530.

²¹ *Re Fleischer*, 151 Fed. 81; *Re Herskovitz*, 152 Fed. 316. *Contra*, *Re Crenshaw*, 155 Fed. 271; *Remington on Bankruptcy*, § 1543. Up-

on such an application, the trustee need not set forth the nature and character of the testimony sought. *Re Bryant*, 188 Fed. 530.

²² *Re Fleischer*, 151 Fed. 81.

²³ *Re Fleischer*, 151 Fed. 81, 18 Am. Br. 197; *U. S. v. Liberman*, 176 Fed. 161; *Cameron v. U. S.*, 192 Fed. 548. *Contra*, in the Third Circuit, *Re Shubinsky*, C. C. A., 172 Fed. 332, 97 C. C. A., 116, 22 Am. B. R. 689; *Re Thompson*, 179 Fed. 874. It was held, in the Fifth Circuit, that the certificate of a referee that the alleged involuntary bankrupt refused to submit to an examination before adjudication upon an application for a receiver,

order;²⁴ and that a special commissioner may be appointed to conduct the examination.²⁵

An order for the examination of a stranger to the proceeding concerning the acts, conduct or property of the bankrupt is not a matter of right, but rests in the discretion of the court or referee.²⁶ No notice of the application is required.²⁷ It has been

could not be sustained on an application of the creditors for an order to examine the latter as a witness. *Craddock-Terry Co. v. Kaufman*, 175 Fed. 303.

²⁴ *Re Fleischer*, 151 Fed. 81, 18 Am. B. R. 197. See *supra*, § 634.

²⁵ *U. S. v. Liberman*, 176 Fed. 161, holding that the powers of such commissioner are not suspended by a subsequent order referring the case generally to a referee after adjudication. But see *Re Ruos*, 164 Fed. 749; *supra*, § 638.

²⁶ *Re Andrews*, 130 Fed. 383. It has been held that the examination of a third person at the request of a receiver or trustee in bankruptcy may be granted without any showing of the questions to be asked or the facts into which inquiry is to be made; *Re Howard*, 95 Fed. 415; *Re Fixen & Co.*, 96 Fed. 748. That the pendency of a suit by or against the bankrupt or his representative is not a prerequisite. *Re Fixen & Co.*, 96 Fed. 748. That the examination may be made concerning facts which could not be the subject of a suit in a court of the United States; *Re Cliffe*, 97 Fed. 540. That a witness cannot refuse to attend or be examined by a receiver in bankruptcy on the ground that the order appointing a receiver was erroneously or improvidently made. *Re Fixen & Co.*, 96 Fed. 748. That he cannot refuse to produce books because he claims that they contain nothing relating to the bankrupt's property;

but must leave the determination of that question to the court. *Re Fixen & Co.*, 96 Fed. 748. But see *Re Carley*, 106 Fed. 862. That an examination may be had of books of a corporation managed by two bankrupts, in which their wives own substantially all the stock, and it is claimed that the corporate property is assets of the bankrupts. *Re Horgan*, C. C. A., 98 Fed. 414; s. c., 97 Fed. 319. *Cf. Re Cohn*, 98 Fed. 75. A witness is not justified in refusing to answer a material question because he owes to his customers the duty not to disclose their private affairs, *Re Lathrop*, *Haskins & Co.*, 184 Fed. 534; *Cf. § 343, supra*; nor an attorney to refuse to identify documents which he has witnessed for his client or to testify with reference to facts concerning which he obtained knowledge from others, *Re Ruos*, 159 Fed. 252. It was held that a judge who made an order appointing a receiver was a competent witness to testify that the appointment was not made because of insolvency. *Schumert & Warfield v. Security Brewing Co.*, 199 Fed. 358. Upon an issue as to the insanity of an alleged bankrupt, it was said that the evidence of his acts, speech and demeanor, the change of his habits, and the testimony of physicians who treated him, was of greater weight than the hypothetical testimony of alienists. *Re Ward*, C. C. A., 194 Fed. 89. Upon the trial of an issue as to the

said: that the request for the same may be oral;²⁸ and that the order may be made by the referee.²⁹ After such an examination of a third person has been terminated, a further examination may be ordered by the referee for special cause shown; but it has been said to be within the discretion of the referee to decide in each particular case what cause is sufficient and upon what he will make the order.³⁰ "No person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from

value of land, it was held that the master properly excluded cross-examination of the trustee concerning efforts made by him to secure purchasers at a given price and his knowledge or understanding of what the property could have been bought for, *Re Graves*, 182 Fed. 443; and that evidence of the amounts received on sale of similar land in the neighborhood was inadmissible in the absence of proof that it was substantially of the same value as the land in controversy and covered with similar timber, *Ibid.* A party who called a witness was not allowed to impeach his credibility. *Re San Miguel Gold Min. Co.*, 197 Fed. 126. The examination is not limited to transactions occurring within the four months preceding the bankruptcy. *Re Brunlage*, 100 Fed. 613; *Re Pursell*, 114 Fed. 371. The witness should not be compelled to answer matters not relevant to the acts, conduct or property of the bankrupt; and when he was denied that the transaction inquired into has any relation to the same, it seems that the examiner must show some connection therewith, or that the question will be disallowed. *Re Carley*, 106 Fed. 862, 866. The act does not demand such liberality of construction when it is sought to inquire into the acts, conduct, or

property of any person other than the bankrupt himself. Indeed, the act does not authorize, in the mode of proceeding, and examination whatever into matters other than those specifically mentioned, which might, however, include cases where the acts, conduct, or property of the witness are so connected or interwoven with those of the bankrupt as to make them virtually the same, by reason of community of interest. The court of bankruptcy itself would have no jurisdiction under the form of proceeding otherwise to inquire into the acts, conduct, or property of any other person except the bankrupt." *Ibid.* It has been held, that a mere affidavit of belief on the part of the creditors, or others, that an answer will bring out the facts in relation to the acts, conduct or property of the bankrupt is insufficient to compel an answer to the question or the production of a document, as the case may be, when the witness positively contradicts it under oath. *Ibid.*

²⁷ *Re Howard*, 95 Fed. 415.

²⁸ *Re Howard*, 95 Fed. 415. See *Re Abbey Press*, C. C. A., 134 Fed. 51.

²⁹ *Re Abbey Press*, C. C. A., 134 Fed. 51.

³⁰ *Re Abbey Press*, C. C. A., 9, 134 Fed. 51.

such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him."³¹ Where the examination is held in another district, the proper course is to make an ancillary application to a judge of that district for the examination of the witness there.³²

The bankrupt "shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence."³³ He is not entitled to any witness fees.³⁴ Other witnesses must, however, be paid or tendered their legal fees in advance.³⁵ It has been held: that a witness cannot be compelled to appear at a place outside the State where he resides, although within one hundred miles from his residence;³⁶ and that he cannot be compelled to attend within the State at a place more than one hundred miles from his resi-

³¹ 30 St. at L. 544, § 31.

³² *Re Robinson*, 179 Fed. 724. See *Re Williams*, 123 Fed. 321. It has been held that such an examination may be had. The examination may be had by order of the court, in which proceedings in bankruptcy were pending, in another district by a commission under the Revised Statutes, *Re Carley*, 106 Fed. 862; U. S. R. S., §§ 868, 869. See *Re Robinson*, 179 Fed. 724, or before a referee in bankruptcy in another district. *Re Sturgeon*, C. C. A., 139 Fed. 608 (where the order was made by the referee in the district where the proceedings were pending). But see *Re Williams*, 123 Fed. 321, and that in such a case, it is the duty of the referee to take all the evidence and note objections to the same. *Re Sturgeon*, C. C. A., 139 Fed. 608.

³³ 30 St. at L. 544, § 7. Where the bankrupt obtained an order of protection, forbidding his arrest on

civil process while in attendance for examination in a State where he did not reside, it was held that when he was there arrested on a claim not dischargeable in bankruptcy, he should be discharged by the court of bankruptcy upon the writ of *habeas corpus*. U. S. ex rel. *Mansfield v. Flynn*, 179 Fed. 316. It has been held that the writ of *habeas corpus* and *testificandum* should not issue to bring before the court, for examination, the bankrupt, who is in another State in the custody of the authorities there, after his commitment as a lunatic. *Re Thaw*, C. C. A., 166 Fed. 71.

³⁴ *Re Shanker*, 138 Fed. 802.

³⁵ *Re Kerber*, 125 Fed. 653. See *supra*, § 277. The husband of a bankrupt is entitled to witness fees. *Re Marcus*, 160 Fed. 229.

³⁶ *Re Cole*, 133 Fed. 414. But see *Re Hemstreet*, 117 Fed. 568

dence.³⁷ "No testimony given by the bankrupt should be used against him in any criminal proceedings."³⁸ It has been held: that this does not exempt him from an indictment for perjury then committed;³⁹ and that he may be punished for contempt for such perjury and for evasive answers,⁴⁰ and for a refusal to produce his books.⁴¹ Since the statute does not relieve him from an indictment for a crime thus disclosed,⁴² he can plead his privilege against an incriminating question.⁴³ The objection cannot be taken before he is sworn.⁴⁴ He cannot object to surrendering books of account of a receiver or trustee because they may tend to criminate him.⁴⁵ A refusal to answer a question approved by the court and referee may be a ground for denying a discharge in bankruptcy.⁴⁶ A witness other than the bankrupt is not entitled to have counsel present upon the ex-

³⁷ *Re Hemstreet*, 117 Fed. 568.

³⁸ 30 St. at L., 544, 548, § 7.

³⁹ *Glickstein v. U. S.*, 222 U. S. 139; *Edelstein v. U. S.*, C. C. A., 149 Fed. 636; *Remington on Bankruptcy*, § 1536. *Cf. State v. Strait* (Minn.), 102 N. W. 913. Upon the trial of an indictment for concealing assets, his schedules may be put in evidence. *Johnson v. U. S.*, 228 U. S. 457. *Cf. Ensign v. Pennsylvania*, 227 U. S. 592; *Edelstein v. U. S.*, C. C. A., 149 Fed. 636; *U. S. v. Brod*, 176 Fed. 165.

⁴⁰ *Re Fellerman*, 149 Fed. 244, 17 Am. B. R. 785; *supra*, § 428.

⁴¹ *Re Magen*, 179 Fed. 572; *Re Alper*, 162 Fed. 207; *Re Sorkin*, 166 Fed. 831.

⁴² *Burrell v. Montana*, 194 U. S. 572, 48 L. ed. 1122; *Re Walsh*, 104 Fed. 518.

⁴³ *Re Scott*, 95 Fed. 815; *Re Rosser*, 96 Fed. 308; *Re Feldstein*, 103 Fed. 269; *Re Walsh*, 104 Fed. 518; *Re Smith*, 112 Fed. 509; *Re Shera*, 114 Fed. 207; *U. S. v. Goldstein*, 132 Fed. 789 (voluntary bankruptcy). See *supra*, §§ 339, 343. He cannot

when he has previously volunteered partial testimony upon the subject. *Re Bendheim*, 180 Fed. 918.

⁴⁴ *Re Scott*, 95 Fed. 815.

⁴⁵ *Matter of Harris*, 221 U. S. 274, 55 L. ed. 732; *Re Sapiro*, 92 Fed. 340. *Cf. Re Nachman*, 114 Fed. 995. See, also, *Re Edward Hess & Co.*, 136 Fed. 988. *Contra, Re Kanter & Cohen*, 121 Fed. 984, 58 C. C. A. 260 (where the bankrupts were relieved from filing schedules as well as from producing books). It has been held not to be improper for the trustee to permit the use of such books by a State prosecutor in criminal proceedings against the bankrupt. *Re Tracy & Co.*, 177 Fed. 532. It was said, however, that if the trustee proposed to show the books to trade rivals of the bankrupt, that would be a wanton and illegal misuse of his powers. *Ibid. Cf. State v. Strait*, 94 Minn. 384. *Contra, Blum v. State*, 94 Md. 375, 56 L.R.A. 322; *People v. Swarts*, (Cook County Crim. Ct., Ill.) 8 Am. B. R. 487. ⁴⁶ *Re Dresser*, C. C. A., 146 Fed. 383. *Infra*, § 491.

amination,⁴⁷ except possibly when he is a creditor.⁴⁸ The bankrupt is entitled to have counsel present before the referee at all hearings.⁴⁹ It has been held that the referee may rule upon the admission and exclusion of evidence.⁵⁰ According to some authorities, it is his duty to receive and take down answers to questions, even after he has sustained objections to the same.⁵¹ It has been held that he may exclude repetitions of the same question.⁵² It has been held that the referee is bound to be personally present when evidence is taken, upon which he is to pass, unless his presence is waived.⁵³ The testimony so taken is a part of the record, to which creditors are entitled to access so long as it remains in the custody of the referee, although it might in a suit for a preference, injuriously affect the party taking the same.⁵⁴ The testimony of a bankrupt

⁴⁷ *Re Abbey Press*, C. C. A., 134 Fed. 51.

⁴⁸ According to Referee Remington, any creditor can cross-examine witnesses upon a general examination. Remington on Bankruptcy, § 1574. Citing *contra*, *Re Cobb*, 7 Am. B. R. 104.

⁴⁹ *Re Hark*, 136 Fed. 986.

⁵⁰ *Re De Gottardi*, 114 Fed. 328; *Re Wilde's Sons*, 131 Fed. 142. *Re Ruos*, 159 Fed. 252.

⁵¹ *Re Lipset*, 119 Fed. 379; *Dressel v. North State Lumber Co.*, 119 Fed. 531; *Re Sturgeon*, C. C. A., 139 Fed. 608; *Bank of Ravenswood v. Johnson*, C. C. A., 143 Fed. 463; *Re Isaacson*, 175 Fed. 292; reversing *Re Romine*, 138 Fed. 837; excepting evidence plainly privileged and which affirmatively appears to be so incompetent, irrelevant and immaterial, that it would be an abuse of process to compel its production or permit its introduction. *Missouri-Am. El. Co. v. Hamilton-Brown Shoe Co.*, C. C. A., 165 Fed. 283. See §§ 343, 353, *supra*. *Contra*, *Re Harrison Bros.*, 197 Fed. 320, 321: "To the same effect is the sound reasoning and conclu-

sion in *Re Wildes Sons* (D. C.) 11 Am. Bankr. Rep. 715, 131 Fed. 142. It is true that some courts have reached a contrary conclusion requiring the referee to hear and record everything that is offered, regardless of how relevant he may consider it. A careful examination of these cases, however, will disclose the fact that in most every instance where this ruling was made the referee was acting as a commissioner, or special master, to take testimony to report to the court. In *re Lipset* (D. C.) 9 Am. Bankr. Rep. 32, 119 Fed. 379; In *re Romine* (D. C.) 14 Am. Bankr. Rep. 789, 138 Fed. 840; In *re Isaacson* (D. C.) 23 Am. Bankr. Rep. 665, 175 Fed. 292; *Bank of Ravenswood v. Johnson*, 143 Fed. 463, 74 C. C. A. 597," see General Order XXII; *supra*, §§ 352, 355 391.

⁵² *Re Romine*, 138 Fed. 837; reversed upon another point, *Bank of Ravenswood v. Johnson*, C. C. A., 143 Fed. 463. Approved in Remington on Bankruptcy, § 552.

⁵³ *Re Wilde's Sons*, 131 Fed. 142.

⁵⁴ *Re Samuelsohn*, 174 Fed. 911

upon his examination at a creditor's meeting, or otherwise, may be offered in evidence against him as an admission upon his application for his discharge,⁵⁵ or upon any other application in the proceeding;⁵⁶ even, it has been said, although it was not signed nor taken down in writing, if it is proved by the testimony of those who heard the same.⁵⁷ But the testimony of other persons in other applications in the proceeding in bankruptcy cannot be offered in evidence against the bankrupt, except as a means of contradicting a witness then examined, after his attention has been called to the same.⁵⁸ It has been held that, in an action by a trustee against a stranger to the proceeding, the books of the bankrupt are competent evidence of his insolvency,⁵⁹ and a single case seems to hold that the uncorroborated testimony of the bankrupt upon his examination in the bankruptcy proceedings is competent for the same purpose.⁶⁰ It has been held that where a material issue was the indebtedness of the bankrupt to a petitioner, an adjudication of bankruptcy which found that issue in favor of the latter was conclusive evidence of the validity of his claim, which could not thereafter be disputed by either the bankrupt or another creditor.⁶¹

⁵⁵ *Re Leslie*, 119 Fed. 406; *Shaffer v. Koblegard Co.*, 183 Fed. 71.

⁵⁶ *Re Wilcox*, C. C. A., 109 Fed. 628; *Re Alphin & Lake Cotton Co.*, 131 Fed. 824; *Re Wiesen Bros.*, 135 Fed. 442. *Re Greer*, 189 Fed. 511. It has been held: that such statements made by the bankrupt are admissible against the trustee in litigation with a stranger to the proceeding, *Re Thompson*, 197 Fed. 681; that in a plenary action by a trustee in another court in the same district, it cannot take judicial notice of matters of record in the bankruptcy proceedings, *McDonald v. Clearwater Shortline Ry. Co.*, 164 Fed. 1007; See *supra*, § 329; and that insolvency may then be proved by the uncorroborated testimony of the bankrupt, *Collett v. Bronx Nat. Bank*, 200 Fed. 111, which seems to hold that the testimony of the bank-

rupt upon his examination in bankruptcy is then admissible. *Contra*, *Taylor v. Nicholas*, 134 App. Div. (N. Y.) 787. It has been held that the bankrupt's books are competent evidence to show his solvency or insolvency at a particular time. *Ernst v. Mechanics' & Metals Nat. Bank of N. Y.*, 200 Fed. 295. *Contra*, *Taylor v. Nicholas*, 134 App. Div. (N. Y.) 787.

⁵⁷ *Re Bard*, 108 Fed. 208; *Re Knaszak*, 151 Fed. 503.

⁵⁸ *Re Alphin & Lake Cotton Co.*, 131 Fed. 824; *Re Wiesen Bros.*, 135 Fed. 442.

⁵⁹ *Ernst v. Mechanics' & Metals Nat. Bank of N. Y.*, 200 Fed. 295.

⁶⁰ *Collett v. Bronx Nat. Bank*, 200 Fed. 111. *Contra*, *Re Hersey*, 171 Fed. 1004.

⁶¹ *Re Henry Ulfelder Clothing Co.*, 98 Fed. 409.

§ 640. Meetings of creditors and appointments of trustees. “(a) The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. (b) At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. (c) The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act. (d) A meeting of the creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. (e) The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of filing the request. (f) Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.”¹

“If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed, but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed

as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.”² “Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.”³ “(a) Creditors shall pass upon matters submitted to them at their meeting by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. (b) Creditors holding claims which are secured or have priority shall not, in respect to such claims be entitled to vote at creditors’ meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.”⁴ The word “creditor,” in the act, includes “any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy.”⁵ But none of them can vote at a creditors’ meeting until their claims have been proved and allowed.⁶ The words “secured creditor” include “a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt, has such security upon the bankrupt’s assets”⁷ Upon the election of a trustee, a secured creditor may surrender his security and vote as if his claim was unsecured; but otherwise his vote is only good for the amount of the excess of his claim over the value of his security as found by the court, or

² General Order XV.

³ General Order XXV.

⁴ 30 St. at L. 544, 560, § 56.

⁵ 30 St. at L. 544, § 1. It has been held that a stockholder or director, *Re Syracuse Paper & Pulp Co.*, 164 Fed. 275; *Re L. W. Day & Co.*, C. C. A., 178 Fed. 545; *Re Stradley & Co.*, 187 Fed. 285; or attorney, *Re L. W. Day & Co.*, C. C.

A., 178 Fed. 545; or employee, *Re Syracuse Paper & Pulp Co.*, 164 Fed. 275; *Re Ployd*, 183 Fed. 791; of the bankrupt, if he is a creditor, may vote.

⁶ *Re Walker*, 96 Fed. 550; *Re Eagles*, 99 Fed. 695; *Re Henschel*, C. C. A., 113 Fed. 443, 7 Am. B. R. 662.

⁷ 30 St. at L. 544, 545, § 1.

perhaps as found by the referee.⁸ The claimant and the objecting creditors are entitled to a hearing and to offer testimony on the question.⁹ If objections are made to a claim on the ground that it is preferred, the claimant cannot be allowed to vote until that question is decided.¹⁰ It has been held that, where a creditor of a bankrupt is a debtor to the estate for an amount equal to his claim, he cannot vote until he has made his indebtedness good.¹¹ Where claims have been assigned, the assignee is counted as a single creditor.¹² "The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so."¹³ "If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called."¹⁴ "No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases."¹⁵ "It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond."¹⁶ It has been held that there is no authority for the election of separate trustees for bankrupt partners, when the partnership is in bankruptcy.¹⁷ No one can cast a vote of a creditor with-

⁸ *Re Eagles*, 99 Fed. 695.

⁹ *Re Columbia Iron Works*, 142 Fed. 234.

¹⁰ *Re Malino*, 118 Fed. 368; *Re Columbia Iron Works*, 142 Fed. 234.

¹¹ *Re Duryea Power Co.*, 159 Fed. 783.

¹² *Re Messingill*, 113 Fed. 366.
Fed. Prac. Vol. II.—135.

¹³ 30 St. at L. 544, 557, §. 44.

¹⁴ General Order XV; *Re Smith* 93 Fed. 791.

¹⁵ General Order XIV.

¹⁶ General Order XVI.

¹⁷ *Re Coe*, 154 Fed. 162. *Contra*, *Re Currie*, 197 Fed. 1012.

out a written proxy,¹⁸ even if he be an attorney at law who has appeared generally for him in the proceedings.¹⁹ If the election of the trustee was procured by the influence of the bankrupt, it will be set aside.²⁰ An election will not be set aside because persons, not the bankrupt, canvassed creditors to secure the election of a particular person as trustee.²¹ "Ordinarily, the creditor whose claim has been allowed should be permitted to vote in person or by proxy, and any question as to whether his vote has been improperly influenced should be reserved until the referee is called upon to approve the election, when the parties can be fully heard and a new election ordered, if it appear that the creditors have been prevented from exercising a free and unrestricted choice."²² It has been held that

¹⁸ *Re Blankfein*, 97 Fed. 191; *Re Eagles*, 99 Fed. 695; *Re Richards*, 103 Fed. 849. It has been held that a proxy may be acknowledged before a justice of the peace, *Re Roy*, 185 Fed. 551; or held a foreign consul; that it may contain a power of substitution; and that when given to three or to anyone or more of them, its acknowledgment before one of the three does not invalidate its appointment of the other two. *Re Sugenhimer*, 91 Fed. 744.

¹⁹ *Re Blankfein*, 97 Fed. 191; *Re Scully*, 108 Fed. 372.

²⁰ *Re Kaufman*, 179 Fed. 552; *Re Ployd*, 183 Fed. 791; *Re Sitting*, 182 Fed. 917; in all of which proxies were cast by attorneys for the bankrupt; *Re Van de Mark*, 175 Fed. 287; *Falter v. Reinhard*, 104 Fed. 292; s. c., as *Re McGill*, C. C. A., 106 Fed. 57. It has been held, however, that the attorney for the bankrupt may be allowed to vote upon a proxy that comes to him unsolicited. Where a debtor stated, at a meeting of his creditors: that he intended to file a petition in bankruptcy; that if a person, whom he nominated, could be elected trustee, he believed that his debts would be

paid in full and a surplus for himself; and he then asked his creditors to vote for such person, to which they agreed; and pending the election a letter was prepared by the bankrupt's attorney, signed and sent out by a large creditor advocating the election of the bankrupt's candidate, who was elected by a large majority in number and in amount of claims: it was held that the election would not be set aside. *Re Eastlack*, 145 Fed. 68. See *Re Ketterer Mfg. Co.*, 155 Fed. 987.

²¹ *Re Fisher*, 193 Fed. 104, where the trustee occupied the same suite of offices as the bankrupt's attorney; *Re Margolies*, 191 Fed. 369. See *Re Kreuger*, 196 Fed. 705. But where the canvasser was an endorser upon the bankrupt's notes, which, after payment, he transferred to a stranger without any consideration, the votes thereupon were excluded. *Re L. W. Day & Co.*, C. C. A., 178 Fed. 545. It was similarly held where the canvasser was a large creditor of the trustee, who was charged with having obtained a preference. *Re Anson Mercantile Co.*, 185 Fed. 993.

²² *Falter v. Reinhard*, 104 Fed.

the holders of proxies who were not allowed to vote should not be counted as present at the election.²³ Votes cast for a candidate that is disqualified are not to be disregarded so as to give the election to one who has less than a majority of the votes;²⁴ but the holders of proxies, which have not been duly executed, are not to be counted.²⁵ When objections to a proxy are not verified, they may be disregarded.²⁶ It has been held that where the holders of proxies were not allowed to vote and the votes cast and counted are less than a majority, the referee should give those whose votes were excluded an opportunity to appoint a new proxy and should adjourn the election for that purpose.²⁷

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only."²⁸ Where claims offered for proof and allowance at a meeting of creditors were disallowed and the claimants excluded from voting, the court has power, after they have been allowed upon appeal, to set aside the election provided that their votes, if cast, would have changed the result.²⁹ The fact that the trustee has solicited

292, 294, per Thompson, J.; *Falter v. Reinhard*, 104 Fed. 292.

²³ *Re Kaufman*, 179 Fed. 552.

²⁴ *Re Machin*, 128 Fed. 315.

²⁵ *Re Henschel*, C. C. A., 113 Fed. 443, 7 Am. B. R. 662.

²⁶ *Re Syracuse Paper & Pulp Co.*, 164 Fed. 275.

²⁷ *Re Kaufman*, 179 Fed. 552. But see *Re Goldstein*, 199 Fed. 665.

²⁸ General Order XIII. See *Re Sitting*, 182 Fed. 917; *Re L. W. Day & Co.*, C. C. A., 173 Fed. 545; *Re Van de Mark*, 175 Fed. 287. It seems that suspicious by the referee that the appointment was procured by improper considerations, is insufficient to justify him in setting aside an election, although it is based upon the frequency with which the candidate has been selected as trustee in bankruptcy matters under the influence of the same attorneys. *Re Kreuger*, 196 Fed. 705.

See *Re Margolies*, 191 Fed. 369. Since the referee has no power to remove a trustee, his order appointing a new incumbent to the office and directing the one originally appointed to turn over the assets to the latter is ineffectual. *Re Berree & Wolf*, 185 Fed. 224. It was held that a referee properly refused to approve the election of the assignee in insolvency of the bankrupt and of such assignee's attorney. *Re Keller*, C. C. A., 192 Fed. 830.

²⁹ *Re Eagles*, 99 Fed. 695: At a creditors' meeting an attorney, who formerly represented the bankrupt, may be asked by any creditor whether any claims which he wishes to vote upon have been assigned in the interest of the bankrupt. If he refuses to answer, the referee may compel an answer, or else the election may be set aside. *Re Dayville Woolen Co.*, 114 Fed. 674.

votes is not a disqualification if this was not done in the interest, or at the request, of the bankrupt.³⁰ Where the unpreferred creditors had been paid in full, an election of a trustee was not set aside because the bankrupt solicited votes for him.³¹ Where a trustee elected by the creditors is disapproved by the court, or declines to act, or fails to qualify, a vacancy arises which must be filled by a new election if practicable.³² When, at a meeting of creditors, objections are made to the person elected as trustee and the referee takes them under advisement, the meeting should be adjourned for a new election then, in case the objections are sustained and the appointment disapproved.³³

An adjourned meeting of the creditors is considered as a continuance of the original meeting and not a separate one.³⁴ When there is no election or the choice of the creditors is disapproved, and it appears that the majority are not likely to agree upon another candidate, the referee appoints the trustee.³⁵

It has been held improper to allow a creditors' meeting to select the attorney for the trustee,³⁶ or to elect appraisers,³⁷ or to determine the manner in which the property shall be sold.³⁸

§ 641. Qualifications of trustees. "Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed."¹ An alien, who has an office in the district,

³⁰ *Re Lloyd*, 148 Fed. 92, 17 Am. B. R. 96.

³¹ *Re Morton*, 118 Fed. 908.

³² *Re Lewensohn*, 98 Fed. 576; *Re Margolies*, 191 Fed. 369; *Re Van de Mark*, 175 Fed. 287.

³³ *Re Lewensohn*, 98 Fed. 576.

³⁴ *Re Eagles*, 99 Fed. 695.

³⁵ Appointments have been sustained when there was immediate need of action by a trustee, and after two sessions of a creditors' meeting, upon successive days, there was a failure to obtain a majority for any one; *Re Kuffier*, 97 Fed. 187. Where, at a meeting of

creditors called for the election of a trustee a majority in number were represented by the attorney of record for the bankrupt and by a student in his office; *Re Morris*, 154 Fed. 211, and where, at the first creditors' meeting, there was no request that an election be had nor a nomination of any candidate. *Re Brooke*, 100 Fed. 432.

³⁶ *Re Columbia Iron Works*, 142 Fed. 234.

³⁷ *Ibid.*

³⁸ *Re Arnett*, 112 Fed. 770.

§ 641. 130 St. at L. 556, 547, § 45. See *Re Lewensohn*, 98 Fed.

is competent to act as trustee.² Non-residence in the county where the assets are situated is no disqualification.³ A trustee may be a creditor of the bankrupt's estate.⁴ Hostility to the bankrupt is not an objection to the approval of the election if it has not been accompanied by misconduct.⁵ It has been held that the legal adviser of a bankrupt,⁶ and his assignee in insolvency,⁷ and the counsel of the latter,⁸ are disqualified from being appointed or elected trustee. It has been even said that his former attorney cannot be appointed;⁹ but it has been held that a person is not disqualified because he is an attorney representing certain creditors,¹⁰ or although, when a proxy, he voted for himself,¹¹ or because he is a director of a bankrupt corporation.¹²

§ 642. Duties of trustees. "(a) Trustees shall respectively (1) account for and pay over to the estate under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such informa-

576. It has been held: that the remoteness of his residence from the place where the trust property is to be administered, is no ground for disapproval where he resides or has an office within the district, *Re Kreuger*, 196 Fed. 705; and that he should not be removed because he changes his legal residence to another district, if he retains his office in that where he was appointed, and the change does not interfere with the administration of the estate and the service of notices upon him *Re Seider*, 163 Fed. 138.

² *Re Coe*, 154 Fed. 162.

³ *Re Jacobs & Roth*, 154 Fed. 988.

⁴ *Re Lazoris*, 120 Fed. 716.

⁵ *Re Lewensohn*, 98 Fed. 576; *Re Mangan*, 133 Fed. 1000.

⁶ *Re Gordon Supply & Mfg. Co.*, 129 Fed. 622.

⁷ *Re Kellar*, C. C. A., 192 Fed. 830, where the assignee had an unsettled account and a claim for his services.

⁸ *Ibid.*

⁹ *Re Gordon Supply & Mfg. Co.*, 129 Fed. 622; *Contra, Re Machin*, 128 Fed. 315; *Re Cooper*, 135 Fed. 196.

¹⁰ *Re Margolies*, 191 Fed. 369.

¹¹ *Ibid.*

¹² *Re Syracuse Paper & Pulp Co.*, 164 Fed. 275, where two other trustees were appointed.

tion concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amount of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." "a. Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate."¹ "b. Proofs of debt received by any trustee shall be delivered to the referee, to whom the cause is referred."² "(b) Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties. (c) The creditors of a bankrupt estate, at their first meeting, after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so. (d) The court shall require evidence as to the actual value of the property of sure-

§ 642. 130 St. at L. 544, 550,

² General Order XXI.

§ 46. Cf. *Merchants' Bank v. Sledge*, 106 U. S. 558, 27 L. ed. 204.

ties. (e) There shall be at least two sureties upon each bond. (f) The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond. (g) Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected. (h) Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.³ (i) Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees. (j) Joint trustees may give joint or several bonds. (k) If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.”⁴ “Suits upon trustees’ bonds shall not be brought subsequent to two years after the estate has been closed.”⁵ “The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be

³ *Alexander v. Union Surety & Guaranty Co.*, 89 App. D. (N. Y.) 3. It has been held that an order directing a trustee to account is a necessary prerequisite to an action on his bond; *U. S. v. Sondheim*, 188 Fed. 378; unless he has absconded when it is not, *Scofield v. U. S.*, C. C. A., 174 Fed. 1. That the account may be settled and allowed

by the referee upon the confirmation of a composition; and that when this is done without any objection or appeal by the bankrupt, the latter cannot thereafter dispute such allowance in a suit upon such bond. *U. S. v. Sondheim*, 188 Fed. 378.

⁴ St. at L. 544, 558, § 50.

⁵ *Ibid.*

argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at the time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court."⁶ "(b) All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court."⁷ Real and personal property shall, when practicable, be sold; subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. (c) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee."⁸ "1. All sales shall be by public auction unless otherwise ordered by the court. 2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specific portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article

⁶ General Order XVII.

⁷ A person is not disqualified for appointment as an appraiser of a bankrupt's property merely because some of the officers and directors of a corporation creditor are also officers and directors of another corporation of which such appraiser is president. *Re Columbia Iron Works*, 142 Fed. 234. Where a bankrupt's goods were appraised at \$5,000 and realized \$3,400 at a public sale by the trustee, it was held that an upset bid merely amounting to an advance of \$400 was insufficient to

warrant a vacation of the sale and an order directing a resale. While a sale may be set aside on the sole ground of inadequacy, this must be such as to be unconscionable. *Re Shapiro*, 154 Fed. 673. It has been held that the court may select an auctioneer, whom all trustees must employ. *Re Benjamin*, C. C. A., 136 Fed. 175, 14 Am. B. R. 481, affirming 13 Am. B. R. 18, but this ruling has been criticised by a high authority, Referee Remington in his work on Bankruptcy, § 2037.

⁸ 30 St. at L. 444, 505, § 70.

sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee. 3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."⁹ "Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any condi-

⁹ General Order XVIII. A sale by the trustee should ordinarily not be made without notice to the creditors. *Re James Carothers & Co.*, 193 Fed. 687. But such notice is not required in the sale of securities of fluctuating value which have been pledged by the bankrupt. *Ibid.* An appraiser has no right to buy property of the bankrupt. *Re Frazer & Oppenheim*, C. C. A., 181 Fed. 307. A sale to a corporation, in which the appraiser and the bankrupt's family have the controlling interest, was set aside. *Ibid.* In the absence of a charge of collusion by the trustee, it was held: that, after the confirmation, a creditor could not, upon a petition, obtain a summary order setting aside the same for a conspiracy between the purchaser and former employees of the bankrupt, which enabled the purchaser to buy the property for an inadequate consideration; and that the remedy was a plenary suit by the trustee for an accounting. *Re Charles Knosher & Co.*, C. C. A., 197 Fed. 136. A sale was confirmed although the property was brought by a reorganization committee,

whose purchase was favored by the trustee. *Schuler v. Hassinger*, C. C. A., 177 Fed. 119. The order is not invalid because it does not fix an up-set price for the property, when the sale is subject to confirmation by the court. *Ibid.* A sale will very rarely be set aside for inadequacy in price or mistake on the part of the bidder. *Re Kronrot*, 183 Fed. 653. If the accepted bid equals the appraised value, the sale will ordinarily be confirmed and not set aside for inadequacy of price. *Schuler v. Hansinger*, C. C. A., 177 Fed. 119. *Cf. Re Zehner*, 193 Fed. 787. The purchaser at a judicial sale may be required to accept a title good by adverse possession, although not supported by the records. *Marsh v. Kenyon*, 37 App. D. C. 574. The purchaser was not allowed a credit upon his bid for the amount he had paid in endeavoring to obtain possession of property from a person who gave notice at the sale that he would not surrender the same. *Re Criblier*, 184 Fed. 338. For authorities upon Judicial Sales, see § 394, *supra*.

tional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any other creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee."¹⁰

A Court of Bankruptcy has power, in its discretion, to order a sale of the bankrupt's property free from liens thereon, which may be transferred to the proceeds.¹¹ "The trustee shall, with-

¹⁰ General Order XXVIII.

¹¹ *Re Keet*, 128 Fed. 651. See also *Re Worland*, 92 Fed. 893; *Re Sanborn*, 96 Fed. 551; *Re Styer*, 98 Fed. 290; *Re Pittelkow* 92 Fed. 901; *Re Mead*, 58 Fed. 312; *So. L. & Tr. Co. v. Benbow*, 96 Fed. 514; *Factors' & Tr. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582. As an incident thereto, the court has the power to determine the amount of the lien claimed and to direct payment thereof out of the funds arising from the same, *Re Torchia*, 185 Fed. 576; *Re Roger Brown & Co.*, C. C. A., 196 Fed. 758; and in case the lienor is a purchaser, to permit the amount of the lien to be credited upon his bid, *Re Roger Brown & Co.*, C. C. A., 196 Fed. 758. It has been said that this should be done whenever there is reasonable ground to believe that more may be realized than the amount of the encumbrance, although there is doubt upon the point. *Re Zehner*, 193 Fed. 787. In such a case, the creditor will usually be enjoined from foreclosing in the State court. *Ibid.* Where it is reasonably certain that the property is encumbered to its

full value, the court will not direct such a sale, nor enjoin foreclosure proceedings in the State court. *Ibid.*; *Re Rose*, 193 Fed. 815; *Re Fayetteville Wagon-Wood & Lumber Co.*, 197 Fed. 180, where there was a dispute as to the validity of the lien. *Re Foster*, 181 Fed. 703. Where a trustee had taken possession of property in another State where a lienor lived, it was held that he might be authorized to make such a sale. *Re Wilka*, 131 Fed. 1004. An order directing a sale of a bankrupt's property on which valid liens exist should be granted only on notice to lien creditors, and the record should affirmatively disclose that every creditor whose lien will be discharged by the sale has received such notice. *Re Torchia*, 185 Fed. 576; *Re Stewart*, 193 Fed. 791; *Re Platteville Foundry & Machine Co.*, 147 Fed. 828. Where property belonging to a bankrupt was sold free from liens, it was held that the act of a lien creditor in bringing trover against trustee for the conversion of the property so sold constituted an affirmation of the sale. *Re Platteville Foundry &*

in 30 days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for

Machine Co., 147 Fed. 828. An order by the bankruptcy court directing a sale of the bankrupt's property without mentioning liens was construed as only authorizing a sale subject to existing liens. *Ibid.* The details as to the sale of encumbered property may be left to the discretion of the creditors, subject to the approval of the court, after the lienor has been afforded a hearing. *Re Zehner*, 193 Fed. 787. Ordinarily, no more should be expended for advertising than would be required in case of a sale under the State laws. *Ibid.* Where it is doubtful whether the property will sell for more than the amount of the lien, the trustee may be directed to sell the property himself without the aid of an auctioneer. *Ibid.* Where the trustee sells mortgaged property free from a mortgage, which the court holds to be valid, the mortgagee is entitled to the payment of interest, as well as principal, out of the proceeds; if the mortgage entitles him to interest. *Coder v. Arts*, C. C. A., 15 L.R.A. (N.S.) 372, 152 Fed. 943, *aff'd*, 213 U. S. 233, 53 L. ed 772; *Re Allert*, 173 Fed. 691. A recent amendment gives the trustees commissions "on all moneys disbursed or turned over to any person, including lienholders, by them." 36 St. at L. 838, amending 30 St. at L. 544, § 48; *Re Holmes Lumber Co.*, 189 Fed. 179. See § 663, *infra*. It was previously held that where the property was sold for less than the amount of the lien, no

fee should be allowed the referee, *Re Allert*, 173 Fed. 691; *Re Stewart*, 193 Fed. 791; *Re Harralson*, C. C. A., 179 Fed. 490; nor to the attorneys for the bankrupt and trustee, *Re Allert*, 173 Fed. 691, nor to the trustee, *Re Allert*, 173 Fed. 691; *Re Stewart*, 193 Fed. 791; out of the fund, *Re Harralson*, C. C. A., 179 Fed. 490; *Re Foster*, 181 Fed. 703. *Contra. Re Stewart*, 193 Fed. 791; unless, perhaps, the lienor consented to the sale, when, according to a few decisions, the expenses thereof, including the trustee's fees, could be subtracted from the fund before the lien is satisfied, *Re Utt*, C. C. A., 105 Fed. 754, 45 C. C. A. 32; *Re Mammoth Pine Lumber Co.*, 116 Fed. 731; *Re Chambersburg Silk Mfg. Co.*, 190 Fed. 411, holding that where the mortgage contained a provision giving a majority of the bondholders the control of foreclosure proceedings, a consent of such majority to the sale was sufficient. *Re Evans Lumber Co.*, 176 Fed. 643. *Cf. Re Torchia*, C. C. A. 188 Fed. 207. *Contra*, in the Second Circuit, *Re Anders Push Button Telephone Co.*, 136 Fed. 995; *Re Allert*, 173 Fed. 691. Where it is contended that the amount secured by the lien is in part a voidable preference, the trustee may deduct that amount from the payment and withhold the same until the controversy has been adjudicated. *Re V. & M. Lumber Co.*, 182 Fed. 231.

each copy so filed, which together with a filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.”¹² “The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.”¹³ “Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.”¹⁴

“Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estate; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days

¹² 32 St. at L. 797.

¹³ 30 St. at L. 544, 558, § 49. A creditor may inspect them, although he claims adversely to the trustee. *Re Saur*, 122 Fed. 101. It seems that his motive is immaterial. *Re Sully*, C. C. A., 152 Fed. 619, reversing 142 Fed. 895. A mere debtor of the estate cannot. *Re Sully*, C. C. A., 152 Fed. 619.

¹⁴ 30 St. at L. 544, 562, § 61. It

has been held that the District Court should not direct a trustee to withdraw the proceeds of a sale from the designated depository and deposit them in a national bank in the district, in return for a time certificate of deposit bearing the highest current rate of interest. *Huttig Mfg. Co. v. Edwards*, C. C. A., 160 Fed. 619.

after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."¹⁵

The estate to which the deposit belongs should be stated at the time of the same.¹⁶ The deposit should be made in the name of the court or judge,¹⁷ or in that of the trustee in his official capacity.¹⁸ "No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks."¹⁹ Payments made by the trustee without any authority from the Court of Bankruptcy may be disallowed, and he and his bondsmen may be obliged to return to the estate the amount of the same, although the court might have authorized them had the trustee applied for authority before they were made.²⁰ The court may instruct the

¹⁵ 30 St. at L. 544, § 47, subd. a. It has been held that a trustee is not bound to account for profits made by a corporation, of which he was a stockholder, upon goods sold by the corporation to himself and other receivers of the bankrupt's estate. *Re Frazin & Oppenheim, C. C. A.*, 181 Fed. 307. It is hoped that this decision, which opens the door for fraud, will not be followed.

¹⁶ *Re Cobb*, 112 Fed. 655, 657; *Re Carr*, 117 Fed. 572. But see *State Bank v. Dodge*, 124 U. S. 333, 31 L. ed. 458.

¹⁷ *Re Cobb*, 112 Fed. 655, 657.

¹⁸ *Carr*, 117 Fed. 572.

¹⁹ General Order XXIV.

²⁰ *Re Hoyt & Mitchell*, 127 Fed. 968. *Cf. Re Rude*, 101 Fed. 805. But see *Re Cobb*, 112 Fed. 655.

trustee what counsel to employ²¹ and give orders concerning litigation by him.²² The trustee may be directed to institute a suit to recover assets upon the petition of a creditor who files a bond to protect the estate from liability for costs and expenses.²³ A trustee in bankruptcy is bound to use due diligence to collect the assets of the estate, and he may be charged in his account with the value of assets which never came into his possession, if he failed to exercise reasonable diligence in collecting them.²⁴ He may be personally responsible for transferring property in such a way as to defeat a lien upon the same, of which notice has been given him.²⁵

A trustee in bankruptcy is considered to be an officer of the court and subject to its direction by an order in summary proceedings, as to all matters affecting money or property, which came into his possession by virtue of his office.²⁶ It has been held that an order in such a proceeding cannot be set aside by

²¹ *Re Arnett*, 112 Fed. 770.

²² *Re Bailey*, 151 Fed. 953. He should not engage in expensive litigation concerning doubtful claims without the authority of a large majority of the creditors, unless creditors who wish the litigation instituted assume responsibility for the expense. *Re Harper*, 175 Fed. 412; *Re Kearney*, 184 Fed. 190. But he may be required to do so upon the petition of a creditor, *Re Bailey*, 151 Fed. 953, or stockholder, *Re John H. Woodbury Dermatological Institute, C. C. A.*, 191 Fed. 819, of the bankrupt who files a bond to protect the estate from liability for costs and expenses; and, in such a case, the court may direct that the creditors who paid the expense of the litigation should have a prior lien for the same and for the amount of their claims out of any amount that may be recovered, *Cornell v. Nichols & L. Mach. Co. C. C. A.*, 201 Fed. 320, affirmed 189 Fed. 556. See §§ 311, 322, 421, *supra*.

²³ *Re Bailey*, 151 Fed. 953.

²⁴ *Re Reinboth, C. C. A.*, 16 L.R.A.(N.S.) 341, 157 Fed. 672. *Re Kane*, 161 Fed. 633. A trustee is under no obligation to buy property at a foreclosure sale in order to prevent its being acquired by the mortgagor for less than the amount of the mortgage. *Re Graves*, 182 Fed. 443. Where a trust company was appointed receiver and trustee, it was held that it was its duty to act as custodian of the property and that it could not charge for the services of a watchman, although that was required as a condition to the issue of a fire insurance policy. *Re Pickhardt*, 198 Fed. 879.

²⁵ *Re Cadenas & Coe*, 178 Fed. 158. The fact a trustee failed to object to the discharge of a bond for the value of property given by a third party in possession thereof is evidence of the negligence in this respect. *Ibid*.

²⁶ *Re Howard*, 130 Fed. 1004; *Re Cadenas & Coe*, 178 Fed. 158.

the court that made it, after the expiration of a year.²⁷ When a trustee in bankruptcy, in a suit in another district, had been required to make restitution of money paid to his attorney under a previous decree, which was reversed; it was held that that decree might be enforced by a summary application in the district where he was appointed; that it was no defense that his attorney refused to surrender a part of the fund because of an alleged lien for counsel fees and disbursements; but that, where there were no funds of the estate in his hands, he could not be required to pay the costs awarded against him in the other district.²⁸ A trustee may be sued in a State court in trover, without leave of the Court of Bankruptcy, for an act done in the performance of his official functions;²⁹ but, it has been held that rent cannot be collected from him, except by a proceeding in the Court of Bankruptcy.³⁰ The trustee is liable for reimbursement from the estate for rent, which he is obliged to pay for the reasonable use of property for the purposes of his trust.³¹

§ 643. Title and powers of trustees. "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent-rights, copy-rights, and trade-marks;¹ (3) powers he might have exercised for his own benefit, but not those which he might have exer-

²⁷ *Re Hoyt & Mitchell*, 127 Fed. 968. But see § 614, *supra*.

²⁸ *Re Howard*, 130 Fed. 1004.

²⁹ *Re Smith*, 121 Fed. 1014.

Re Hunter, 151 Fed. 904.

³⁰ *Re Bishop*, 153 Fed. 304. See § 647, *infra*.

³¹ *Re Hunter*, 151 Fed. 904.

§ 643. ¹ It has been held that the trustee takes no interest in applications for patents, which have not been granted. *Re McDonnell*, 101 Fed. 239; *Re Dann*, 129 Fed. 495. *Contra, Re Cantelo Mfg. Co.*,

185 Fed. 276. Where a bankrupt corporation had agreed to publish an author's works, the copyright for which was taken in the corporate name, under a contract providing that, upon its failure to carry out its provisions, the copyright should revert to the author; it was held that the trustee in bankruptcy of the company acquired no title to the same. *Re D. H. McBride & Co.*, 132 Fed. 285. But see *Re Howley-Dresser Co.*, 132 Fed. 1002.

cised for some other person; (4) property transferred by him in fraud of his creditors;² (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:³ Provided, that when any bankrupt shall have any insurance policy which has a cash-surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash-surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets;⁴ and (6)

² See § 644, *infra*.

³ It has been held that the right to a liquor license or the proceeds thereof passes to a trustee in bankruptcy in Massachusetts, *Re Brod-bine*, 93 Fed. 643; *Fisher v. Cushman*, C. C. A., 51 L.R.A. 292, 103 Fed. 860. See *Tracy v. Ginzberg*, 205 U. S. 170; *Re McArdle*, 126 Fed. 442; *Minnesota, Re May*, 5 Am. B. R. 1, by Merriman, Referee; *Pennsylvania, Re Becker*, 98 Fed. 407; *contra, Re Olewine*, 125 Fed. 840; and in *Virginia, Re Flaherty*, 184 Fed. 962. But see, as to Georgia, *Re Keller*, 16 Am. B. R. 727, by Referee Isaac. So does the right to a market stall, *Re Emrich*, 101 Fed. 231; and a membership in a stock exchange, *Page v. Edmunds*, 187 U. S. 596, 47 L. ed. 318 (the Philadelphia Stock Exchange); *Re Gaylord*, 111 Fed. 717 (the St. Louis Stock Exchange); *Re Hurlbutt, Hatch & Co.*, C. C. A., 135 Fed. 504 (the New York Stock Exchange); *O'Dell v. Boyden*, C. C. A., 150 Fed. 731 (the New York Stock Exchange); or chamber of commerce, *Re Neimann*,

124 Fed. 738 (the Milwaukee Chamber of Commerce); when the same is transferable, although the other members have a right to decide the eligibility of the purchaser. The bankrupt may be compelled to execute the necessary application for such transfer. *Page v. Edmunds*, 187 U. S. 596, 47 L. ed. 318; *Re Gaylord*, 111 Fed. 717; *Re Hurlbutt, Hatch & Co.*, C. C. A., 135 Fed. 504; *O'Dell v. Boyden*, C. C. A., 150 Fed. 731.

⁴ Policies of life insurance, which are exempted by the State law, do not pass to the trustee, *Holden v. Stratton*, 198 U. S. 202, 49 L. ed. 1018, *infra*, § 650. The trustee takes life insurance policies, not exempt, which are payable to the bankrupt or the estate conditionally or contingently, as in the case of tontine, *Re Boardman*, 103 Fed. 783; *Clark v. Equitable Life Assur. Soc.*, 143 Fed. 175; or semi-tontine, *Re Slingluff*, 106 Fed. 154; *Re Welling*, C. C. A., 113 Fed. 189; or endowment, *Re Diack*, 100 Fed. 770; *Clark v. Equitable Life Assur. Soc.*, 143 Fed. 175; *Re Herr*, 182

Fed. 716; *Equitable Life Assur. Soc. of U. S. v. Miller*, C. C. A., 185 Fed. 98; *Re Loveland*, 192 Fed. 1005; *Re Churchill*, 198 Fed. 711; policies, and annuity bonds, *Smith v. Mutual Life Ins. Co.*, 158 Fed. 365; *Mutual Life Ins. Co. of N. Y. v. Smith*, C. C. A., 33 L.R.A. (N.S.) 439, 184 Fed. 1. But, although the bankrupt may be required to execute the necessary assignments or other papers to enable the trustee to realize upon such balance, *Re Coleman*, C. C. A., 136 Fed. 818; a third person, who has a partial or contingent interest therein, cannot be compelled to accept a paid up policy, nor to apply for the surrender value in cash, nor to suffer the policy to lapse, nor to take any other proceedings in relation to the same, *Re Diack*, 100 Fed. 770. Where the bankrupt is the beneficiary in a policy on the life of another, his interest therein passes to his trustee, if the same by the State law is assignable, *Re Blalock*, 118 Fed. 679; *Re Judson*, 188 Fed. 702. It has been held that, where the insured has reserved the right to change the beneficiary at will, the policy passes to his trustee in bankruptcy, *Re Orear*, C. C. A., 30 L.R.A. (N.S.) 990, 178 Fed. 632; *Re Dolan*, 182 Fed. 949; *Re Herr*, 182 Fed. 716; *Re Hogan*, 186 Fed. 537; *Foxhever v. Order of the Red Cross*, 2 Ohio C. C. (N. S.) 394; but if the policy has no actual value at the date of the adjudication, it will not pass to the trustee, *Burlingham v. Crouse*, 228 U. S. 459; *Gould v. N. Y. Life Ins. Co.*, 132 Fed. 927; although the bankrupt dies before the estate is closed. *Ibid.* But, if it has no cash surrender value, yet has an actual value, it has been held that

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it will pass to the trustee, *Gould v. New York Life Ins. Co.*, 132 Fed. 927 (where a few months later, without any further payment, the policy would have a paid-up value, which could be used as collateral to a loan); although, in such a case, it seems that the bankrupt cannot redeem the same, *Gould v. New York Life Ins. Co.*, 132 Fed. 927. It has been held that, where the policy has by its terms no surrender value, but it is the practice of the company to allow its surrender for cash after a certain period, the bankrupt may exercise the right secured by the statute, *Hiscock v. Mertens*, 205 U. S. 202, 51 L. ed. 771, affirming *Re Mertens*, C. C. A., 142 Fed. 445, which reversed 131 Fed. 972. See *Re Judson*, C. C. A., 192 Fed. 834; s. c., 188 Fed. 702. Where the bankrupt died before the cash surrender value had been ascertained, it was held that his legal representative succeeded to the right of redemption and did not forfeit his right by a failure for more than thirty days to pay the money necessary to redeem the same, *Van Kirk v. Vermont Slate Co.*, 140 Fed. 38. It is said to be the duty of the trustee not to wait for the maturity of the policy, but to sell his interest in the same at once for what it will bring, *Re Diack*, 100 Fed. 770; but, it has been held that he may pay premiums out of the bankrupt's assets to keep the life insurance policies alive. *Gould v. New York Life Ins. Co.*, 132 Fed. 927. *Contra*, *Re Josephson*, 121 Fed. 142, affirmed in *Meyers v. Josephson*, C. C. A., 124 Fed. 734. Where the bankrupt dies after the filing of the petition and before the adjudication for the trustee is entitled to no more than the cash surrender value as of the

rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property." ⁵ Trustees

date of the filing of the petition. *Everett v. Judson*, 228 U. S. 474; *Andrews v. Partridge*, 228 U. S. 479, affirming *Partridge v. Andrews*, C. C. A., 41 L.R.A. (N.S.) 123, 191 Fed. 325. The trustee is entitled to the proceeds of an accident policy. *Re Natschke*, 193 Fed. 284. Where, by the terms of a fire insurance policy, it was avoided upon a change in the title, interest, or possession of the premises, whether due to legal process or otherwise, and the insurance company had consented to a recognition of the title of a receiver in bankruptcy to the same, which was noted on the policy, but no such note was made after the trustee's election, since he considered that the general creditors had no substantial interest therein; it was held that the policy was void as to such trustee. *Re M. I. Hibbler Mach. Supply Co.*, 192 Fed. 741.

⁵ 30 St. at L. 544, § 70a. For desultory remarks as to the definition of property, see *Fisher v. Cushman*, C. C. A., 51 L.R.A. 292, 103 Fed. 860, 864. Although the trustee's title vests as of the date of the adjudication, it has been held to be limited to property which belonged to the bankrupt at the time of the filing of the petition. *Burlingham v. Crouse*, 228 U. S. 459, as to policies of life insurance; *Re Judson*, C. C. A., 192 Fed. 834. See *Re Hurley*, 185 Fed. 851. It has been held that his title does not relate back to the time of the filing of the petition. *Re Zotti*, 178 Fed. 304, 26 Am. Br. 234, holding that where a bank paid the bankrupt's checks after the petition was filed, in ignorance of the same, it was not liable to the trustee for their

amount; *Jones v. Springer*, 226 U. S. 148, 57 L. ed. —, holding that a sale of perishable goods by a State court was valid, although made after the filing of the petition in bankruptcy. But see XXV. Harv. Law Rev. 80, 469. It has been said that "the filing of the petition is a caveat to all the world, and in effect an attachment and injunction." *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. ed. 405; citing *Bank v. Sherman*, 101 U. S. 403, 405, 25 L. ed. 866, under the former law. This dictum has been criticised in *Re Williamsburg Knitting Mill*, 190 Fed. 871, 877; *Remington on Bankruptcy*, § 1212. See, also, *York Mfg. Co. v. Cassell*, 201 U. S. 344, 353, 50 L. ed. 782; *Davis v. Crompton*, C. C. A., 158 Fed. 735, 742. It has been recently said of the amendment of June 25, 1910, to § 47a, subd. 2, 36 St. at L. 838: "The amendment does, in fact, give to the bankruptcy proceedings the force of a 'caveat to all the world,' and in effect an attachment and injunction," and the same applies to cases as well of the attempted disposition of property after bankruptcy, as to those asserting title to or lien upon the bankrupt's estate arising out of transactions antedating the bankruptcy. The effect of this change is unquestionably radical and far reaching, as regards the consequence of the institution of bankruptcy proceedings, but it is what Congress had the right to do, and carries out what in the judgment of many should be the effect of such proceeding. It makes the date of the institution of the bankruptcy proceeding, the time as of which rights to, and claims against the

are directed to "collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and, for the purposes of suits specified in subdivision b of section sixty, subdivision e of section sixty-seven, and subdivision e of section seventy of said Act, such trustees shall be deemed lien creditors at the time of the bankruptcy and, as such, vested with all the rights and powers possessed by judgment

estate, should be reckoned with and adjusted." *Re Williamsburg Knitting Mill*, 190 Fed. 871, 877. It has been said by Referee Remington: "By the amendment of 1910 to the bankruptcy act, section 47a (2), 'this rejected doctrine' that bankruptcy operates as an 'equitable levy' as to property in the custody of the bankruptcy court, has become the accepted doctrine." Remington on Bankruptcy, III, 331; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307. It has been held that the trustee takes the title to a contingent remainder. *Clowe v. Seavey*, N. Y. C. C. of Appeals, June 3, 1913, 74 Misc. (N. Y.) 292. The trustee has the title to a legacy bequeathed to the bankrupt by a testator who died a few hours before the petition upon the same day. *Re McKenna*, 137 Fed. 611. Wages earned subsequent to the adjudication are the property of the bankrupt. *Re Karns*, 148 Fed. 143. And it has been held that the trustee cannot obtain an injunction against their collection by a creditor who has an assignment made prior to the petition. *Ibid.* But that the debtor may. *Re Newberry*, 183 Fed. 338. See § 650, *infra*. A trustee acquires the right to an action for damage caused by fraudulent representations, *Re Harper*, 175 Fed. 412; *Re Gay*, 182 Fed. 260; for

damages under the Anti-Monopoly Law, *Loeb v. Eastman Kodak Co.*, C. C. A., 183 Fed. 704; to recover usurious interest paid to a national bank, *Reed v. German-American Nat. Bank*, 155 Fed. 233. A cause of action for malicious prosecution, *Re Haensell*, 91 Fed. 355; or conspiracy to drive the plaintiff out of business, *Cleland v. Anderson* (Neb. Sup. Ct.), 11 Am. B. R. 605; does not pass to the trustee. The trustee acquires no right to the cause of action upon a contract for personal services to be rendered in the trustee acquired no right to a refuture, *Re D. H. McBride & Co.*, 132 Fed. 285. It was held that the ward for information concerning smugglers, allowed by the Secretary of the Treasury, after the filing of the petition for services previously given. *Re Ghazal*, C. C. A., 174 Fed. 809; but he acquires the rights to commissions, subsequently paid upon the renewals of insurance policies negotiated by a bankrupt agent; although, by the terms of the latter's contract with the insurance company, they may be forfeited if he fails to comply with its conditions or quits the company's employment. *Re Wright*, C. C. A., 18 L.R.A. (N.S.) 193, 157 Fed. 544; *Re Wright*, 177 Fed. 578. The trustee of a bankrupt corporation may compel stockholders to pay the balance of their subscriptions. He

creditors holding executions duly returned unsatisfied.”⁶ The clause of the Bankruptcy Act which provides for avoiding levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, provides: that the court may “on due notice, order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate; and thereupon the same may pass to it and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect.”⁷ “Whenever three trustees have been

may collect the same by a suit in equity, irrespective of the citizenship of the parties. *Re Crystal Spring Bottling Co.*, 96 Fed. 945; *Babbitt v. Read*, 173 Fed. 712. A bankruptcy court granted a petition by the trustee to levy an assessment upon stockholders under the Connecticut statute, *Re Monarch Corporation*, 177 Fed. 464; and the New Jersey statute, *Re Remington Automobile & Motor Co.*, C. C. A., 153 Fed. 345; *Re Newfoundland Syndicate*, 196 Fed. 443; including foreign stockholders, *Re Monarch Corporation*, 196 Fed. 252; but not under the New York statute, *Re Jassoy Co.*, C. C. A., 178 Fed. 515. See *Sternbergh v. Duryea Power Co.*, C. C. A., 161 Fed. 540, § 634, *supra*. It has been held that a trustee in bankruptcy cannot maintain a claim, under the New York Stock Corporation Law, against stockholders for the balance of the par value of stock issued as full paid for property purchased at an undervaluation, *Re Jassoy Co.*, C. C. A., 178 Fed. 515; nor enforce the statutory liability of directors to creditors for contractinig debts in excess of the lawful amount, *Re Crystal Spring Bottling Co.*, 96 Fed.

945; or for paying dividends when the corporation was insolvent, *Ibid.*; *contra*, *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 App. Div. (N. Y.) 148; but that he may sue them to recover corporate funds which they have lost or misappropriated, *Re Swofford Bros. Dry Goods Co.*, 180 Fed. 549. A trustee may sue to set aside a fraudulent transfer of the assets of a corporation in which the bankrupt is a stockholder, *Greenhall v. Carnegie Tr. Co.*, 180 Fed. 812; and in such a case, where the result would be to make the bankrupt resuscitate debts of the bankrupt, from which he could not be discharged in the proceeding, he was, against his consent, joined as a party defendant, *Ibid.* For the extent of the liability of a creditors' committee to the trustee, see *Re Thomas*, 199 Fed. 214.

⁶ 30 St. at L. 544, § 47a, subd. 2, as amended 36 St. at L. 838. See *infra*, § 644.

⁷ 30 St. at L. 544, § 67f; *Rock Island Plow Co. v. Reardon*, 222 U. S. 354; 56 L. ed. 231, affirming C. C. A., 168 Fed. 654. See *Mutual Life Ins. Co. of N. Y. v. Cockrell*, N. Y. Sup. Ct., Sp. Tm., *Bischoff J.*, N. Y. L. J. Dec. 22, 1911. The Court of Bankruptcy has power to

appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.”⁸ “Whenever a composition shall be set aside, or discharge revoked, the trustee shall upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.”⁹ It has been held that a trustee cannot move to reopen a bankruptcy proceeding after it has been closed.¹⁰ “The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.”¹¹ “(a) The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate. (b) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator. (c) The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.”¹² It has been

allow the trustee to enforce, for the benefit of all the creditors, an attachment obtained by one of them within the four months’ period, so as to cut off an unrecorded prior deed, which was invalid as against attaching creditors, but was otherwise valid as against the trustee. *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. ed. 967, affirming *C. A.*, 133 Fed. 717. In such a case, the attorneys for the attaching creditors may be allowed, out of the bankrupt’s estate, reasonable compensation for their services in procuring the attachment. *Receivers of Va. Iron, Coal & Coke Co. v.*

Staake, *C. C. A.*, 133 Fed. 717. Such a lien is not preserved unless the Court of Bankruptcy enters some order upon the subject. *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577; *Re Baird*, 126 Fed. 845. The trustee is entitled to a reasonable time within which to apply for the order. *Watschke v. Thompson*, 85 Minn. 105, 7 Am. B. R. 504.

⁸ 30 St. at L. 544, § 47c.

⁹ 30 St. at L. 544, § 70d; §§ 653, 658, *infra*.

¹⁰ *Re Paine*, 127 Fed. 246.

¹¹ 30 St. at L. 546, 557, § 46.

¹² 30 St. at L. 544, 553, § 26.

held: that the court may set aside the award of the arbitrators for any reason that would justify a new trial of an action at common law;¹³ and may set the same aside when the third arbitrator was selected by the contending parties instead of by the two arbitrators respectively selected by them.¹⁴ The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate."¹⁵ "The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt."¹⁶ "A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him."¹⁷ "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."¹⁸ Ordinarily, the trustee

¹³ *Re McLam*, 97 Fed. 922.

¹⁴ *Ibid*.

¹⁵ 30 St. at L. 44, 555, § 27a; *Re Jackson Stores*, 192 Fed. 705; *Re John H. Woodbury Dermatological Institute*, C. C. A., 191 Fed. 819, where the compromise was rejected upon the protestant's indemnifying the estate against any loss that might thereby be sustained. The bankrupt has no right to interfere with such a compromise. *Re Kranich*, 174 Fed. 908. A majority of the creditors have no power to compel the compromise of a pending suit. *Re Meadows, Williams & Co.*, 181 Fed. 911. It has been held, that a trustee in bankruptcy will not be authorized to compromise and settle a suit brought by the bankrupt in a State court without the consent of the bankrupt's attorney therein who has a lien on any judgment recovered for his services; and that he cannot set aside the abandonment or settlement of the contest of a will made by the bankrupt while insolvent, *Edington v.*

Masson, C. C. A., 177 Fed. 209. *Re Adamo*, 151 Fed. 716. A surety upon an attachment bond may be allowed to continue, in the bankrupt's name, a suit which the trustee wishes to abandon. *Bluegrass Canning Co. v. Steward*, C. C. A., 175 Fed. 537.

¹⁶ 30 St. at L. 544, 547, § 11b.

¹⁷ *Ibid*. § 11c. This does not authorize his substitution in a suit such as an action for malicious prosecution, the proceeds of which form no part of the assets. *Re Haensell*, 91 Fed. 355. The court whose approval is required is that which appointed the trustee. *The Alert*, 199 Fed. 542. The trustee is bound in collateral proceedings by a judgment against him in a suit in which he was substituted for the bankrupt. *Re Van Alstyne*, 100 Fed. 929. He may be estopped by his failure to intervene in a pending suit. *Frazier v. So. L. & Tr. Co.*, C. C. A., 99 Fed. 707.

¹⁸ 30 St. at L. 545, 549, § 11d. See *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636; *Hammond v. Whitt-*

acquires no greater rights than the bankrupt or his creditors.¹⁹ It has been said that he does not represent previous creditors of the bankrupt, whose claims were discharged by a prior composition in bankruptcy.²⁰ Where the trustee sells the interest of the bankrupt in land, the purchaser acquires only the latter's interest on the day of the adjudication; and no interest therein, subsequently acquired by him, passes by the deed.²¹ A trustee in bankruptcy takes the property subject to all the equities imposed upon it in the hands of the bankrupt which are not invalid as to creditors or avoided by the Bankruptcy Act.²² Where an asset, such as a patent,²³ or the membership in an exchange,²⁴ or a leasehold,²⁵ is subject to burdens, the trustee is not bound to accept if it would be unprofitable.

redge, 204 U. S. 538, 51 L. ed. 606, *Jenkins v. International Bank*, 106 U. S. 571, 27 L. ed. 304. See § 654, *infra*. Ordinarily, when there are sufficient assets to pay the costs and damages, no bond for costs nor injunction bond will be required of a trustee in bankruptcy suing in a Federal court in the district where he was appointed, even where the State law requires a bond in such a case. *Re Barrett*, 132 Fed. 362. A trustee is usually bound by a stipulation made by a receiver of the bankrupt before his appointment. *Re E. M. Newton & Co.*, C. C. A., 153 Fed. 841.

¹⁹ *Re N. Y. Economical Printing Co.*, C. C. A., 110 Fed. 514; *Re Kellogg*, C. C. A., 118 Fed. 1017. It has been said that he represents the creditors only and not the bankrupt. *Re Kreuger*, 196 Fed. 705.

²⁰ *Batchelder & Lincoln Co. v. Whitmore*, C. C. A., 122 Fed. 355.

²¹ *Cramer v. Wilson*, 195 U. S. 408, 49 L. ed. 256.

²² *Re Chantler Cloak & Suit Co.*, 151 Fed. 952; *Re V. & M. Lumber Co.*, 182 Fed. 231; *Aldine Tr. Co. v. Smith*, C. C. A., 182 Fed. 449; *Re Wade*, 185 Fed. 664; *Henry v. Har-*

ris, 191 Fed. 865; *Re Stewart*, 193 Fed. 791; *Re McConnell*, 197 Fed. 438; *Re Hoffman*, 199 Fed. 448; *Re Davison*, 179 Fed. 750.

²³ *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609.

²⁴ *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915; *Jaretzki v. Lee*, City Court of City of New York, *McAvoy, J.*, N. Y. L. J. Jan'y. 6, 1912. But see *Dushane v. Beall*, 161 U. S. 513, 40 L. ed. 791.

²⁵ *Re Chambers, Calder & Co.*, 98 Fed. 865. The obligations which the trustee assumes by occupying, after the adjudication, premises leased to the bankrupt has not yet been authoritatively determined. Referee Remington is of the opinion that the trustee in such a case is only liable for the value of the use of the premises while he occupies them, subject to his right to occupy, free of charge, for an unexpired portion of a term, for which a landlord holds a provable claim, and that he does not thereby accept the lease. He cites *Bray v. Cobb*, 100 Fed. 270, 3 Am. B. R. 788; reversed on another point, *Cobb v. Overman*, C. C. A., 109 Fed. 65, 54 L.R.A. 369, 6 Am. B. R. 324, and *Re Jefferson*,

§ 644. Right of trustee to set aside preferences, liens and conveyances. "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent¹ and that its existence

93 Fed. 948, 2 Am. B. R. 206. See *supra*, § 313. But see *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278; *People v. National Trust Co.*, 82 N. Y. 283; *People v. Universal Life Ins. Co.*, 30 Hun (37 N. Y. S. C. R.) 142; *Wells v. Higgins*, 132 N. Y. 459. In such a case it was held that the trustee might remain in possession of the premises a reasonable time in order to ascertain whether it was expedient to assume the lease; that one month was not unreasonable; and that in such a case, where that time was required for the proper packing and safe removal of the bankrupt's property thereupon, the lease was not assumed and the estate was liable only for a reasonable sum for the use and occupation of the premises. *Re Chambers Calder & Co.*, 98 Fed. 865. *Of. Re Grimes*, 96 Fed. 529; *Bray v. Cobb*, 100 Fed. 270; *Re Secor*, 18 Fed. 319; *Re Rubel*, 166 Fed. 131. It has been held that a delay of five days in the payment of the first month's rent by the trustee, does not authorize a forfeiture of the lease. *Re Gutman*, 197 Fed. 472. For a case where it was held that a lease was terminated before the bankruptcy, see *Re Van Da Grift Motor Car Co.*, 192 Fed. 1015. For a subsequent termination, see *Re Desmond & Co.*, 198 Fed. 581. It has been said that

it is the duty of a trustee who claims a leasehold, either to sell the same at an upset price for the balance of the rent for the term, which he should pay to the lessor, or to condition the sale upon a bond of indemnity; and that if he cannot obtain a bid subject to these conditions, he should surrender the lease. *Re Gutman*, 197 Fed. 472. A leasehold owned by the bankrupt passes to the trustee. *Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950; *Crowe v. Baumann*, 190 Fed. 399. The trustee receives the same by operation of law; and neither the bankruptcy, nor the sale by the trustee of the bankrupt's interest, is a ground for re-entering under a covenant in the lease providing for its termination upon its assignment by the lessee, or a sale of its interest under execution or other legal process when there is no right to a re-entry in case of a transfer by operation of law. *Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950.

§ 644. ¹A bankrupt was insolvent at the time of the transfer if the property that he then owned, at a fair valuation, was insufficient to pay the debts that he then owed. *Paper v. Stern*, C. C. A., 198 Fed. 642. See § 622, *supra*. When he is then engaged in business, his property must be valued as that of a going concern and not as what it was

and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."² "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part³ to hinder, delay, or defraud his credit-

worth as dead property after bankruptcy had intervened and the business was closed. *Re Klein*, C. C. A., 197 Fed. 241. In determining the solvency of a bankrupt, when a conveyance by him is attacked as made with intent to defraud his creditors, the value of the property conveyed is not to be computed; but if the same conveyances are attacked as preferences not fraudulent, the value of such property is to be considered in determining the question of solvency when the same was made. *Acme Food Co. v. Meier*, C. C. A., 153 Fed. 74.

² 30 St. at L. 544, 564, § 67c. *Cf.* See § 643, *supra*.

³ It has been held that to avoid a transfer of property under § 67e, the plaintiff must show actual, as distinguished from constructive, fraud. *Meservey v. Roby*, C. C. A., 198 Fed. 844. It has been held that a suit to compel a stockholder to pay corporate debts, because of participation in a fraudulent over-

valuation of the assets in payment for stock, does not fall within the statute and cannot be brought in a court of bankruptcy without the consent of the defendant. *Re Haley*, C. C. A., 158 Fed. 74. See § 643, *supra*. In the absence of any State law upon the subject, it seems that a voluntary conveyance made by a debtor to his wife or children while he was insolvent, but in ignorance of that fact, may be set aside. *Adams v. Riley*, 122 U. S. 382, 30 L. ed. 1207; *Re Steele*, 98 Fed. 78. But see *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. ed. 400; *Re Smith*, 9 Fed. 592. For a case where the transaction was set aside when the debtor continued in possession nominally as agent for his wife after she had bought the property at a sale upon the foreclosure of a chattel mortgage, given to a relative under suspicious circumstances, see *Re Smith*, 100 Fed. 795. But it was held that money paid by a bankrupt, while insolvent, to a creditor of his wife,

ors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State or Territory,⁴ or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.⁵ "For the purpose of such

in the absence of proof of a fraudulent intent, could not be recovered as a preference. *Re Kayser*, C. C. A., 177 Fed. 383. For a case where the court went very far in sustaining an alleged gift to the wife, see *Re Simon*, 197 Fed. 102. See § 639, note 3, *supra*.

⁴ See *infra*, § 649.

⁵ This invalidates such liens created within when the bankrupt was insolvent, irrespective of knowledge by the lienor of such insolvency. *Cook v. Robinson*, C. C. A., 194 Fed. 785, 792. See *Grant v. Nat. Bank of Auburn*, 197 Fed. 581. The statute does not impair the vendor's right of stoppage *in transitu*; *Re Burke & Co.*, 140 Fed. 971, 15 Am. B. R. 495; *Re Portuondo Co.*, 135 Fed. 592; and to retain possession in case of the buyer's insolvency before he has shipped the goods, *Re Portuondo Co.*, 135 Fed. 592; nor his

right to rescind a sale for fraud, *Re Weil*, 111 Fed. 897; *Re O'Connor*, 114 Fed. 777; *Re Patterson & Co.*, 125 Fed. 562. It has been held that an assignment for the benefit of creditors, made more than four months before the filing of the petition, is not invalidated thereby, unless it was forbidden by the State law. *Re Shinn*, 185 Fed. 990. See § 613, *supra*. This does not include a transfer to secure or pay pre-existing debts which is not voidable as a preference or otherwise contrary to law. *Sargent v. Blake*, C. C. A., 160 Fed. 57, an application of partnership property to the payment of an individual debt of a partner, when the firm was insolvent and the creditor had no reasonable cause to believe that a preference was thereby intended. It has been held: that an order by a bankrupt for the payment by his debtor

recovery any Court of Bankruptcy hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.”⁶

“Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.”⁷ “The trustees may avoid any transfer by the bankrupt

of money to a third person does not take effect until it is presented to that debtor; and that consequently, although it was executed before the four months' period, it may be set aside if not presented until within the same. *Johnston v. Huff*, *Andrews & Moyler Co.*, C. C. A., 133 Fed. 704; *Long v. Farmers' State Bank*, C. C. A., 147 Fed. 360 (a written contract to assign fire insurance as collateral security when the policies themselves were not assigned). But see *Lowell v. International Tr. Co.*, C. C. A., 158 Fed. 781. Where a general creditor brought under the West Virginia statute, within the four months' period, a suit to set aside a deed previously executed; it was held that he thereby acquired a statutory lien upon the property thereby covered, which was not affected by the bankruptcy proceedings. *Moore v. Green*, C. C. A., 145 Fed. 472. See *Re Kavanaugh*, 99 Fed. 928. The lien upon the tenant's property, given by the laws of Georgia to the landlord, exists from the time of the lease, and a distress warrant to enforce the same, issued within the four months, will not be set aside. *Henderson v. Mayer*, 225 U. S. 631, 56 L. ed. 1233. A conveyance of

exempt property cannot be set aside as a preference. *Vitzthum v. Large*, 162 Fed. 685; *Re Bailey*, 176 Fed. 990; *Huntington v. Baskerville*, C. C. A., 192 Fed. 813.

⁶ 30 St. at L. 544, § 64, § 67e.

⁷ 36 St. at L. 838, amending 30 St. at L. 544, 557, § 47; *Re Whatley Bros.*, 199 Fed. 326. The object of this amendment was to abrogate the rule laid down in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 351, 26 Sup. Ct. 481, 50 L. ed. 782, and to give trustees in bankruptcy the right to set aside chattel mortgages and conditional sales in cases where a judgment creditor with an execution returned unsatisfied might have done so. Report of Judiciary Committee of Senate, 61st Congress, 2nd Sess., quoted in *Remington on Bankruptcy*, III, 351; *Re Williamsburg Knitting Mill*, 190 Fed. 871, 878. *Contra*, *Re Lausman*, 183 Fed. 647. This statute does not give the trustee the rights of a purchaser of the bankrupt's property for value. *Re Charles Town Light & Power Co.*, 199 Fed. 846, 851. See *Holt v. Crucible Steel Co.*, 224 U. S. 262, 56 L. ed. 756. As to the former law, see *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. ed. 986; *Humphrey v. Tatman*, 198 U. S. 91,

of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any Court of Bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.”⁸ “That all levies, judg-

49 L. ed. 956; *Re N. Y. Economical Printing Co.*, C. C. A., 110 Fed. 514; *Re Great Western Mfg. Co.*, C. C. A., 152 Fed. 123. See *Sparks v. Weatherby*, (Ala.) 58 So. 280; 26 Harv. Law Rev., p. 82.

⁸ 30 St. at L. 544, § 70, as amended by 32 St. at L. 797. This gives a right of action to the trustee when the property was fraudulently conveyed more than four months before the institution of the proceedings. *Bush v. Export Storage Co.*, 136 Fed. 918; *Mueller v. Bruss*, 112 Wis. 406; *Andrews v. Mather*, 134 Ala. 358; *Beasley v. Coggins*, 48 Fla. 215. In the latter case, it has been held, that without the defendant's consent the proceedings cannot be instituted in the Court of Bankruptcy. *Gregory v. Atkinson*, 127 Fed. 183, by Referee Geiger; *supra*, § 608. Except, at least, when there was no consideration for the conveyance, fraudulent intent on the part of the grantee, as well as on the part of the bankrupt, must be shown, *Bush v. Export Storage Co.*, 136 Fed. 918, 922, unless the conveyance is made within four months prior to the filing of the petition in bankruptcy and while the bankrupt was insolvent, when no proof of fraud is necessary if such a conveyance is void by the laws of the State

as against the creditors of the debtor. 30 St. at L. 544, § 67a. “A sale may be void for bad faith, though the buyer pays the full value of the property bought.” This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditor, and where he buys recklessly, with guilty knowledge.” *Re Pease*, 129 Fed. 446, 448, citing *Clements v. Moore*, 6 Wall. 312, 18 L. ed. 786. See *supra*, § 621. A sale of a stock of goods by an insolvent shortly before his bankruptcy was held to be void, as made with intent to defraud his creditors, when it was shown that it was made for less than half the value of the property during an adjournment of an action against him by a creditor, that no part of the proceeds was paid to his commercial creditors, and no evidence was offered by the purchaser to show his good faith or to corroborate his own testimony as to the payment of the price. *Ott v. Doroshow*, 147 Fed. 762. It was held: that a buyer of the entire stock of a shopkeeper is put upon inquiry as to the seller's solvency and motive in selling and should not be protected as a *bona fide* purchaser against the creditors of the vendor; where he made no inquiry of the latter, who sold while

ments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.”⁹ In

insolvent for the purpose of delaying and defrauding his creditors, and the sale was made hurriedly without an inventory for a price considerably less than the actual value of the goods, although paid without knowledge by the buyer of such fraudulent intent. *Re Knopf*, 146 Fed. 109.

⁹ 30 St. at L. 544, 564, § 67f. All levies, judgments, attachments, and other liens obtained through legal proceedings are avoided if the levy was made or the lien first came into existence within four months before the petition was filed, although the suit in which they were made or issued was previously begun, *Re Richards*, C. C. A., 96 Fed. 935; *Re Higgins*, 97 Fed. 775; *Re Burrus*, 97 Fed. 926; *contra*, *Re De Lue*, 91 Fed. 510; *Re Easley*, 93 Fed. 419; *Benjamin v. Chandler*, 142 Fed. 217; whether or not the defendant co-operated in the obtaining of the same, *Re Richards*, C. C. A., 96 Fed.

935; *Re Burrus*, 97 Fed. 926: or the creditor had knowledge of the debtor's insolvency, *Ibid*: in cases of voluntary as well as of involuntary bankruptcy, *Re Vaughan*, 97 Fed. 560. But see *Re O'Connor*, 95 Fed. 943. Where a sale has been made under such a levy prior to the adjudication of bankruptcy and within four months before the filing of the petition, the rights of a purchaser are not affected, *Re Kenney*, 95 Fed. 427; *Weitzel*, 191 Fed. 463; but the proceeds in the hands of the sheriff are part of the bankrupt's estate, *Clarke v. Larremore*, 188 U. S. 486, 47 L. ed. 555; *Re Kenney*, 97 Fed. 554. The proceeds of an execution sale, which has been consummated, cannot be recovered, although made within the four months, when the proceeding was *in invitum*. *Nelson v. Svea Pub. Co.*, 178 Fed. 136. Ordinarily the test is the date of the judgment, not the date of the execution. *Owen v. Brown*, C. C. A.,

so far as they conflict, subdivision c is nullified by subdivision f.¹⁰ "A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of a petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditor of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer if by law such recording or registering is required."¹¹

120 Fed. 812. The enforcement of an execution against the bankrupt's salary, issued under such a judgment, may be enjoined. *Re Harrington*, 200 Fed. 1010. A judgment of dispossession is not affected by this statute. *Plaut v. Gorham Mfg. Co.*, 174 Fed. 852. Where the judgment was not a lien upon personal property until the levy of an execution, and, although the judgment was previously entered, the writ was not issued nor levied until within the four months; it was held that the latter should be set aside. *Re Harrington*, 200 Fed. 1010. A judgment entered within the four months upon a judgment note previously given is avoided. *Re Rhoads*, 98 Fed. 399. Where the lien of the judgment does not take effect until it is docketed in the county, it is avoided if not docketed there till within the four months. *Re Dunavant*, 96 Fed. 542. Creditors of a bankrupt who have obtained a judgment prior to the four months' period, can maintain a judgment creditors' action, which they began previously thereto, although judgment enforcing their lien was not entered within the four months.

Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122. A judgment entered within the four months' period, to enforce an attachment prior thereto, will not be set aside in the absence of fraud. *Re Beaver Coal Co.*, C. C. A., 113 Fed. 889. *Contra*, *Re Lesser*, 108 Fed. 201. But when the judgment was recovered within the four months' period, any liens acquired thereunder may be set aside as an unlawful preference. *Clarke v. Larremore*, 188 U. S. 486. 23 Sup. Ct. 363.

¹⁰ *Re Richards*, C. C. A., 96 Fed. 935; *Re Tune*, 115 Fed. 906; *Cook v. Robinson*, C. C. A., 194 Fed. 785. 792; *Folger v. Putnam*, C. C. A. 194 Fed. 793.

¹¹ 30 St. at L. 454, 562, § 60a. as amended by 32 St. at L. 797: 32 St. at L. 842. A preference and a fraudulent transfer are not the same. In a preferential transfer the fraud is technical and consists in a violation of the rule of equal distribution among all creditors. In a fraudulent transfer the fraud is actual, in that the bankrupt has secured thereby an advantage for himself out of what in law should belong to his creditors. *Van Ider-*

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the

stine v. Nat. Discount Co., C. C. A., 174 Fed. 518. A guarantor is such a creditor, Stern v. Paper, 183 Fed. 228. So is a surety, United Surety Co. v. Iowa Mfg. Co., C. C. A., 179 Fed. 55; or indorser, McAtee v. Shade, C. C. A., 185 Fed. 442. It has been held that the transfer may be avoided if the creditor had reasonable cause to believe that a preference was intended, irrespective of the actual intent of the debtor. Hotchkiss v. Nat. City Bank, 200 Fed. 287; aff'd C. C. A., 201 Fed. 664; Alexander v. Redmond, C. C. A., 180 Fed. 92; Collett v. Bronx Nat. Bank, 200 Fed. 111. *Contra*, Hardy v. Gray, C. C. A., 144 Fed. 922, 75 C. C. A., 562, 16 Am. Br. 387; *Re* First Nat. Bank of Louisville, C. C. A., 155 Fed. 100, 84 C. C. A. 16, 18 Am. Br. 766; Debus v. Yates, 193 Fed. 427. *Re* The Leader, 190 Fed. 624, 629, states evidence held to be sufficient to establish the debtor's intent. Under the New York mechanic's lien law, the lien of a material man is good against a bankrupt contractor, although the notice was filed within the four months' period, *Re* Emslie, C. C. A., 102 Fed. 291; *Re* Grissler, C. C. A., 136 Fed. 754; and the same may be enforced by him in the State court, *Ibid*. It has been held that a statutory lien for wages, *Re* Kerby-Dennis Co., C. C. A., 95 Fed. 116 (Michigan lumber law); or for rent, *Re* Wolf, 98 Fed. 74, Iowa landlord and tenant law; *Cf* note 5,

supra, is not avoided by the filing of the petition and the adjudication of bankruptcy, unless the lienor has taken other security within the four months, by which he waives his rights under the State statute. *Re* Wolf, 98 Fed. 84; Henderson v. Mayer, 225 U. S. 631, 56 L. ed. 1233. See § 649, *infra*. Upon the question of its validity as a preference, a deed is considered to take effect from the date of its record and not from the date of its delivery. English v. Ross, 140 Fed. 630. Where the State statute requires a conveyance or transfer to be recorded, in order to be effectual against subsequent lienors or any other class of creditors, the date of its record is that to be considered upon the question whether it is a preference. Loeser v. Savings Deposit Bank & Trust Co., C. C. A., 148 Fed. 975. See First Nat. Bank v. Connett, C. C. A., 142 Fed. 33. *Contra*, Meyer Bros. Drug Co. v. Pipkin Drug Co., C. C. A., 136 Fed. 396; *Re* Klein, C. C. A., 197 Fed. 241; Sparks v. Weatherly, (Ala.) 58 So. 280. See 26 Harv. Law Rev., p. 82. For cases where deeds were held to be preferential because not recorded within the four months, although previously executed, see Page v. Rogers, 211 U. S. 575, 53 L. ed. 332; Ragan v. Donovan, 189 Fed. 138. For similar rulings as regards chattel mortgages, see Mattley v. Giesler, C. C. A., 187 Fed. 970; Mattley v. Wolfe, 175 Fed. 619. *Contra*, Bean v. Orr,

filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any State court which would have held jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."¹² "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered,

C. C. A., 182 Fed. 599, a mortgage. The rule does not apply where the instrument was given for a present consideration, although not recorded until later. *Re Jackson Brick & Tile Co.*, 189 Fed. 636, a deed; *Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. 940, a bill of sale; *Re Sturtevant*, C. C. A., 188 Fed. 196, a chattel mortgage; *Re Sayed*, 185 Fed. 962, an assignment of a land contract; *Debus v. Yates*, 193 Fed. 427, a deed. See *Hinchman v. Consolidated Arizona Smelting Co.*, 198 Fed. 907.

¹² 30 St. at L. § 454, 562, § 606, as amended, 36 St. at L. 838, 842. For cases where the trustee was allowed to attack chattel mortgages, see *Frank v. Vellkommer*, 205 U. S. 521, 51 L. ed. 911, N. Y.; *Knapp v. Milwaukee Tr. Co.*, 216 U. S. 545, 54 L. ed. 610, Misc.; *Fourth St. Nat. Bank v. Millbourne Mills Co.'s Trustee*, C. C. A., 172 Fed. 177, Pa.; *Re Hammond*, 188 Fed. 1020, Ohio; *Re Geiver*, 193 Fed. 128, S. D.; *Re Smith*, 198 Fed. 876, Misc.; *Sattler*

v. Slonimsky, 199 Fed. 592, Pa.; *Skilton v. Codington*, 185 N. Y. 80, 113 Am. St. Rep. 885; *Re Shiebler*, 165 Fed. 363, N. Y.; *Re Bothe*, C. C. A., 173 Fed. 597, Mo.; *Re Beckhaus*, C. C. A., 177 Fed. 141, Ill.; *Re Oxley*, 182 Fed. 1019, Wash.; *Re Watts-Woodward Press*, C. C. A., 181 Fed. 71, N. Y.; *Re Jules & Frederic Co.*, 193 Fed. 533, Mass.; *Re New Galt House Co.*, 199 Fed. 533, Ky.; *Re Williamsburg Knitting Mill*, 190 Fed. 871, Va. For chattel mortgages which were sustained, see *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567; *Re Shaw*, 146 Fed. 273; *Re Doran*, 148 Fed. 327; *Re Standard Telephone & El. Co.*, 157 Fed. 106; (see *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306); *Holt v. Crucible Steel Co. of America*, 224 U. S. 262; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 351, 50 L. ed. 782, Ohio; *Re Columbia Fire D. & T. Co.*, 168 Fed. 159; *Mattley v. Wolfe*, 175 Fed. 619, *Re Lausman*, 183 Fed. 647, Ky.; *Re Endlar*, C. C. A., 192 Fed. 762, Mass.; *Re Riehl*, 200 Fed. 455, Md.

the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit

For cases where the *trustee was allowed to attack the vendor's title under conditional sales*, see *Re Fish Bros. Wagon Co.*, C. C. A., 164 Fed. 553, Kan.; *Re Bement*, C. C. A., 172 Fed. 98, Wisc.; *Chilberg v. Smith*, C. C. A., 174 Fed. 805, Wash.; *Re Franklin Lumber Co.*, 187 Fed. 281, Pa.; *Re Bazemore*, 189 Fed. 236, Ala.; *Re Calhoun Supply Co.*, 189 Fed. 537, Ga.; *Re Nelson*, 191 Fed. 233, S. D.; *Re Farmers' Supply Co.*, 196 Fed. 990, Ala.; *Re Dancy Hardware & Furniture Co.*, 198 Fed. 336, Ala.; *Re Kreuger*, 199 Fed. 367, Ky.; *Re Williamsburg Knitting Mill*, 190 Fed. 871, Va.; *Re Burlage Bros.*, 169 Fed. 1006, Ia.; *Re Penny & Anderson*, 176 Fed. 141, N. Y.; *Re Williamsburg Knitting Mill*, 190 Fed. 871, Va.; *Mishawaka Woolen Mfg. Co. v. Westveer*, C. C. A., 191 Fed. 465, Mich.; *Re Senoia Duck Mills*, 193 Fed. 711, Ga.; *Re J. S. Appel Suit & Cloak Co.*, 198 Fed. 322, Colo.; *Re A. Gaglione & Son*, 200 Fed. 81, Pa. For *conditional sales where the vendors' titles have been sustained*, see *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690; *Re Butterwick*, 131 Fed. 371; *Re Great Western Mfg. Co.*, C. C. A., 152 Fed. 123; see *Re Franklin Lumber Co.*, 147 Fed. 852; *York Mfg. Co. v. Brewster*, C. C. A., 174 Fed. 566, Texas; *John Deere Plow Co. v. Anderson*, C. C. A., 174 Fed. 815, Ga.; *Nauman Co. v. Brawshaw*, C. C. A., 193 Fed. 350, Ia.; *Re J. S. Appel Suit & Cloak Co.*, 198 Fed. 322, Colo.; *Crucible Steel Co. of America v. Holt*, C. C. A., 174 Fed. 127, Ky.; *Re Miller Pure Rye Distilling Co.*, 176 Fed. 606, Pa.; *Bryant v. Swofford Bros.*, 214 U. S. 279, 53 L. ed. 997, Ark.; *Mishawaka Woolen Mfg. Co. v. Smith*, 158 Fed. 885, Wisc.; *Re Hager*, 166 Fed. 972, Ia.; *York Manufacturing Co. v. Cassell*, 201 U. S. 344, Ohio; *aff'd* 201 U. S. 344, 50 L. ed. 782. In the following cases, the transactions were *sustained*; *Powell v. Gate City Bank*, C. C. A., 178 Fed. 609; *Pyle v. Texas Transport & Terminal Co.*, 192 Fed. 725; *Sexton v. Kessler & Co.*, 225 U. S. 90; *Mills v. Virginia-Carolina Lumber Co.*, C. C. A., 164 Fed. 168; *Re Kessler & Co.*, 174 Fed. 906; *Re Bird*, 180 Fed. 229; *Mason v. National Herkimer County Bank*, C. C. A., 172 Fed. 529, reversing 163 Fed. 920; *Germania Sav. Bank & Tr. Co. v. Loeb*, C. C. A., 188 Fed. 285. For cases where transactions were *set aside* as preferential, see *McElvain v. Hardesty*, C. C. A., 169 Fed. 31; *Ludvigu v. Am. Woolen Co.*, 176 Fed. 145. In the following cases, the transactions were *not sustained*; *Rogers v. Fidelity Sav. Bank & Loan Co.*, 172 Fed. 735; *Re Medina Quarry Co.*, 179 Fed. 929; *Nelson v. Svea Pub. Co.*, 178 Fed. 136; *Chicago Title & T. Co. v. Federal Tr. & Sav. Bank*, 192 Fed. 967; *Continental & C. T. & S. Bank v. Chicago T. & T. Co.*, C. C. A., 199 Fed. 704.

of the estate."¹³ Preferences under a general deed of assignment, executed within the four months' period, are set aside by the bankruptcy proceedings.¹⁴ A conveyance or pledge made within the four months to secure an antecedent debt under a previous parol agreement was sustained.¹⁵ Payment to a creditor who has an inchoate lien is not a preference to the extent thereof.¹⁶ It has been held that a mortgage within the four months' period, although given to secure prior indebtedness, is still good if the mortgagee did not have reasonable cause to believe that it was intended to create a preference.¹⁷ A preferential transfer of accounts or other property, made more than four months prior to the filing of the petition in bankruptcy, cannot be set aside in bankruptcy as a preference.¹⁸ The time is ordinarily calculated from the date when the lien actually accrues, although it relates back to a prior time.¹⁹ Where a judgment

¹³ 30 St. at L. 544, 562, § 60. It has been held that it is not a preference for the bankrupt to give his attorney a mortgage to secure payment of a reasonable fee for services to be subsequently rendered in relation to his indebtedness, *Re Pangborn*, 185 Fed. 673; *Re Cummins*, 196 Fed. 224; nor for defending the bankrupt in a criminal prosecution, *Re Pangborn*, 185 Fed. 673. See §§ 608, 611, *supra*.

¹⁴ *Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165.

¹⁵ *Re Sheridan*, 98 Fed. 406; *Re Smith*, 176 Fed. 426; *Cf. Hurley v. Atchison, Topeka & Santa Fe Railroad*, 213 U. S. 126, 53 L. ed. 729. It has been held that the payment to a bank, when it has reasonable cause to believe that the payer is insolvent, can be recovered as a preference, although it was made in payment of a clearance loan, to be paid before the closing of banking hours on the same day to release

securities for sale, and was made out of the proceeds of such securities. *Hotchkiss v. National City Bank*, 200 Fed. 287; *aff'd C. C. A.*, 201 Fed. 664. See *Ernst v. Mechanics' & Metals Nat. Bank of N. Y.*, 200 Fed. 295. *Contra, Vitzthus v. Large*, 162 Fed. 685; *Re Empire Cork Co.*, 193 Fed. 225.

¹⁶ *Re Lynn Camp Coal Co.*, 168 Fed. 998. See *Hurley v. A. T. & S. F. R. R. Co.*, 213 U. S. 126, 53 L. ed. 729.

¹⁷ *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, *affirming C. C. A.*, 152 Fed. 943; *McNair v. McIntyre*, C. C. A., 113 Fed. 113; *Re Sam Q. Lorch & Co.*, 199 Fed. 944. *Contra, Re W. W. Mills Co.*, 162 Fed. 42.

¹⁸ *Jackson v. Sedgwick*, 189 Fed. 508. *Contra, Tilt v. Citizens' Tr. Co.*, 191 Fed. 441.

¹⁹ *Re Darwin*, 117 Fed. 407. But see *Fisher v. Zollinger*, C. C. A., 149 Fed. 54; *Remington on Bankruptcy*, § 1384.

by confession was entered within the four months' period, upon an irrevocable power of attorney, given previously thereto, it was held that the judgment and execution thereunder were a preference suffered or permitted by the debtor.²⁰ Where record is not necessary, in the absence of fraud, the four months' period begins to run from the date when the transfer was first valid and not from the date when the grantee took possession or the bankrupt's creditors acquired notice.²¹ "Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."²² Where the security is given partly for an antecedent indebtedness and partly for a contemporaneous consideration, it will only be sustained so far as the latter is concerned.²³ Where the creditor had notice that the money which he advanced was to be used in making a preferential payment, his security was set aside.²⁴ To con-

²⁰ *Wilson v. Nelson*, 183 U. S. 191, 46 L. ed. 147.

²¹ *Little v. Holley-Brooks Hardware Co.*, C. C. A., 133 Fed. 874; *Re Hunt*, 139 Fed. 283; *Re Evans Lumber Co.*, 176 Fed. 643.

²² 30 St. at L. 544, § 64d. When the mortgagee or purchaser for a present consideration had no reasonable cause to believe that the borrower was insolvent, it was not set aside because he knew that the proceeds were to be used to pay the latter's debts. *Re Kullberg*, 176 Fed. 585; *Van Iderstine v. National Discount Co.*, C. C. A., 174 Fed. 518. An annuity company may be required to return the consideration for an annuity bought by the bankrupt in fraud of creditors, although at the time when it received the money it has issued a contract to pay the annuity. *Smith v. Mutual Life Ins. Co. of N. Y.*, 178 Fed. 510. A chattel mortgage, given to secure a contemporaneous loan, will not be set aside. *Re Wolf*, 98 Fed. 84; *Martin*

v. Hulen & Co., 149 Fed. 982, 79 C. C. A., 492, 17 Am. B. R. 510. Nor one for future advances, so far as this and subsequent advances are concerned. *City Nat. Bank of Greenville v. Bruce*, C. C. A., 109 Fed. 69; *Stedman v. Bank of Monroe*, C. C. A., 117 Fed. 237; *Re Sayed*, 185 Fed. 962. The same rule applies to a chattel mortgage upon property to be subsequently acquired, given to secure the purchase price thereof. *Re Chantler Cloak & Suit Co.*, 151 Fed. 952. See *Meservey v. Roby*, C. C. A., 198 Fed. 844; *Re Thomas*, 199 Fed. 214; *Re Martin*, C. C. A., 200 Fed. 940; *Templeton v. Wollens*, C. C. A., 200 Fed. 257. A release of other persons from liability is not such a present consideration as will support what would otherwise be a voidable preference. *Burgoyne v. McKillip*, 182 Fed. 452.

²³ *Re Mahland*, 184 Fed. 743; *Re Empire Cork Co.*, 193 Fed. 225.

²⁴ *Re Thweatt*, 199 Fed. 319.

stitute a voidable preference, it is not essential that the transfer be made directly to the creditor. It may be made to another for his benefit and, if preferential, a circuitry of arrangement will not avail to save him.²⁵ Payments by a bankrupt upon a note, which its indorsers would otherwise have paid, were held to be a preference.²⁶ It was held that money collected through a preferential lien can be recovered in the same manner as if it had been directly paid by the bankrupt.²⁷ It is no defense to

²⁵ Nat. Bank of Newport, N. Y. v. Nat. Herkimer County Bank of Little Falls, 225 U. S. 178, 56 L. ed. 1042; Johnson v. Hanley, Hoyer Co., 188 Fed. 752.

²⁶ Swarts v. Fourth Nat. Bank, C. C. A., 117 Fed. 1; Kobusch v. Hand, C. C. A., 156 Fed. 660; Huttig Mfg. Co. v. Edwards, C. C. A., 160 Fed. 619. But not if indorser did not advise, nor procure the payment, nor know of the same until after it had been made. Reber v. Skulman, C. C. A., 183 Fed. 564. A recovery cannot be had from one indorser because of a preference given to a prior indorser, who is financially responsible. Page v. Moore, 179 Fed. 988. It was held that the indorser who, after the bankruptcy, pays the balance has no greater rights than the original holder of the note; but that the holder of a note paid by the indorser may prove the whole face of the note against the maker. Swarts v. Fourth Nat. Bank, C. C. A., 117 Fed. 1. The cases are in conflict as to whether the payee of a note, who has been compelled to surrender a payment as a fraudulent preference, can still hold sureties upon the same. That he may do so, although he has known of the debtor's insolvency, is held in Hooker v. Blount, 44 Tex. Civ. App. 162, 97 S. W. 1083. See Petty v. Cook, (L. R.) 6 Q. B. 790; Williams v. Gilchrist, 11 N. H. 535; West Phila. Nat. Bank

v. Field, 140 Pa. St. 473. The safer practice for a creditor is to notify the surety of the facts and ask what he shall do; and if the latter does not advise a course to pursue, to proceed and receive the payment without prejudice, Northern Bank of Kentucky v. Cooke, 13 Bush (Ky.) 340; since if the former refuses to accept a payment tendered at maturity of the note and bankruptcy does not follow, the surety is to that extent discharged, Smith v. Old Dominion B. & L. Ass'n., 119 N. C. 257; Second Nat. Bank v. Pruett, (Tenn.) 96 S. W. 334. See XVII Harv. Law Rev., 205, and cases cited.

²⁷ *Re Belding*, 116 Fed. 1016. "A company was hiring laborers to gather ties. The insolvent was operating stores and supplying the men. For many months an inspector had sent a pay roll once in about two weeks to the company, upon which the name of each laborer, his earnings, and the amount furnished him by the insolvent appeared. The company had uniformly deducted the price of the supplies from the earnings of each man, had sent him a check for the balance, and had sent the insolvent a check for the supplies furnished. The insolvent owed the company more than \$20,000, when, within four months of the filing of the petition in bankruptcy, it retained the amount owing the insolvent for the supplies

an action to recover the value of a preference, that the defendant's agent had guaranteed part of the indebtedness upon which the preferential payment was applied.²⁸ The dissolution of an insolvent partnership and a division of the assets between the partners will be set aside when it thus gives the individual creditors a preference over the creditors of the firm.²⁹ A trustee can recover a secret preference paid a creditor upon a former composition.³⁰ A payment on account of an antecedent debt, made while the bankrupt was insolvent within the four months, can be recovered by the trustee in bankruptcy, if the creditor had reasonable cause to believe that it was intended thereby to give a preference;³¹ but not if the payment was made upon an open

furnished for three months and credited him with this amount, \$2,210.73, on its claim against him. Held: that this was not a preference, and could not be set off against its claim; but that it received the money thus retained as trustee for the bankrupt and the court below had power to protect the bankrupt's estate in respect to dividends to the corporation in case it should not discharge its obligations. *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571. So held of fire insurance when contemporaneous with the preferential security expressed to be for the benefit of the mortgagor, although with a provision that any loss should be payable to the mortgagee, as his interest might appear although the premium was paid by the mortgagee. *Brown City Sav. Bank v. Windsor*, C. C. A., 198 Fed. 28. As regards a newspaper route, see *Re Martin*, C. C. A., 200 Fed. 940. A bankrupt, within four months prior to his bankruptcy, contracted to sell certain real estate and to give a clear title to the same. The property was encumbered by liens which the purchaser undertook to pay out of the purchase money,

but before these payments were completed or the property was conveyed defendant, who held judgment notes of the bankrupt, entered judgment, thus obtaining a lien on the property which the purchaser paid in order to clear the title, although this payment, together with those made to remove the prior liens, exceeded the purchase price. It was held that such payment to defendant constituted a voidable preference to the full amount received. *Benjamin v. Chandler*, 142 Fed. 217.
²⁸ *Plummer v. Myers*, 137 Fed. 660.

²⁹ *Re Head*, 114 Fed. 489. But see *Worrell v. Whitney*, 179 Fed. 1014; *Re L. M. Alleman Hardware Co.*, C. C. A., 181 Fed. 810.

³⁰ *Re Chaplin*, 115 Fed. 162.

³¹ *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 45 L. ed. 1171. The burden of proof, that the creditor had reasonable cause to believe of the intention to give a preference, rests upon the trustee in bankruptcy, when he sues or objects to the allowance of a claim. *Calhoun County Bank v. Cain*, C. C. A., 152 Fed. 983; *Re Pfaffinger*, 154 Fed. 523; *Re Sanger*, 169 Fed. 722; *Reber v. Louis Shulman & Bro.*, 179

account, in which the bankrupt's interest was subsequently increased by at least the amount thus paid.³² The fact that the grantee or payee had no personal knowledge of the actual insolvency is no defense to an action to recover the preference.³³

Fed. 574; *Alter v. Clark*, 193 Fed. 153; *Re F. M. & S. Q. Carlile*, 199 Fed. 612. It has been held that the passive receipt of a payment on account for a loan without a request or independent action to collect the same, in the absence of notice of insolvency, does not justify the setting aside of the transaction. *Wright v. Sampter*, 152 Fed. 196. See *Re Oppenheimer*, 140 Fed. 51. The payment of a loan upon demand does not constitute a preference, when there is no proof that the creditor had reasonable cause to believe that the debtor was insolvent. *Re Pfaffinger*, 154 Fed. 523.

³² *Jaquith v. Alden*, 189 U. S. 78, 47 L. ed. 717; *Re Dickson*, C. C. A., 111 Fed. 726; *Kimball v. E. A. Rosenham Co.*, C. C. A., 114 Fed. 85; *C. S. Morey Mercantile Co. v. Schiffer*, C. C. A., 114 Fed. 447; *Re Maher*, 144 Fed. 503. *Cf. Wild & Co. v. Provident Life & Tr. Co.*, 214 U. S. 292, 53 L. ed. 1003. It was held: that an increase of a bankrupt's estate as a net result of transactions between the bankrupt and a creditor within four months prior to the bankruptcy, where the last transaction was a payment on account of the indebtedness, was not sufficient to relieve the creditor from surrendering this last payment as preferential before he was permitted to prove the balance of his claim, when the account ran far back beyond the four months' period, and the transactions ended with a large payment on account of the whole indebted-

ness. *Re Colton Export & Import Co.*, 115 Fed. 158. The deposit of money by an insolvent within four months prior to his bankruptcy on an open account, subject to a check, does not constitute a preference, although the bank was at that time a creditor, and the latter may set off so much of its claim as equals the balance of such account, provided it had no reasonable cause to believe that a preference was intended. *N. Y. County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380; *Re George M. Hill Co.*, C. C. A., 130 Fed. 315. See *Re Percy Ford Co.*, 199 Fed. 334; *Studley v. Boylston Nat. Bank of Boston*, C. C. A., 200 Fed. 249. See *Ernst v. Mechanics' & Metals Nat. Bank of New York*, 200 Fed. 295. It has been held that the payment to a bank by an insolvent, within the four months' period, of notes given to third persons, which were indorsed to and owned by the bank, constitutes a preference when the bank had reasonable ground to believe that a preference was thereby intended. *Re George M. Hill Co.*, C. C. A., 130 Fed. 315. See *Continental & Commercial Tr. & Sav. Bank v. Chicago Title & Tr. Co.*, C. C. A., 199 Fed. 704.

³³ *Plummer v. Myers*, 137 Fed. 660. It has been said that it is immaterial how the agent obtained his knowledge, whether through confidential relations with the bankrupt or personal interest that prevented him from disclosing his knowledge to his principal, *Campbell v. Balcomb*, C. C. A., 183 Fed.

The question whether the grantee or payee had reasonable notice of the bankrupt's insolvency depends upon whether the facts that he knew were such as would have excited the attention of an

766. Notice to a township trustee of the insolvency of a debtor to the town is notice to the township. *Painter v. Napoleon Tp.*, 190 Fed. 637. It was held that a corporation was not chargeable with knowledge of the insolvency of the bankrupt acquired by its president as a stockholder thereof, *Benner v. Blummer-Frank Drug Co.*, 198 Fed. 362, and where its general manager fraudulently transferred its funds to the account of the bankrupt, a corporation, of which he was president and controlling stockholder, and subsequently restored part of the same. *High v. Opalite Tile Co.*, C. C. A., 184 Fed. 450. But see *Collett v. Bronx Nat. Bank*, 200 Fed. 111. When the bankrupt transfers his entire stock of goods to the creditor in payment of the claim, it will be presumed that a preference was intended and accepted; *Re Knopf*, 146 Fed. 109; *Allen v. McMannes*, 156 Fed. 615; *Re Thweatt*, 199 Fed. 319. The same rule was applied when the creditor took nearly all the bills receivable and a large part of the assets of the debtor, *Tilt v. Citizens' Tr. Co.*, 191 Fed. 441. But see *Doxsee v. Waddick*, 122 Ia. 599; *Bank v. Jewelry Co.*, 123 Ia. 432; *Myers v. Fultz*, 124 Ia. 437; *Burnham v. Fort Dodge Grocery Co.*, s. c., 144 Iowa. 577. It was so held, although the creditor held a mortgage upon the same, which both parties presumed to be valid, but it was not allowed. *Allen v. McMannes*, 156 Fed. 615. It is sufficient evidence of knowledge by the grantee of the bankrupt's insolvency that he had previously received a circular

letter advising him that the latter was in failing circumstances, and desired to effect a compromise with his creditors; *Benjamin v. Chandler*, 142 Fed. 217; but see *Re Varley & Bauman Clothing Co.*, 191 Fed. 459; also that checks previously been given by the bankrupt had been dishonored and the creditor had practically ceased selling the bankrupt goods some time before and had repeatedly pressed for payment of his account. *Pittsburgh Plate Glass Co. v. Edwards*, C. C. A., 148 Fed. 377. See also *Parker v. Black*, 143 Fed. 560; *Hardy v. Gray*, C. C. A., 144 Fed. 922; *Hotchkiss v. National City Bank*, 200 Fed. 287; *aff'd C. C. A.*, 201 Fed. 664; *Ernst v. Mechanics' & Metals Nat. Bank of N. Y.*, 200 Fed. 295. See *Fowler State Bank, of Fowler, Kan. v. White*, C. C. A., 198 Fed. 631; *Re Thomas*, 199 Fed. 214; *Ernst v. Mechanics' & Metals Nat. Bank of N. Y.*, 200 Fed. 295; *Citizens' Tr. Co., of Patterson, N. J. v. Tilt*, C. C. A., 200 Fed. 410. Where, after information that a debtor, who was slow in payments, had placed a chattel mortgage on his stock, the creditor sent an attorney to investigate, and he was informed by the bankrupt that he did not have sufficient capital to meet his bills, but was doing a profitable business, entirely solvent and had an offer for his stock in cash and land, amounting to a sum largely in excess of his indebtedness, which he could accept at once, and the attorney advised its acceptance, and meantime took a chattel mortgage upon the stock for the amount of the claim; it was

ordinarily intelligent man and put such a man upon inquiry.³⁴ A mere suspicion by the creditor that the debtor is insolvent, without any evidence legal or moral to support it,³⁵ even if he knows that the latter is "behind in his payments," to his creditors,³⁶ does not constitute a reasonable cause for belief in the insolvency within the meaning of the statute. A trustee may sue a municipal corporation or the trustees of a township to recover a preferential payment, received by or on behalf of the municipal corporation or township, under such circumstances as would render an individual liable.³⁷ A bankrupt is liable, in a representative capacity, for individual payments which were preferential.³⁸ It has been held that a suit to recover a preference should be brought in equity, although it is simply to recover a sum of money.³⁹ It must be a plenary suit, not a summary

held that this could not be set aside as a preference. *Hussey v. Richardson-Roberts Dry Goods Co.*, C. C. A., 148 Fed. 598. *Re Klein*, C. C. A., 197 Fed. 241.

³⁴ *Wright v. Sampter*, 152 Fed. 196; *Hamilton Nat. Bank of Chicago v. Balcomb*, C. C. A., 177 Fed. 155; *Re Sanger*, 169 Fed. 722; *Gering of Leyda*, C. C. A., 186 Fed. 110; *Stern v. Paper*, 183 Fed. 228; *Coleman v. Decatur Egg Case Co.*, C. C. A., 186 Fed. 136; *Ragan v. Donovan*, 189 Fed. 138; *Re The Leader*, 190 Fed. 624, 629; *Alexander v. Redmond*, C. C. A., 180 Fed. 92; *Re Thomas Deutschle & Co.*, 182 Fed. 435, where the creditors had refused the delivery of goods which they had shipped until they received a certified check for the price. In determining the question, the court will take judicial notice of business customs. *McGirr v. Humphreys Grocery Co.*, 192 Fed. 55.

³⁵ *Stucky v. Masonic Sav. Bank*, 108 U. S. 74, 27 L. ed. 640; *Sparks v. Marsh*, 177 Fed. 739; *Re Houghton Web Co.*, 185 Fed. 213; *Re Thomas Deutschle & Co.*, 182 Fed. 435, where the creditor knew that

notes of the bankrupt had frequently gone to protest during the past year. *Debus v. Yates*, 193 Fed. 427; *Paper v. Stern*, C. C. A., 198 Fed. 642; *Re F. M. & S. Q. Carlile*, 199 Fed. 612.

³⁶ *Re Eggert*, 98 Fed. 843; s. c., C. C. A., 102 Fed. 735; *Sharpe v. Allender*, C. C. A., 170 Fed. 589.

³⁷ *Painter v. Napoleon Tp.*, 156 Fed. 289.

³⁸ *Clarke v. Rogers*, 228 U. S. 534, affirming C. C. A., 183 Fed. 518. See, also, *Block v. Rice*, 167 Fed. 693; *Re Dorr*, C. C. A., 196 Fed. 292.

³⁹ *Pond v. New York Nat. Exch. Bank*, 124 Fed. 992; *Re Plant*, 148 Fed. 37; *Wall v. Cox*, 101 Fed. 403; *Off v. Hakes*, 142 Fed. 364; *Parker v. Black*, 151 Fed. 18; *Mason v. Herkimer County Bank*, 163 Fed. 920. See *Parker v. Black*, 143 Fed. 560; *Kaufman v. Tredway*, 195 U. S. 271, 49 L. ed. 190. *Contra*, *Warmath v. O'Daniel*, C. C. A., 159 Fed. 87; *Plumb v. Lyell Ave. Lumber Co.*, 202 N. Y. 617; *Allen v. Gray*, 201 N. Y. 504, a suit to set aside fraudulent transfers under § 70; *Reber v. Ellis Bros.*, 185 Fed. 313.

proceeding.⁴⁰ The defendant in an action to recover a preference is not liable for more than he actually received from the

⁴⁰ *Re Knickerbocker*, 121 Fed. 1004. The trustee may join in the same suit, a claim to set aside a fraudulent transfer of property and one to recover back a preferential payment. *French v. R. P. Smith & Sons*, 81 Minn. 341. The bill must contain four essential allegations: (1) that the bankrupt was insolvent when the alleged preference was given; (2) that it was within four months prior to the institution of the bankruptcy proceedings; (3) that the effect of the endorsement of the judgment or transfer, or the retention of the property or money, as the case may be, will be to enable the defendant to obtain a greater percentage of his debt than any other creditor of the same class; and (4) that defendant had reasonable grounds to believe that a preference was intended. *Painter v. Napoleon Tp.*, 156 Fed. 289; *Re Sanger*, 169 Fed. 722. The complaint was held to be demurrable when it failed to show the amount of the preferred and the unsecured claims. *Grant v. National Bank of Auburn*, 197 Fed. 581. In a suit to set aside a preference obtained by the confession of a judgment and the purchase of property at an execution sale, subject to prior judgments which were paid, the trustee in bankruptcy need not make the sheriff nor the holders of the prior judgments parties, unless they are charged to have been guilty of misconduct in connection with the transaction. *Ibid.* The plaintiff need not plead, nor offer evidence, that claims have been proved against the estate of the bankrupt, but he should plead and offer evidence to show that the bankrupt is indebted to general creditors. *Gering v. Leyda*, C. C. A., 186 Fed. 119. *Cf. Miller v. New Orleans, A. & F. Co.*, 211 U. S. 496, 505. In such a suit, the creditor is precluded by the adjudication, in so far as it determines that the bankrupt committed an act of bankruptcy within four months prior to the filing of the petition. *Cook v. Robinson*, C. C. A., 194 Fed. 785. It was held that the dismissal of a bill to set aside a preference by a firm, because of the failure to prove that the individual partner as well as the co-partnership were insolvent, was *res adjudicata* against a subsequent suit for the same relief alleging the insolvency of both the firm and its individual members, although the former bill did not contain the latter allegation. *Worrell v. Kemmerer*, C. C. A., 192 Fed. 911. The fact that a debtor was adjudged a bankrupt on the ground that a chattel mortgage was a preference and an act of bankruptcy does not affect the mortgage in an action to set aside the same as a preference. *Hussey v. Richardson-Roberts Dry Goods Co.*, C. C. A., 148 Fed. 598. No previous demand by the trustee is required before a suit to recover a preferential payment. *Kaufman v. Tredway*, 195 U. S. 271, 49 L. ed. 190; *Wright v. Skinner*, 136 Fed. 694. As to a demand held to be sufficient, see *Grant v. National Bank of Auburn*, 197 Fed. 581. For cases where such a suit was held not to be an election that prevented the trustee from afterwards pursuing another remedy, see *Rock Island Plow Co. v. Reardon*, 222 U. S.

proceeds of the sale of the property, provided that he acted in good faith and exercised reasonable diligence in selling the same.⁴¹ Interest is recoverable from the beginning of the suit.⁴² It has been held that a judgment in such a suit may be enforced by contempt proceedings.⁴³

§ 645. Proof and allowance of claims. (a) Proof of claims shall consist of a statement under oath,¹ in writing,

354, 56 L. ed. 231, § 368, *supra*. *Contra*, *Re Hurst*, C. C. A., 194 Fed. 830. Where the preference was made by the sale of property for less than its value, the trustee may recover the surplus without a previous tender of the purchase money. *Stern v. Louisville Trust Co.*, C. C. A., 112 Fed. 501. The defendant cannot set off the amount of any dividend to which he would be entitled from the estate of the bankrupt, *Templeton v. Kehler*, 173 Fed. 574; *Ommen v. Talcott*, 175 Fed. 259; and the day of judgment will not be postponed until he has proved his claim and the dividend has been declared, *Templeton v. Kehler*, 173 Fed. 574. The fact that a transfer is set aside as fraudulent does not deprive the defendant of the right to participate in the proceeds of the sale of the property recovered, so far as concerns a debt incurred previous to the execution of the fraudulent conveyance and not connected with the sale. *Re Hurst*, 188 Fed. 707. Where a conveyance of a husband's real estate is set aside as preferential, it cannot be enforced so far as concerns the contemporary transfer of the wife's right of dower in the same property. *Re Lingafelter*, C. C. A., 32 L.R.A. (N.S.) 103, 181 Fed. 24. It has been held that before the election of a trustee, such a suit may be instituted by a creditor;

and that, in such a case, the trustee upon his election should be made plaintiff in the same. *Frost v. Latham & Co.*, 181 Fed. 866.

⁴¹ *Allen v. McMannes*, 156 Fed. 615.

⁴² *Kaufman v. Tredway*, 195 U. S. 271, 49 L. ed. 190.

⁴³ *Re Plant*, 148 Fed. 37. A trustee cannot make a settlement with a preferential creditor that will give the latter's contested lien priority to the rights of a purchaser for value in good faith; and, where the trustee was unwilling to continue the litigation, it was held that he should accept the offer of such a purchaser to pay the expenses of its further prosecution and the costs already incurred. *Re Geiselhart*, 181 Fed. 622. Where there are insufficient funds to justify litigation and no creditor is willing to pay such expenses, the trustee may sell his interest in real estate which has been preferentially or fraudulently transferred. *Re Downing*, 192 Fed. 683.

§ 645. ¹The claim may be verified before a foreign consul of the United States (*Re Sugheimer*, 91 Fed. 744), or before the creditor's attorney, *Re Kimball*, 100 Fed. 777. It has been held that the official seal and signature of a notary public is a sufficient authentication of his authority in another state. *Re Pan-*

signed by a creditor setting forth the claim, the consideration therefor,² and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon; and that the sum claimed is justly owing from the bankrupt to the creditor. (b) Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim.³ After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court,

coast, 129 Fed. 643. An objection that the attorney who verified the claim failed to assign the reason why the claimant did not personally swear to the same, may be cured by amendment. *Re Medina Quarry Co.*, 179 Fed. 929; *Re Stradley & Co.*, 187 Fed. 285. It is too late to make the objection after the claimant has voted. *Re Stradley & Co.*, 187 Fed. 285.

² The claim must be specific, and, if for several services or payments, it must be itemized. *Re Scott*, 93 Fed. 418; *Re Globe Boat Co.*, 190 Fed. 92. Under the act of 1867, it was held: that a general statement of the consideration "for goods, wares and merchandise" or "for hay, barley and board" was not sufficient; but that the kinds of goods, the quantity, the price, the approximate date of the sale and the time or period of the delivery should be stated. *Re Elder*, Fed. Cas. No. 4, 326, 1 Sawy. 73. The statement that there was a consideration for a note is insufficient. *Re Coventry Evans Furniture Co.*, 166 Fed. 516. So, where the sole statement of consideration was stated to be for "services, mdse., etc.," "bal. of wages," "for goods sold and delivered," and the like. *Re Morris*, 154 Fed.

211. It has been held: that, where the bankrupt is charged as an indorser, notice of dishonor and any other facts necessary to establish his liability must be stated. *Re Stevens*, 104 Fed. 323; criticised in *Remington on Bankruptcy*, § 602; and that, where the claim is for a balance due on various collateral notes, upon which the bankrupt was maker or indorser, some of which became due after discount, the date of the discount, the amount advanced and the person to whom the advancement was made must be stated in the proof. *Re Stevens*, 104 Fed. 323. A mortgagee of property sold free of his encumbrance, who intervenes to prove his lien upon the proceeds, is not bound to prove his claim in the same manner as if it were one against the general estate of the bankrupt; but he need only plead and prove his debt and security in the manner required in an ordinary suit in equity. *Re Goldsmith*, 118 Fed. 763. The same rule seems to apply to a claimant for taxes. *Re Kallak*, 147 Fed. 276.

³ It has been held that the fact that a written instrument is not filed with a proof of claim raises no presumption against its existence, when it is not required by the stat-

upon leaving a copy thereof on file with the claim.⁴ (c) Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred. (d) Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion. (e) Claims of secured creditors, and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.⁵ (f) Objections

ute or general orders. *Re Dresser*, C. C. A., 135 Fed. 495. See *Kelsey v. Munson*, C. C. A., 198 Fed. 841. Where no objection to a claim was made upon the ground that the original notes and mortgages, which were the basis thereof, were not attached thereto; it was subsequently presumed that the original securities were presented at the trial, or that their presentation was waived. *Re Carter*, 138 Fed. 846.

⁴ *Re Loden*, 184 Fed. 965.

⁵ The court may, upon a summary application, diminish or expunge a claim that has been allowed, unless the claimant pays to the trustee the value of property of the bankrupt which he has converted after the filing of the petition in bankruptcy. *Re W. A. Paterson Co.*, C. C. A., 34 L.R.A.(N.S.) 31, 186 Fed. 629. The fact that a lien is obtained in a foreign country does not prevent its being a preference, which must be surrendered before the creditor's claim is proved. *Re Pollmann*, 156 Fed. 221. The filing of a claim and the receipt of dividends upon its full amount may be treated as a waiver of the creditor's security. *Re Fisk*

& Robinson, 185 Fed. 974. Cf. *Re Abell*, C. C. A., 198 Fed. 484. The settlement of a claim by the transfer to the creditor of the legal title to the security, *Re M. I. Hibbler Mach. Supply Co.*, 192 Fed. 741 (a release after the bankruptcy proceedings had been begun), or otherwise, *Re Norris*, 190 Fed. 101, prevents the creditor from proving the same. It has been held that, where the liability of the bankrupt is an indorser, a creditor is not obliged to credit the proceeds of collateral securities, given by the maker of the obligation, before being allowed to participate in the distribution of the indorser's estate. *Gorman v. Wright*, C. C. A., 136 Fed. 164, reversing *Re Matthews*, 132 Fed. 274. It has been said that, where the property held as security does not belong to the bankrupt, no deduction for the value of the same should be made from the claim. *Re Noyes Bros.*, C. C. A., 127 Fed. 286; *Re Mertens*, C. C. A., 142 Fed. 445, affirmed *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. ed. 945. It has been held that a sale of goods, to be paid for in ten days, cannot be

to claims shall be heard and determined as soon as the convenience of the court and the best interest of the estates and the claimants will permit. (g) The claims of creditors who have received preferences voidable under section 60, subdivision b, or to whom conveyances, transfers, assignments or incumbrances void or voidable under section 67, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, assignments or incumbrances. (h) The value of securities held by secured creditors shall be determined by converting the same into money, according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation.

treated as a cash transaction, so as to prevent a payment within the period from being treated as a preference. *Re John Marrow & Co.*, 134 Fed. 686. A payment is no less a preference because some other creditors have obtained larger proportional payments upon their claims during the same period. *Re Mayo Contracting Co.*, 157 Fed. 469. Amounts paid on a debt of the bankrupt by a surety are not deducted from the creditor's claim; but, if the dividend exceeds the balance due him, the creditor holds the excess in trust for the surety. *Swarts v. Fourth Nat. Bank*, C. C. A., 117 Fed. 1. See *Re Noyes Bros*, C. C. A., 127 Fed. 286. A surety, who has paid the bankrupt's debt, stands in the shoes of the creditor and cannot prove the claim without surrendering all preferences that the creditor has received upon the same. *Livingstone v. Heinman*, C. C. A., 120 Fed. 786. Securities held on exempt property of the bankrupt must be deducted. *Re Little*, 110 Fed. 621; *Fenley v. Poor*, C. C. A., 121 Fed. 739; *Re Lantzenheimer*, 124 Fed. 716. But see *Re Bailey*, 176 Fed.

990. It has been held: that the holder of a note with a waiver of exemptions is a secured creditor; and that the value of the exemptions must be deducted before the allowance of his claim. *Re Meredith*, 144 Fed. 230. The secret renewal of a lease, given the creditor as security, is considered to be a continuance of the security. *Fitch v. Richardson*, C. C. A., 147 Fed. 197; *Re Sig. H. Rosenblatt & Co.*, C. C. A., 193 Fed. 638. A creditor who has returned a preference can prove his claim notwithstanding his satisfaction of a judgment against the bankrupt at the time when he received the preference and the expiration of the time allowed by the State law of the vacation of such satisfaction. *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179. It has been said to be the better practice upon the filing of an objection by the trustee to the proof of a secured debt, to try the issue and allow the claim as secured or unsecured before the alleged security is converted into money. *Re Quinn*, C. C. A., 165 Fed. 144. Cf. § 652, *infra*. A lienor need not prove his claim. *Re Goldsmith*, 118 Fed. 763.

tion, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. (i) Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor. (j) Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. (k) Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. (l) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. (m) The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. (n) Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the rights of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.⁶ "Unliqui-

⁶ 30 St. at L. 544, 560, 561; § 57. A claim may be presented in the name of the real party in interest although he is not the owner at common law. *Re Worcester County*, C. C. A., 102 Fed. 808. If the claim has been assigned before bankruptcy, the assignee should make the

proof in his own name. *Re Worcester County*, C. C. A., 102 Fed. 808. This is the case although the assignment was made as collateral security. *Re Am. Specialty Co.*, C. C. A., 191 Fed. 807. An assignment of a claim gives the assignor any right of intervention which was held

dated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." ⁷

"1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. 2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place to be designated by the postoffice box or street number, as he may appoint; and thereafter, and until some other designation

by the assignor. *Re Fitzgerald*, 191 Fed. 95. Where a surety proves a claim, he must make the proof in the name of the creditor, *Livingstone v. Heineman*, C. C. A., 120 Fed. 786; unless, before the filing of the petition, he has paid money or suffered pecuniary loss, when he may make the proof in his own name. *Boyce v. U. S. Fidelity & Guaranty Co. of Maryland*, C. C. A., 111 Fed. 138. The bankrupt may prove, against himself, a claim, which he holds in a representative capacity. *Warner v. Spooner*, 3 Fed. 890. Different claims by the same creditor need not be included in the same proof. *Re Ball*, 123 Fed. 164.

⁷ *Ibid.*, § 63; *Re Heinsfurter*, 97 Fed. 198. The claim may be liquidated before the referee, *Re Duquesne Incandescent Light Co.*, 176 Fed. 785, or in a State court, *Re Havens*, 182 Fed. 367. See *infra*. Where the holder of an unliquidated claim is one of the petitioning creditors, the liquidation may be made before the adjudication. *F. L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445. It has been held that the failure to insert, at the head of the proof of claim, the title of the court is not a fatal defect. *Re Blue Ridge Packing Co.*, 125 Fed. 619.

shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt. 3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or, if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter. 4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt. 5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof."⁸

It has been said that a creditor, who holds a preference that is voidable, may file formal written proof thereof, although it cannot be allowed until the preference is surrendered.⁹ Where a creditor holds several claims, some of which are preferred and some not, he cannot prove any of them unless

⁸ General Order XXI.

⁹ *Stevens v. Nave-M'Cord Mercantile Co.*, C. C. A., 150 Fed. 71.

his preference is surrendered.¹⁰ But, it has been held that, in the case of a bankrupt partnership, where he holds securities, which are the individual property of a partner, he may apply the same upon his claim against the latter's individual estate and prove against the partnership estate his entire claim against the firm.¹¹ An unlawful preference cannot be set off against a claim, but must be surrendered before the claim is proved; even if it relates to an independent transaction.¹² An adjudication that a security is void is equivalent to a voluntary surrender by the creditor.¹³ A Court of Bankruptcy, when it rejects the proof of a claim because the creditor is secured, has no jurisdiction, without his consent, to value the security and enter a decree against him for the excess of the value of the same over the debt due him.¹⁴ When the security is surrendered, the claim may be allowed without deduction.¹⁵ After the unpreferred creditors have been paid in full, the balance of the assets should be distributed among the innocent preferred creditors.¹⁶ A creditor may be given leave to withdraw a claim.¹⁷ 6. "When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to

¹⁰ *Dunn v. Gans*, C. C. A., 129 Fed. 750; *Re Mayo Contracting Co.*, 157 Fed. 469. Amounts paid on a debt of the bankrupt by a surety are not deducted from the creditor's claim; but, if the dividend exceeds the balance due him, the creditor holds the excess in trust for the surety.

¹¹ *Re Mertens*, C. C. A., 144 Fed. 818.

¹² *Re Chaplin*, 115 Fed. 162. The holder of an invalid mortgage can
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prove the claim for the debt thereby secured, if otherwise good. *Post v. Berry*, C. C. A., 175 Fed. 564. See *Re Elletson Co.*, 193 Fed. 84.

¹³ *Re Otto F. Lange Co.*, 170 Fed. 114; *Re Elletson Co.*, 193 Fed. 84.

¹⁴ *Fitch v. Richardson*, C. C. A., 147 Fed. 197.

¹⁵ *Re Eagles & Crisp*, 99 Fed. 695; *Re Hurlbutt, Hatch & Co.*, C. C. A., 143 Fed. 958, 16 Am. B. R. 198.

¹⁶ *Re Morton*, 118 Fed. 908.

¹⁷ *Re Strickland*, 167 Fed. 867.

be expunged or diminished, the referee may order accordingly."¹⁸ It is the better practice to make objections to claims in writing;¹⁹ but this is not indispensable,²⁰ unless the referee so requires.²¹ They need not be under oath.²² They "should be sufficiently explicit to indicate to the claimant the nature and character thereof."²³ They may be amended;²⁴ and an amendment may be allowed to conform to evidence, which has been admitted without objection.²⁵ The statute of limitations may be interposed against the allowance of a claim by the trustee,²⁶ or, it seems, by any creditor.²⁷ The inclusion of a claim in Schedule A. by the bankrupt does not take it out of the statute of limitations, so far as the trustee and other creditors are concerned.²⁸ A creditor may attack a judgment as fraudulent and collusive, when proof of the same is offered.²⁹ The presentation of a deposition proving a debt, in accordance with the rules of the statute, establishes a *prima facie* case;³⁰

¹⁸ General Order XXI. The claim may be allowed in whole or in part, and, in the latter case, without any requirement of an amendment or new verification of the same. *Re Goldstein*, 199 Fed. 665. The trustee is not bound to move for a reconsideration of a claim that has been filed until after a direct or indirect order for an allowance of the same has been made. *Re Two Rivers Woodenware Co.*, C. C. A., 199 Fed. 877. For a case where an adjustment of the controversy was held not to deprive the trustee of the right to resist claims filed against the estate, see *Ibid.*

¹⁹ *Re Royce Dry Goods Co.*, 133 Fed. 100.

²⁰ *Re Cannon*, 133 Fed. 837.

²¹ *Re Cannon*, 133 Fed. 837.

²² *Re Wooten*, 118 Fed. 670.

²³ *Re Royce Dry Goods Co.*, 133 Fed. 100, 101.

²⁴ *Re Royce Dry Goods Co.*, 133 Fed. 100.

²⁵ *Ibid.*

²⁶ *Re Wooten*, 118 Fed. 670.

²⁷ *Re Lafferty & Bro.*, 122 Fed. 558; *Remington on Bankruptcy*, § 786.

²⁸ *Re Lipman*, 94 Fed. 353; *Re Resler*, 95 Fed. 804; *Re Wooten*, 118 Fed. 670.

²⁹ *Chandler v. Thompson*, C. C. A., 120 Fed. 940.

³⁰ *Whitney v. Dresser*, 200 U. S. 532, 50 L. ed. 584, affirming *Re Dresser*, C. C. A., 135 Fed. 495; *West v. W. A. McLaughlin & Co's. Trustee*, C. C. A., 162 Fed. 124. See *Re Halsey El. Generator Co.*, 163 Fed. 118. If the claimant is present, subject to cross-examination, no testimony by him, in addition to his deposition, is required, *Baumhauer v. Austin*, C. C. A., 186 Fed. 260, although he is a near relation of the bankrupt, *Ibid.* It has been held that the trustee has the burden of proof to establish a set-off. *Re Harper*, 175 Fed. 412. But see *Re Graves*, 182 Fed. 443. Where a petition to expunge a claim is filed, a reply to the same is required or the claim will be expunged. *Re Goble*

but not a *prima facie* case for the allowance of a priority, when that is claimed.³¹ The evidence in support of a claim must be consistent with the claimant's allegations therein.³² It has been held that the bankrupt may object to a claim.³³

Before the election of a trustee, objection to a claim may be made by any creditor,³⁴ or by the bankrupt,³⁵ but not by a debtor of the estate.³⁶ It has been held that, after the election and qualification of the trustee, all objections and applications for the re-examination of claims should be made in his name.³⁷

Boat Co., 190 Fed. 92. The failure of the bankrupt to deny an allegation in the petition that the petitioner is a creditor, does not relieve the latter from the necessity of proving his claim. *Re Harper*, 175 Fed. 412. For a case where a claim was disallowed because the evidence in its support was improbable, see *Re Baumhauer*, 179 Fed. 966. Upon the hearing of a claim, the claimant may be required to produce papers relevant to the same which are in his possession, and he may be punished for contempt if he disobeys an order to that effect. *Baumhauer v. Austin*, C. C. A., 186 Fed. 260.

³¹ *Re Jones*, 151 Fed. 108, 18 Am. B. R. 206.

³² *Re Lansaw*, 118 Fed. 365. For a case where a claim, not mentioned in the bankrupt's schedules and supported only by the claimant's affidavit, was disallowed for insufficient proof, see *Re Shaw*, 112 Fed. 947. Mortgages which are void may be put in evidence as admissions of antecedent debts therein described. *Re New Brunswick Carpet Co.*, 4 Fed. 514. But see *Wilson v. Pennsylvania Tr. Co.*, C. C. A., 114 Fed. 742; *Orr v. Park*, C. C. A., 183 Fed. 683. An amendment to conform the claim to the proof may be allowed. *Re Watertown Paper Co.*, C. C. A., 169 Fed. 252.

³³ *Re Lane*, 125 Fed. 772; *Re French*, 181 Fed. 583.

³⁴ *Re Lafferty & Bro.*, 122 Fed. 558. See *Re Lipman*, 94 Fed. 353; *Re Sully*, C. C. A., 152 Fed. 619. An oral objection is sufficient when a claimant makes no objection to the form thereof. *Orr v. Park*, C. C. A., 183 Fed. 683. Objections may be treated as a petition for the reconsideration and disallowance of the claim when no objection to the omission of such a petition is made until after the order upon the same. *Re Canton Iron & Steel Co.*, 197 Fed. 767.

³⁵ *Re Ankeny*, 100 Fed. 614.

³⁶ *Re Sully*, C. C. A., 152 Fed. 619.

³⁷ *Re Lewensohn*, C. C. A., 121 Fed. 538. Where no objection was raised by the claimant because the petition was made by creditor's instead of the trustee, until subsequent to the order of the referee, it was not disturbed. *Re Canton Iron & Steel Co.*, 197 Fed. 767. See *Re Mexico Hardware Co.*, 197 Fed. 650. Defects in the form of objections and applications for the reconsideration of the claim, are waived by the taking of the testimony without objection. *Orr v. Park*, C. C. A., 183 Fed. 683; *Re Effinger*, 184 Fed. 724; *Re Canton Iron & Steel Co.*, 197 Fed. 767. Upon the refusal of the trustee to move for the re-examina-

The referee may disallow the claim of his own motion.³⁸ An objection to a claim may be made by the trustee at any time before the estate is closed.³⁹ Upon the re-examination of a claim that has been allowed, the burden of proof is upon the objector.⁴⁰ Upon a petition to re-examine a claim, the objectors should have an opportunity to examine the claimant,⁴¹ as well as other witnesses.⁴² It is said to be improper for the attorney for the trustee,⁴³ or for the attorney for the bankrupt,⁴⁴ to represent the claimant when objections to the same are interposed. A rehearing was denied where it was made solely for the purpose of renewing the petitioner's right of appeal.⁴⁵ Where the petition for the re-examination of a claim is defective for lack of certainty the proper remedy is a motion for a more specific statement, not a motion to strike out part of the petition.⁴⁶ A claim may be disallowed, or if allowed may be re-examined and expunged, because it is barred by the statute of limitations;⁴⁷ and because the claimant has joined with it other claims that are fraudulent;⁴⁸ but not, it has been

tion of a claim he may, in a proper case, be ordered to do so. *Chatfield v. O'Dwyer*, C. C. A., 101 Fed. 797; *McDaniel v. Stroud*, C. C. A., 106 Fed. 486; *Re Stern*, C. C. A., 144 Fed. 956. It has been held that, in such a case, the creditor may himself proceed, *Re Little River Lumber Co.*, 101 Fed. 558; *Re Sully*, C. C. A., 152 Fed. 619, upon indemnifying the trustee against his costs; *Chatfield v. O'Dwyer*, C. C. A., 101 Fed. 797; *Re Sully*, C. C. A., 152 Fed. 619; *Re Bailey*, 151 Fed. 953; but the proper practice seems to be for the creditor to make his objections or application in the name of the trustee by leave of the court. *McDaniel v. Stroud*, C. C. A., 106 Fed. 486; *Re Sully*, C. C. A., 152 Fed. 619; *Re Bailey*, 151 Fed. 953; *Re Mexico Hardware Co.*, 197 Fed. 650, holding that a creditor may move in his own name for a reconsideration of the claim.

³⁸ *Re James Dunlap Carpet Co.*, 171 Fed. 532.

³⁹ *Re Globe Laundry*, 198 Fed. 365. For a case where stockholders were held to be estopped by laches, see *Re Pittsburg Lead & Zinc Co., Consolidated*, 198 Fed. 316.

⁴⁰ *Re Felter*, 7 Fed. 904; *Re Howard*, 100 Fed. 630. *Cf. Re Ankeny*, 100 Fed. 614; *Re Pittsburg Lead & Zinc Co., Consolidated*, 198 Fed. 316.

⁴¹ *Re Sumner*, 101 Fed. 224; *Re Castle Braid Co.*, 145 Fed. 224.

⁴² *Re Sumner*, 101 Fed. 224.

⁴³ *Re Stern*, C. C. A., 144 Fed. 956.

⁴⁴ *Re Wooten*, 118 Fed. 670.

⁴⁵ *Re Girard Glazed Kid Co.*, 129 Fed. 841. See § 667, *infra*.

⁴⁶ *Re Ankeny*, 100 Fed. 614.

⁴⁷ *Re Lipman*, 94 Fed. 353.

⁴⁸ *Re Flick*, 105 Fed. 503.

held, because it was acquired from the original claimant after the adjudication of bankruptcy for the purpose of controlling the proceedings.⁴⁹ The disallowance of a claim is *res adjudicata* against a subsequent suit upon the same.⁵⁰ The liquidation of a claim should ordinarily be before the judge or referee in bankruptcy.⁵¹ They should not be liquidated by a proceeding in the State court taken subsequent to the institution of the bankruptcy proceedings, unless the judge or referee so directs.⁵² A proof of claim may be amended by leave of the court or of the referee, upon proof of an error or omission, due to inadvertence or to a mistake of fact or law.⁵³ By such an amendment, a claim may be increased,⁵⁴ or the benefit of a lien preserved,⁵⁵ and an application may be made of the funds of the bankrupt in the hands of claimant.⁵⁶ It has been held that the creditor may move to compel the referee to accept the claim, and that the formalities of an order and petition of review are unnecessary.⁵⁷ But an amendment bringing in a new cause of action cannot be made, under ordinary circumstances, more than a year after the adjudication.⁵⁸

⁴⁹ *Re Headley*, 97 Fed. 765.

⁵⁰ *Hargadine-McKittrick D. G. Co. v. Hudson*, C. C. A., 122 Fed. 232.

⁵¹ *Re Heim Milk Product Co.*, 183 Fed. 787.

⁵² *Ibid.* Under the Act of 1867 (14 St. at L. 517), it was held that the filing of a proof of claim in bankruptcy is not a waiver of a right of action upon the same in another court, and that if the trustee does not apply for a stay of a suit pending before the petition was filed, judgment therein is proper proof of the amount claimed as liquidated. *Re Buchan's Soap Corporation*, 169 Fed. 1017.

⁵³ *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 1181; *Re Baxter*, 12 Fed. 72; *Re Myers*, 99 Fed. 691; *Re Roeber*, C. C. A., 127 Fed. 122; *Re Robinson*, 136 Fed. 994; *Re Salvator Brewing Co.*, C. C. A., 193 Fed. 989. See § 646, *infra*.

An amendment may be allowed so as to include a claim for a security. *Re James Carothers & Co.*, 182 Fed. 501; *Re Fisk & Robinson*, 185 Fed. 974. Such a claim may be amended more than a year after the adjudication. *Re Faulkner*, C. C. A., 161 Fed. 900; *Re Kessler*, C. C. A., 184 Fed. 51; *Re Fairlamb*, 199 Fed. 278; *Re Basha*, 200 Fed. 951.

⁵⁴ *Re Shiebler*, 165 Fed. 363.

⁵⁵ *Re Falls City Shirt Mfg. Co.*, 98 Fed. 592. *Contra*, *Re Wilder*, 101 Fed. 104.

⁵⁶ *Re Myers*, 90 Fed. 691. An amendment to conform the claim to the proof may be allowed. *Re Wattertown Paper Co.*, C. C. A., 169 Fed. 252.

⁵⁷ *Re John A. Baker Notion Co.*, 180 Fed. 922.

⁵⁸ *Re McCallum v. McCallum*, 127 Fed. 768 (where it was sought to amend a claim upon a promissory

§ 646. Time for proof of claim. "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."¹ It has been held that the court may limit the time for proof to less than a year, provided due notice and reasonable time is given to all parties interested.² The time to file a claim cannot be extended because of accident or mistake;³ not even, it has been held, when the claim was scheduled by the bankrupt,⁴ although in proceedings for a composition, he has deposited sufficient to pay a dividend upon the claim if proved;⁵ nor, it has been held, by the filing of a supplemental petition showing new assets,⁶ nor when assets omitted from the bankrupt's schedules have been afterwards discovered.⁷ The statutory limitation

note, made by the firm, so as to charge, upon his indorsement thereof, the individual estate of one of the partners). See *Hutchinson v. Otis*, 190 U. S. 552, 555. Permission was given after the expiration of the year, to amend a claim in the form of a book account, so as to base the same upon promissory notes of the bankrupt. *Brown v. O'Connell*, C. C. A., 200 Fed. 229.

§ 646. 130 St. at L. 544; 566, § 57, subd. n. It has been held that relief cannot be given to a creditor who handed his claim to an employee of the trustee in the trustee's office within the year and the latter failed to file the same, it not appearing in what capacity such person was employed by the trustee. *Re Lathrop, Haskins & Co.*, C. C. A., 197 Fed. 164. So where the claimant sent the receiver an unverified account showing a general balance and its attorney testified that the

receiver, who was afterwards trustee, shortly thereafter said that "it was all right," which conversation the receiver testified that he did not recollect. *Re Alfred Kessler & Co.*, 176 Fed. 647; *Re French*, 181 Fed. 583.

² *Re T. A. McIntyre & Co.*, C. C. A., 176 Fed. 552.

³ *Re Sanderson*, 160 Fed. 278.

⁴ *Re Blond*, 188 Fed. 452.

⁵ *Re Blond*, 188 Fed. 452.

⁶ *Re Shaffer*, 104 Fed. 982. See *Re Peck*, C. C. A., 168 Fed. 48.

⁷ *Re Peck*, C. C. A., 168 Fed. 48; *Re Meyer*, 181 Fed. 904; *Re Shaffer*, 104 Fed. 982. *Contra, Re Pierson*, 174 Fed. 160. But where, through the fraud of the bankrupt, the schedule stated no assets and consequently no claims were proved, no trustee appointed, the bankrupt discharged and the estate closed, upon the discovery of assets, the estate was reopened and the filing of claims was

does not apply to a claim of ownership of property adverse to the bankrupt,⁸ nor affect a creditor's right to plead his claim as a set-off or counter-claim in an action by the trustee to recover his indebtedness to the estate;⁹ nor, it has been held, apply to the United States.¹⁰ Where a claim is liquidated by litigation, proof of the same may be made within sixty days after the rendition of the judgment, no matter how long subsequent to the order such judgment was entered.¹¹ Where the claim had been recognized by an order of the court of bankruptcy made within the year,¹² or by the trustee in a paper used as a basis for a composition,¹³ or has been stated in a verified petition presented by the creditor seeking other relief,¹⁴ it was held that it might be filed *nunc pro tunc* after the year had expired. But a foreclosure action brought in a State court within the year, does not justify the proof of a judgment for a deficiency thereafter.¹⁵ In a case of an appeal or writ of error to review the adjudication, the time to prove claims is extended until one year after the affirmance of the order below or the dismissal of the writ or appeal.¹⁶ Where a claimant is in good faith engaged in litigation either in a court of bankruptcy¹⁷ or a State court,¹⁸ to enforce¹⁹ or defend²⁰ a pre-

permitted subsequent to the year. *Re Pierson*, 174 Fed. 160. Where no creditor objected, a single creditor who had been thus deceived by the bankrupt was allowed to prove his claim after the statutory period. *Re Towne*, 122 Fed. 313.

⁸ *Nauman Co. v. Bradshaw*, C. C. A., 193 Fed. 350.

⁹ *Norfolk & W. Ry. Co. v. Graham*, C. C. A., 145 Fed. 809.

¹⁰ *Re Stoeve*, 127 Fed. 394.

¹¹ *Powell v. Leavitt*, C. C. A., 150 Fed. 89, 80 C. C. A., 43; *Re Strobel*, 163 Fed. 787.

¹² *Re Basha*, C. C. A., 200 Fed. 951, reversing 193 Fed. 151.

¹³ *Re Faulkner*, C. C. A., 161 Fed. 900; *Re Fairlamb*, 199 Fed. 278.

¹⁴ *Re Faulkner*, C. C. A., 161 Fed. 900; *Buckingham v. Estes*, C. C. A., 128 Fed. 584.

¹⁵ *Re Sampter*, C. C. A., 170 Fed. 938.

¹⁶ *Re Lee*, 171 Fed. 266.

¹⁷ *Powell v. Leavitt*, C. C. A., 150 Fed. 89, 80 C. C. A., 43; *Re Landis*, 156 Fed. 318; *Re Strobel*, 163 Fed. 787; *Re Otto F. Lange Co.*, 170 Fed. 114; *Re Standard Telephone & Electric Co.*, 186 Fed. 586. See *Page v. Rogers*, 211 U. S. 575, 581, 53 L. ed. 332.

¹⁸ *Re Baird*, 154 Fed. 215; *Re Keyes*, 160 Fed. 763. See *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. ed. 790. Where security for part of the claim was set aside by the State court and the Supreme Court of the United States more than a year before the attempt to prove the claim, and the claimants had since then continually insisted in bankruptcy proceedings that they had se-

erence or a claim to security,²¹ his claim is not liquidated so as to set the statute in motion until the final judgment therein is entered. It has been said, that the clause of the bankruptcy act containing this short statute of limitations does not apply to the claims of creditors who have been deprived of preferences which are merely voidable, but that such may be proved and allowed after the preference has been surrendered at any time before the estate is finally settled.²² Where an appeal is taken from the adjudication, the time to prove claims does not begin to run until the appeal has been decided or dismissed.²³ Claims may be assigned,²⁴ even after the year allowed for proof of claim.²⁵ The presentation and delivery of the claim to the trustee within the statutory time is a sufficient filing of proof thereof,²⁶ but a claim by the trustee in his individual capacity must be actually filed with the referee within the statutory period.²⁷

curity for the rest, and notes given to them were shown by the bankrupts' schedules; it was held that they might prove the part not solely secured by the mortgage that was set aside. *Re Vogt*, 188 Fed. 764, in which the writer was counsel. Where as a result of the litigation, each party recovered a judgment for costs; it was held that the time for filing the claim expired at least sixty days after an order off-setting those judgments and that it was not extended by the fact that the balance was not paid until later. *Re Clover Creamery Ass'n.*, C. C. A., 176 Fed. 907. Where a suit to set aside a preference was not brought until more than a year after the adjudication, it was held that the creditor was entitled to rely upon his preference until that time and that he could prove his claim within sixty days after his defeat in such litigation. *Re Clark*, 176 Fed. 955. But see *Re Havens*, 182 Fed. 367.

¹⁹ *Powell v. Leavitt*, C. C. A., 150

Fed. 89, 80 C. C. A., 43; *Re Baird*, 154 Fed. 215, overruling *Re Baird*, February 6, 1907; *Re Strobel*, 163 Fed. 787; *Re Otto F. Lange Co.*, 170 Fed. 114; *Re Standard Telephone & Electric Co.*, 186 Fed. 586. See *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. ed. 790; *Page v. Rogers*, 211 U. S. 575, 581, 53 L. ed. 332. *Contra*, *Re Fagan*, 140 Fed. 758; *Re Kemper*, 142 Fed. 210.

²⁰ *Re Shiebler*, 165 Fed. 363; *Re John A. Baker Notion Co.*, 180 Fed. 922; *Re Clark*, 176 Fed. 955.

²¹ *Re Salvator Brewing Co.*, C. C. A., 193 Fed. 989; where it does not clearly appear whether the claimant was a party to the litigation.

²² *Re Otto F. Lange Co.*, 170 Fed. 114, 116.

²³ *Re Lee*, 171 Fed. 266.

²⁴ *Re Miner*, 114 Fed. 998.

²⁵ *Hutchinson v. Otis*, C. C. A., 115 Fed. 937.

²⁶ *J. B. Orcutt Co. v. Green*, 204 U. S. 96, 51 L. ed. 390.

²⁷ *Ibid.*

§ 647. **Provable claims.** "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;¹ (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. (b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."² A claim may be proved which is purely equitable and not recognized by a court of common law.³ It has been held: that a solvent partner can claim from the estate of his bankrupt associate, any amount that may be due him for advances to pay the firm debts;⁴ that an accounting and settlement of the partnership affairs may be had before the referee in bankruptcy;⁵ that the trustee of a partnership estate may do

§ 647. ¹ Stenographers and referees' fees, when taxable by the State law, may be proved as such costs. *Re J. B. Brewster & Co., C. C. A.*, 180 Fed. 109. The right to costs is not lost because the creditor knew or believed, when the suit was brought, that the debtor was in financial difficulty. *Re Harnden*, 200 Fed. 172. A surety upon the bankrupt's bond for costs on appeal may

prove his claim for the costs that he has paid. *Re Lyons Beet Sugar Refining Co.*, 192 Fed. 445. *Cf.* § 649, *infra*.

² 30 St. at L. 544, 562, 563, § 63; *Re Heinsfurter*, 97 Fed. 198.

³ *Re Putnam*, 193 Fed. 464.

⁴ *Re Effinger*, 184 Fed. 728; *Re Hirth*, 189 Fed. 926. *Contra, Re Walker*, 176 Fed. 455.

⁵ *Re Hirth*, 189 Fed. 926.

the same;⁶ but that such a claim is payable only from the surplus after the individual claims of the bankrupt have been paid;⁷ and that where a partnership and its members are bankrupt and the individual estate of one of them is more than enough to pay his individual indebtedness, the claim of an individual creditor for interest accruing after the filing of the petition in bankruptcy cannot be proved so as to be entitled to a priority as against partnership creditors in the distribution of such individual assets.⁸ It seems that a debt barred by the statute of limitations may be proved when the bankrupt interposes no objection to the same,⁹ but that it is not entitled to any dividend until the other creditors have been paid in full.¹⁰ The provability of a debt depends upon its status at the time the petition in bankruptcy is filed.¹¹ Contingent debts or liabilities, the valuation or estimation of which it is substantially impossible to fix, cannot be proved in bankruptcy.¹²

⁶ *Re Telfer*, C. C. A., 184 Fed. 224.

⁷ *Ibid.*

⁸ *Re Chandler*, C. C. A., 184 Fed. 887.

⁹ *Re Currier*, 192 Fed. 695, *Contra*, *Re Putnam*, 193 Fed. 464.

¹⁰ *Re Currier*, 192 Fed. 695, *Cf.* § 652, *infra*.

¹¹ *Re Swift*, C. C. A., 112 Fed. 315; *Re Pettingill & Co.*, C. C. A., 137 Fed. 840; *Re Reading Hosiery Co.*, 171 Fed. 195. "That part of the present Bankruptcy Act, which describes what debts may be proved does not repeat at all points the words 'owing at the time of the filing of the petition,' but it is impossible to consider it other than as though it did repeat them." *Re Swift*, C. C. A., 112 Fed. 315, 321, per Putnam, J.

¹² *Dunbar v. Dunbar*, 190 U. S. 340, 350, 47 L. ed. 1084. The amount of a note may be proved, although it does not mature until subsequent to the filing of the petition. *Re Percy Ford Co.*, 199 Fed. 334. See *Matter of Fleet v. Yawger*, or *People v. Met-*

ropolitan Surety Co., 205 N. Y. 135; and *supra*, § 320. The notes of a bankrupt corporation, given to its officers are provable. *Spencer v. Lowe*, C. C. A., 198 Fed. 961. So is a note given to a stockholder for money borrowed to effect a composition. *Re C. H. Bennett Shoe Co.*, 162 Fed. 691. The liability of the bankrupt as indorser or surety is a provable debt, although default is not made by the principal until after the filing of the petition and the adjudication. *Moch v. Market Street Bank*, C. C. A., 107 Fed. 897; *Re Philip Semmer Glass Co.*, C. C. A., 135 Fed. 77; *Re Rothenberg*, 140 Fed. 798. But see *Re O'Donnell*, 131 Fed. 150; *Re Pettingill & Co.*, 137 Fed. 143; *Morgan v. Wordell*, 178 Mass. 350, 55 L.R.A. 33; *Goding v. Rosenthal*, 180 Mass. 43. It seems that this can only be done when the liability becomes fixed and absolute, within one year from the date of adjudication. *Ibid.*; *Remington on Bankruptcy*, § 643. Where the surety is liable upon the obligation of

the bankrupt for the absolute and unconditional payment of a sum of money, the claim may be proved in bankruptcy, and the obligation takes effect from the date when the surety signed the obligation. *Re Stout*, 109 Fed. 794; *Swarts v. Siegel*, C. C. A., 117 Fed. 13; *Livingstone v. Heineman*, C. C. A., 120 Fed. 786. The fact that the surety makes no payment until after the adjudication in bankruptcy does not deprive him of the right to prove his claim. *Ibid*; *Re Schmechel Co.*, 104 Fed. 64; *Moch v. Market Street Bank*, C. C. A., 107 Fed. 897, affirming *Re Gerson*, 5 Am. B. R. 89. But see *Phillips v. Dreher Shoe Co.*, 112 Fed. 404. Where the surety's obligation is conditional upon the failure of the bankrupt to perform some other act than the payment of money, the surety cannot prove his claim unless it matures before the petition in bankruptcy. *Clemmons v. Brinn*, 36 Misc. (N. Y.) 157, 35 Misc. (N. Y.) 844, 7 Am. B. R. 714 (a forthcoming bond in replevin). *Re Merrill & Baker*, C. C. A., 186 Fed. 312. It seems that when there is a condition to the surety's liability, such as the recovery of a judgment, or decree, it is not provable if no judgment was obtained before the petition in bankruptcy. *Hibberd v. Bailey*, C. C. A., 129 Fed. 575, reversing *Re Wiseman*, 123 Fed. 185. Directors who have endorsed the notes of a bankrupt corporation may prove the amount they have paid upon the same, *Re Salvator Brewing Co.*, C. C. A., 193 Fed. 989; but not, it has been held, until after payment by them, *Re Dr. Voorhees Awning Hood Co.*, 187 Fed. 611. A judgment for a deficiency after a foreclosure, which was entered within a year after the bankruptcy, may

be proved. *Re Fitzgerald*, 191 Fed. 95. Where such a judgment was obtained by a trustee for bondholders prior to the bankruptcy and afterwards proved by such trustee, the bondholders were allowed to prove their individual claims upon the bonds in their own name so that they might be able to protect their rights. *Mackay v. Randolph Macon Coal Co.*, C. C. A., 178 Fed. 881. It has been held: that a guaranty of dividends to a stockholder is not provable so far as concerns dividends which fall due after the petition in bankruptcy; *Re Pettingill & Co.*, 137 Fed. 143; but that the liability upon a bond to secure the payment of an annuity may be proved while the annuity is still alive. *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084; *Cobb v. Overman* C. C. A., 54 L.R.A. 369, 109 Fed. 65. But see *Re Hartman*, 166 Fed. 776. Where an annuity is to cease upon the marriage of the annuitant, it is not a provable claim. *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084. *Contra*, *Ex parte Blakemore*, 5 Ch. Div. 372. It has been held that a claim for damages for breach of a contract to pay royalties on a minimum number of patented articles during the term of the patent, can be proved, but that the claim for the future royalties cannot. *Re Dr. Voorhees Awning Hood Co.*, 187 Fed. 611. The amount due for work under a building contract, performed after the petition in bankruptcy, may be proved as a claim for a breach of contract, if there is such a liability for the same; but not upon a *quantum meruit*. *Re Adams*, 130 Fed. 788. Where, by his contract, a subcontractor had no claim against the builder until the owners had made

a payment on account of the labor and material, which he had furnished, and no such payments had been made; it was held that the claim could not be proved. *Re Ellis*, C. C. A., 143 Fed. 103. It has been held that a materialman cannot prove against the estate of a contractor with the United States, his claim under a contract with a subcontractor, but that his remedy is confined to the bond. *Re Hawley*, 194 Fed. 751. Where bankruptcy is a breach of a contract and matures the obligation for installments, which otherwise would not be due until subsequently, the claim may be proved. *Re Swift*, C. C. A., 112 Fed. 315; *Re Adams*, 130 Fed. 788; *Re Pettingill & Co.*, 137 Fed. 143. But see *Re Imperial Brewing Co.*, 143 Fed. 579. It has been held that the damages for the breach of a contract of employment may be proved, although the term of service has not expired; *Re Silverman Bros.*, 101 Fed. 219, but not, it has been held, the salary of an officer of the corporation. *Re Dr. Voorhees Awning Hood Co.*, 187 Fed. 611. *Contra*, *Re Inman & Co.*, 171 Fed. 185; *Re Am. Vacuum Cleaner Co.*, 192 Fed. 939; and that so may be the breach of a continuing contract to supply goods, *Re Stern*, C. C. A., 116 Fed. 604; *Re Gliel*, 184 Fed. 967; *Contra*, *Re Inman & Co.*, 175 Fed. 312, or to buy property, where the trustee does not assume the same; *Re Saxton Furnace Co.*, 142 Fed. 293; *Re Imperial Brewing Co.*, 143 Fed. 579; *Re Spittler*, 151 Fed. 942; *Re Neff*, C. C. A., 28 L.R.A. (N.S.) 349, 157 Fed. 57; *contra*, *Phenix National Bank v. Waterbury*, 123 App. Div. (N. Y.) 453, see *Re Duquesne Incandescent Light Co.*, 176 Fed. 785; and damages for a breach of

warranty, although the amount has not yet been fixed, *Re Grant Shoe Co.*, C. C. A., 130 Fed. 881; *Switzer v. Henking*, C. C. A., 15 L.R.A. (N.S.) 1151, 158 Fed. 784. It is settled that bankruptcy does not cancel a lease, *Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950; *Re Pennewell*, C. C. A., 119 Fed. 139; *Watson v. Merrill*, C. C. A., 69 L.R.A. 719, 136 Fed. 359; even though it is forfeited by an assignment by the lessee, or by the sale of his interest under execution, or other legal process. *Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950. Rent, which has accrued prior to the filing of the petition, may be proved, *Re Arnstein*, 101 Fed. 706; although it is payable in advance for a period which has not then expired. *Wilson v. Pennsylvania Trust Co.*, C. C. A., 114 Fed. 742; *Re Mitchell*, 116 Fed. 87; *Re Roth & Appel*, 174 Fed. 64. It has been held that a claim for rent accruing before the adjudication, but after the filing of the petition, may be proved, *Re Hinkel Brewing Co.*, 123 Fed. 942. *Contra*, *Re Adams*, 130 Fed. 788. And where the lease, by its terms, is terminated by the tenant's bankruptcy, neither future rent nor damages for loss may be proved. *Re Shaffer*, 124 Fed. 111; *South Side Trust Co. v. Watson*, C. C. A., 200 Fed. 50. A number of authorities hold that claims for rent, which is not due before the adjudication, are not provable against the estate unless the trustee has assumed the lease or accepted the premises, *Re Jefferson*, 93 Fed. 948; *Re Mahler*, 105 Fed. 428; *Atkins v. Wilcox*, C. C. A. 53 L.R.A. 118, 105 Fed. 595; *Re Hays, Foster & Ward Co.*, 117 Fed. 879; *Re Hinkel Brewing Co.*, 123 Fed. 942; *Re Adams*, 130 Fed. 788;

Watson v. Merrill, C. C. A., 69 L.R.A. 719, 136 Fed. 359; *Re Rubel*, 166 Fed. 131; *Colman Co. v. Withoft*, C. C. A., 195 Fed. 250, *contra*, as to the difference between the rent which the bankrupt covenanted to pay and that which was collected after his default under another lease, *Re Caloris Mfg. Co.*, 179 Fed. 722; even where the lease provides that rent, subsequently accruing, shall become due upon the bankruptcy of the tenant; *Re Winfield Mfg. Co.*, 137 Fed. 984; s. c., 140 Fed. 185; but see *Atkins v. Wilcox*, C. C. A., 105 Fed. 595, 598; and that the same rule applies to notes for future rent, which are in the hands of the landlord, *Atkins v. Wilcox*, C. C. A., 53 L.R.A. 118, 105 Fed. 595; and that a person jointly liable with the bankrupt upon a lease cannot prove his claim for contribution against the bankrupt, *Colman Co. v. Withoft*, C. C. A., 195 Fed. 250. As to tenant's improvements. See *Re O'Malley*, 191 Fed. 999. But these decisions have not yet been approved by the Supreme Court of the United States. It has been held that sureties for rent, subsequently accruing, are not released by the bankruptcy of the tenant. *Witthaus v. Zimmerman*, 91 App. Div. (N. Y.) 202, 11 Am. B. R. 314. The acceptance by the landlord of the surrender of the leasehold, or his forfeiture of the term, is a waiver of his right to a claim for the rent of the term; *Wilson v. Pennsylvania Trust Co.*, C. C. A., 114 Fed. 742, even, it has been held, when there is a covenant to indemnify the landlord for damages in such a case. *Re Shaffer*, 124 Fed. 111. It has been held that claims for a tort, which is not connected with a contract, are not provable, *Re Yates*, 114 Fed. 365; *Re New*

York Tunnel Co., C. C. A., 159 Fed. 688; s. c., C. C. A., 166 Fed. 284; *Brown v. Adams v. United Button Co.*, C. C. A., 8 L.R.A.(N.S.) 961, 149 Fed. 48, unless they have been reduced to judgment before the filing of the petition in bankruptcy. *Burnham v. Pidecock*, 58 App. Div. (N. Y.) 273, 68 N. Y. Supp. 1007; but the last word has not been said upon this subject; that a verdict for damages is not a sufficient liquidation to authorize the proof of the claim; *Re Ostrom*, 185 Fed. 988, and that the liability for a statutory penalty cannot be proved. *Re Southern Steel Co.*, 183 Fed. 498. Where the tort may be waived and the suit brought upon a contract, express or implied, the claim may be proved. *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147; *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762; *Re Swift*, 114 Fed. 947; *Re Upson*, 123 Fed. 807; *Re Arnold & Co.*, 133 Fed. 789; *Brown & Adams v. United Button Co.*, C. C. A., 149 Fed. 48, affirming *Re United Button Co.*, 140 Fed. 495. It was held that upon a conversion by a firm, no proof could be made against the individual members upon an implied contract therefrom arising. *Reynolds v. N. Y. Trust Co.*, C. C. A., 39 L.R.A.(N.S.) 391, 188 Fed. 611. It was so held of the conversion of chattels, *Reynolds v. N. Y. Trust Co.*, C. C. A., 39 L.R.A.(N.S.) 391, 188 Fed. 611, and of an embezzlement of money, *Burgoyne v. McKillip*, C. C. A., 182 Fed. 452; *Clarke v. Rogers*, C. C. A., 183 Fed. 518. Where a firm, after accepting bills of lading, converted money which they were bound to apply to the payment thereof, the holder of the bills was allowed to prove two claims, one against the firm upon the acceptance

and the other against the firm and its individual members upon an implied contract to repay the money which they thus converted. *Re* Coe, C. C. A., 183 Fed. 745. It has been held that a creditor cannot rescind any part of a contract for fraud, so as to recover or retain specific property; and then prove his claim for the purchase price of the rest, upon a contract, express or implied, *Re* Heinsfurter, 97 Fed. 198; *Standard Varnish Works v. Haydock*, C. C. A., 143 Fed. 318; but he has been allowed to petition the Bankruptcy Court for an order for the return of part of the property, which is in the court's possession, and at the same time to present a claim for the value of that already sold, *Re* Hildebrant, 120 Fed. 992. See *Re* Hirschman, 104 Fed. 69. These cases are criticised in Remington on Bankruptcy, § 638. It has been held: that, where the claimant has elected to waive the tort and prove his claim upon an implied contract and has participated in a creditors' meeting after such proof of claim; he cannot be allowed to withdraw the same and apply for the return of the goods, *Standard Varnish Works v. Haydock*, C. C. A., 143 Fed. 318. It was held that the act of a creditor of a bankrupt in petitioning the court of bankruptcy for the appointment of a receiver to take charge of and protect the bankrupt's property, which petition set forth that certain of the property in the bankrupt's possession was owned by the petitioner, and that the bankrupt was also largely indebted to it, did not estop it to assert its ownership of such property; *Re* Pierce, C. C. A., 157 Fed. 757; *Lynch v. Bronson*, 160 Fed. 139; but that proof of a claim is not a waiver of

a previous action for the recovery of the specific property. *Mould v. Importers & Traders' Nat. Bank*, 72 App. Div. (N. Y.) 30, 33. *Of* § 649, *infra* It has been said that claims upon the same instrument are to be regarded as single; and, if one of them is unliquidated, the whole is to be treated as an unliquidated claim, *Re* Big Meadows Gas Co., 113 Fed. 974. Where a creditor who had sold goods to the bankrupt, for which a stranger became surety, afterwards received from the latter as security a note of the bankrupt arising upon a separate transaction, it was held that he might prove both claims, *Re* H. V. Keep Shirt Co., 200 Fed. 80. *Contra*, *First Nat. Bank of Beaumont v. Eason*, C. C. A., 149 Fed. 204. Where a note does not mature until after the filing of the petition in bankruptcy, the provision for an attorney's fee for its collection cannot be proved. *Re* T. H. Thompson Milling Co., 144 Fed. 314; *Re* Hersey, 171 Fed. 1904. For a case when less than the stipulated attorney's fee was allowed, see *Re* Fabacher, 193 Fed. 556. Nor, it has been held, if they previously matured, but no attorney has been employed, *Re* Garlington, 115 Fed. 999; *Re* Keeton, Stell & Co., 126 Fed. 429; *Re* Gebhard, 140 Fed. 571. But where they matured and were placed in the hands of an attorney before the petition in bankruptcy was filed, the attorneys fee is provable. *Merchants' Bank v. Thomas*, C. C. A., 121 Fed. 306; *Re* Edens Co., 151 Fed. 940. But see *Re* V. & M. Lumber Co., 182 Fed. 231. *Contra* *McCabe v. Patton*, C. C. A., 174 Fed. 217. Fees for an attorney for services not connected with the bankruptcy proceeding, which were rendered after the filing of the petition

§ 648. **Set-offs and counter-claims.** “(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.¹ (b) A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate;² or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.”³ “If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor’s estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recover-

and before the adjudication, cannot be proved, *Re Burka*, 107 Fed. 674; although, when they have benefited the estate, the court might perhaps make an allowance for the same. Where the mortgage gave a right to attorneys’ fees upon notice of intention to foreclose at a specified term, and bankruptcy intervened before the beginning of the suit, they were not allowed. *Re Weiland*, 197 Fed. 116. Where a mortgage contained a covenant for the payment of attorneys’ fees in case the mortgagee was required to employ counsel, and the attorney proved the claim and lien against the estate, the mortgagee was given a priority of payment for the same. *Re Ferreri*, 188 Fed. 675. Where there was a covenant for attorneys’ fees in case legal services became necessary to protect the interest of the mortgagee, he was allowed those incurred for filing petition of foreclosure, subsequent to the petition in bankruptcy and appearance upon the petition by the trustee, for leave to

sell free from liens. *Re Holmes Lumber Co.*, 189 Fed. 178.

§ 648. ¹The word “debts” includes a right of action against a creditor for injury to the bankrupt’s property. *Re Harper*, 175 Fed. 412. For a case of bailment where it was held that the right of set-off might be enforced, see *Walther v. Williams Mercantile Co.*, C. C. A., 169 Fed. 270.

² 30 St. at L. 544, 565, § 68; *Germania Sav. Bank & Tr. Co. v. Loeb*, C. C. A., 188 Fed. 285; *Re Howe Mfg. Co.*, 193 Fed. 524; *Re White*, 17 Fed. 723.

³ As to debts acquired with knowledge of the bankrupt’s insolvency, see *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571; *Chicago Title & Tr. Co. v. Federal Tr. & Sav. Bank*, 192 Fed. 967; *Continental & C. T. & S. Bank v. Chicago T. & T. Co.*, C. C. A., 199 Fed. 704; *Mason v. Nat. Herkimer County Bank*, C. C. A., 172 Fed. 529.

able from him."⁴ A deposit may be set off against the promissory notes held by the bank which is the depository,⁵ although they are not yet due.⁶ It seems that a surety who pays the debt of his principal after the latter's adjudication in bankruptcy may offset such payment;⁷ but it has been held that a person jointly indebted with the bankrupt, who pays the debt after the adjudication, cannot set it off against a debt due by him to the latter, although he is subrogated to the right of the payee to dividends.⁸ An unliquidated claim held by the bankrupt may be the subject of set-off, provided that it is capable of liquidation in the proceedings in bankruptcy.⁹ The claim set off against each other must be held by the parties in the same right.¹⁰ Money held by the creditor as trustee cannot be applied as a set-off upon its claim.¹¹ If the debt has been incurred before the adjudication in bankruptcy, it may be set off, although it is not yet due;¹² but, if it subsequently arises, it cannot be offset.¹³ A stockholder cannot set off his claim

⁴ 30 St. at L. 544, § 60.

⁵ *N. Y. County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380; *Re Myers*, 99 Fed. 691; *Chicago Title & Tr. Co. v. Federal Tr. & Sav. Bank*, 192 Fed. 967. See *Shutts v. Florida Nat. Bank of Jacksonville*, C. C. A., 193 Fed. 1022. A set-off against a general account of a special deposit for specified purposes, *Continental & C. T. & S. Bank v. Chicago T. & T. Co.*, C. C. A., 199 Fed. 704, and of deposits made subsequent to the petition in bankruptcy in ignorance by the bank and the depositor of such petition, *Re Michaelis & Lindeman*, 196 Fed. 718, was disallowed. *Germania Sav. Bank & Tr. Co. v. Loeb*, C. C. A., 188 Fed. 285. But see *Chicago Title & T. Co. v. Federal Tr. & Sav. Bank*, 192 Fed. 967; *Continental & C. T. & S. Bank v. Chicago T. & T. Co.*, C. C. A., 199 Fed. 704.

⁶ *Germania Sav. Bank & Tr. Co. v. Loeb*, C. C. A., 188 Fed. 285.

⁷ *Re Dillon*, 100 Fed. 627.

⁸ *Re Bingham*, 94 Fed. 796.

⁹ *Re Harper*, 175 Fed. 412, damages for false representation, which by the State statute, could have been set up by a counter-claim.

¹⁰ *Re Howe Mfg. Co.*, 193 Fed. 524.

¹¹ *Western Tie & Timber Co. v. Brown*, 106 U. S. 502, 49 L. ed. 571. It has been held that a claim upon a promissory note of a partner cannot be set off against a judgment in favor of the firm. *Re T. M. Leshner & Son*, 176 Fed. 650.

¹² *Re Philip Semmer Glass Co.*, C. C. A., 135 Fed. 77.

¹³ *Re Bingham*, 94 Fed. 796; *Germania Sav. Bank & Tr. Co. v. Loeb*, C. C. A., 188 Fed. 285. Thus, it has been held that, when the bankrupt is co-surety with another, such other cannot set off against a claim of the estate, his right of contribution, when he paid the obligation after the petition was filed. *Re Bingham*, 94 Fed. 796.

against his liability for an unpaid stock subscription.¹⁴ It has been held that a claim, which was not proved within the year, can be used as a set-off.¹⁵ Where the bankrupt's claim exceeds that of his creditors, it has been said that the latter should not attempt to prove his claim in a Court of Bankruptcy, but should assert the same in the court in which proceedings are taken to enforce the claim against him.¹⁶ But where such a creditor filed a claim, it was held that he thereby consented to the jurisdiction of the Court of Bankruptcy to determine the amount due from him and enter judgment for the same.¹⁷

§ 649. Priorities and liens.—“(a) The court shall order the trustee to pay all taxes legally due and owing to the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.”¹⁸

¹⁴ *Re Wiener & Goodman Shoe Co.*, 96 Fed. 949; *Babbitt v. Read*, 173 Fed. 712. *Re Howe Mfg. Co.*, 193 Fed. 524.

¹⁵ *Norfolk & W. Ry. Co. v. Graham*, C. C. A., 145 Fed. 809.

¹⁶ *Re T. M. Leshner & Son*, 176 Fed. 650.

¹⁷ *Re White*, C. C. A., 177 Fed. 194.

§ 649. ¹It has been said that the word “tax” is used in a broad sense and includes all obligations imposed by the State and general governments under their respective taxing or police power for governmental or public purposes. *Re Otto F. Lange Co.*, 159 Fed. 586. The accumulation of taxes and interest thereupon, through the negligence of the public officers, does not deprive the State or one of its subdivisions of its preference. *Re Weissman*, 178 Fed. 115. The fact that the tax can only be collected from

the property and that no action will lie to recover the same, makes no difference in this respect. *Hecox v. Teller County*, C. C. A., 198 Fed. 634. When real estate is sold subject to the payment of taxes, the purchaser has no right of subrogation to the right to a preferential payment of the same. *Re M. I. Hibbler Mach. Supply Co.*, 192 Fed. 741. A lessor who paid the city water rent, which the bankrupt lessee had covenanted to pay, has no right to a priority. *Re Family Laundry Co.*, 193 Fed. 297. The trustee is not bound to pay taxes assessed against land which became a lien subsequent to its sale by him. *Re Crowell*, 199 Fed. 659. The court of bankruptcy may inquire into the validity of the tax and refuse to allow a claim for personal taxes assessed against property that did not belong to the bankrupt. *Re Otto Freund Arnold Yeast Co.*, 178

The United States have no priority over labor claims for any indebtedness due them, except for taxes.² "(b) The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; and, where property of the bankrupt, transferred or concealed by him either before or

Fed. 305. *Contra, Re Otto F. Lange Co.*, 159 Fed. 586, holding that the word "tax" includes a license to sell cigarettes. A franchise tax, which accrued before the adjudication in bankruptcy, must be paid, although the assessment was subsequently made, and the bankrupt has no property within the State. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, reversing *Re Cosmopolitan Power Co.*, C. C. A., 137 Fed. 858. But not one subsequently accruing, *Re Halsey El. Generator Co.*, 175 Fed. 825, nor a bonus paid the State for the privilege of increasing the capital stock of a corporation, *Re York Silk Mfg. Co.*, 188 Fed. 735. It has been held that a State license fee for selling liquor, although denominated a tax, is not. *Re Ott.*, 95 Fed. 274. *Contra, Re Otto F. Lange Co.*, 159 Fed. 586, holding that the word "tax" includes a license to sell cigarettes. Penalties and interest that have accrued under the laws of the State upon taxes must also be paid as a priority. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284; *Re Kallak*, 147 Fed. 276. The Court of Bankruptcy may review the proceedings of a State court or board assessing taxes. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284; *Re Conhaim*, 100 Fed. 268; *Re Selwyn Importing Co.*, 18 Am. B.

R. 190, by Referee Townsend. It has been held, that the claim of a county against a bankrupt for taxes, received by him as a tax collector, is not entitled to a priority. *Re Waller*, 142 Fed. 883. Property in the hands of the trustee is not exempt from State and municipal taxation. *Swarts v. Hammer*, 194 U. S. 441, 24 Sup. Ct. 695; *Re Sims*, 118 Fed. 356. State and municipal taxes due from a bankrupt need not be proved like the claims of creditors. *Re Kallak*, 147 Fed. 276. Taxes must be paid by the trustee, although they are imposed upon mortgaged property, which he relinquished to the mortgagors. *Chatanooga v. Hill*, C. C. A., 139 Fed. 600; *Re Prince & Walter*, 131 Fed. 546; or upon exempt property, *Re Tilden*, 91 Fed. 500; or upon other property that did not come into his hands, *Waco v. Bryan*, C. C. A., 127 Fed. 79. Where the mortgage provides for insurance, the mortgagee has a preference for insurance premiums which he has paid. *Re Fabacher*, 193 Fed. 556. For attorneys' fees of mortgagees, see § 647, *supra*; for preference as to interest, § 652, *infra*.

² *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 56 L. ed. 706, reversing C. C. A., 174 Fed. 385.

after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration,³ including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;⁴ (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant;⁵ and (5) debts owing to any person who

³ The costs of an attaching creditor, *Re Allen*, 96 Fed. 512; and, it has been said, the fees of a State sheriff, *Re Francis-Valentine Co.*, 93 Fed. 953; s. c., C. C. A., 94 Fed. 793; when their proceedings are set aside, are not entitled to a priority, except to the extent of reasonable and necessary disbursements for the preservation of the estate, *Re Lewis*, 99 Fed. 935; *Re Heller*, 176 Fed. 656; unless the State law gives them a preference, *Re Goldberg & Bros.*, 144 Fed. 566. *Contra, Re The Copper King, Ltd.*, 143 Fed. 649. *Cf. § 647, supra.*

⁴ See § 664, *infra*.

⁵ It has been held that a bookkeeper is entitled to a preference although he also works for others, *Re Baumblatt*, 156 Fed. 422; *Bell v. Arledge*, C. C. A., 192 Fed. 837; that so is a shipping clerk, *Bell v. Arledge*, C. C. A., 192 Fed. 837; a lumber checker, *Ibid.*; a carpenter, who is paid by the day, although not regularly in the employ of the bankrupt, *Re Yoder*, 127 Fed. 894; a bookkeeper, who also acts as di-

rector and treasurer without compensation for the latter's services. *Re H. O. Roberts Co.*, 193 Fed. 294; a steward, although he was also a director and secretary and a nominal, but not an actual, stockholder, *Re Swain Co.*, 194 Fed. 749; that a salesman is not entitled to a preference for a part of his salary, retained by agreement as a fund, to be used later for his benefit, *Re Flick*, 105 Fed. 503; but that he is entitled to a priority for his commissions within the time, *Re Dexter*, C. C. A., 158 Fed. 788; *Re Fink*, 163 Fed. 135; that a man is none the less a salesman within the statute although he supervises the installation of what he sells, *Re Roebuck Weather Strip & Wire Screen Co.*, 180 Fed. 497; or is manager of a branch office, *Re Gay*, 188 Fed. 392; or maintains an office at his own expense, *Re Dexter*, C. C. A., 158 Fed. 788. It has been held: that no priority is given to the compensation due for the services of a president of a business corporation, *Re Carolina Cooperage Co.*, 96 Fed.

by the laws of the States or the United States is entitled to priority." ⁶

950; or of a manager of a mercantile corporation, *Re Grubbs-Wiley Grocery Co.*, 96 Fed. 183; or of contractors in charge of a department of the bankrupt's factory, *Re Thomas Deutschle & Co.*, 182 Fed. 430; or of the driver of a wagon who furnished his own team when a lump sum was paid for the services of both, *Spruks v. Lackawanna Dairy Co.*, 189 Fed. 287. Irrespective of the State statutes, those who have earned wages within the three months period are entitled to a priority to the extent of \$300, *Re McDavid Lumber Co.*, 190 Fed. 97; but not over valid fixed liens recognized by the State law, *Re Yoke Vitriified Brick Co.*, 180 Fed. 235; *Re Proudfoot*, 123 Fed. 733. Under the New York statute, an attorney was given a lien as employee, *Gay v. Hudson River El. Power Co.*, 178 Fed. 499. As to the Kentucky statute, see *Re Floyd & Bohr Co.*, 200 Fed. 1016. As to the Mississippi statute, see *Re Monroe Lumber Co.*, 186 Fed. 252. Payments made during the three months, in the absence of any specific agreement, may be applied to arrears previously accrued and will not affect the preference. *Re Van Wert Mach. Co.*, 186 Fed. 607. Book accounts for supplies furnished by the bankrupt to the laborers do not cancel, in whole or in part, any liens of the mechanics who owe them. A statement in the proof that the claim is for "wages due deponent as clerk and manager and is a preferred claim," is insufficient when it is not shown that the wages were earned within the three months. *Re Dunn*, 181 Fed. 701. Upon this general subject, see

Re Blackstaff Engineering Co., 200 Fed. 1019. A State statute giving a preference to wages, earned more than three months before insolvency, was not followed, *Re Rouse, Hazard & Co.*, C. C. A., 91 Fed. 96; but, where the State statute gave a lien to certain claims for wages within the prescribed time, provided they were filed in a specified office, the filed claims were paid in priority to those of the same class not filed, *Re Rouse*, 91 Fed. 514; *Re Kerby-Dennis Co.*, C. C. A., 95 Fed. 116; *Re Byrne*, 97 Fed. 782. In case of *Re Jones*, 100 Fed. 781; *supra*, § 618.

630 St. at L. 544, 563, § 64, as amended by 32 St. at L. 797, and by 34 St. at L. 287; *Re Iroquois Mach. Co.*, 166 Fed. 629; *Re Amorratis*, C. C. A., 178 Fed. 919. In Minnesota, the State is entitled to such priority for all indebtedness due to it. *Re Western Implement Co.*, 166 Fed. 577. Statutory provisions giving the State a priority in the distribution of the assets of a decedent do not give the State a priority in bankruptcy. *Re Devlin*, 180 Fed. 170. Such claims may be given a priority, although such a claim is first asserted more than a year after the adjudication when the debts have been duly proved. *Re Ashland Steel Co.*, C. C. A., 168 Fed. 679. An attorney's lien upon a cause of action, when given by a State statute, has been enforced by refusing the trustee permission to discontinue the same without satisfying the attorney's claim. *Re Adamo*, 151 Fed. 716. For *reclamation proceedings*, see *Halsey v. Diamond Distilleries Co.*, C. C. A., 191

"Claims which, for want of record, or for other reasons, could not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."^{6a} The lien of an attachment, obtained more than four months before the filing of the petition, will be recognized.⁷ The validity of mortgages,⁸ chattel mortgages,⁹ and conditional sales,¹⁰ which are not preferential,¹¹ is determined by the law of the State. "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of said bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."¹² The right to a preference may be assigned with the claim.¹³ An assignee in insolvency may be allowed reasonable

Fed. 498; *Re Waite-Robbins Motor Co.*, 192 Fed. 47; *Re McAllister-Newgord Co.*, 193 Fed. 265; *Re Sol. Aarons & Co.*, C. C. A., 193 Fed. 646; *Re Canfield*, C. C. A., 193 Fed. 934; *Re Wright-Dana Hardware Co.*, 199 Fed. 632; *Re Sweeney*, C. C. A., 168 Fed. 612. Where property, part of which was subject to a lien, was sold in gross upon notice to the lienor and without objection, it was held that the court could not apportion the same so as to entitle him to a priority of payment out of any part thereof. *Vollmer v. McFadgen*, C. C. A., 161 Fed. 914. See *Keyser v. Wessel*, C. C. A., 128 Fed. 281, 62 C. C. A. 650, 12 Am. Br. 126. Partnership creditors have a lien upon partnership property and a right to payment out of the same prior to that of individual creditors of the partnership. *Re Linforth*, 87 Fed. 386; *Re Mills*, 95 Fed. 269; *Re Jones*, 100 Fed. 781. The fact that the partnership has no assets does not change this rule, *Re Henderson*, 142 Fed. 588. See § 618, *supra*. Where the receiver and trustee in bankruptcy performed a contract made by the bankrupt, the rights

under which had been assigned by the bankrupt, the trustee was directed to pay to the assignee the money collected. *Re De Long Furniture Co.*, 188 Fed. 686.

^{6a} 30 St. at L. 544, 564, 565, § 67a; *Security Warehousing Co. v. Hand*, C. C. A., 143 Fed. 32. *Cf.* § 644, *supra*.

⁷ *Re Crafts-Riordon Shoe Co.*, 185 Fed. 931.

⁸ *Bean v. Orr*, C. C. A., 182 Fed. 599.

⁹ *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577. For cases where such instruments have been sustained or set aside, see § 644, *supra*.

¹⁰ *Bryant v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 53 L. ed. 997. For cases where such instruments have been sustained or set aside, see § 644, *supra*.

¹¹ See § 644, *supra*.

¹² 30 St. at L. 544, 564, 565, § 67b. See *supra*, §§ 643, 644.

¹³ *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 51 L. ed. 436; *Re Bennett*, C. C. A., 153 Fed. 673. For a case where the enforcement of such assignments

compensation for his services in taking care of the estate.¹⁴ It has been held that he will not be required to account in a Court of Bankruptcy for disbursements made by him more than four

was enjoined as collusive and fraudulent, see *Re Kyte*, 182 Fed. 166. It has been held that an assignment of wages to be earned in the future, made as security for a debt, creates no lien until they have been earned; and that where, prior to that time, the debtor is adjudged a bankrupt, the debt is extinguished upon his subsequent discharge, and the wages become the bankrupt's property; and that pending proceedings for a discharge, the assignee may be enjoined from collecting or receiving the same. *Re Lineberry*, 183 Fed. 338. The filing of a claim and the receipt of dividends upon its full amount may be treated as a waiver of the creditors security. *Re Fisk & Robinson*, 185 Fed. 974. Where the claimant had elected to waive the tort and prove his claim upon an implied contract and has participated in a creditors' meeting after such proof of claim, he was not allowed to withdraw the same and apply for the return of the goods, *Standard Varnish Works v. Haydock*, C. C. A., 143 Fed. 318; but proof of a claim for the price of goods is not a waiver of a previous action for the recovery of the specific property, *Mould v. Importers and Traders Nat. Bank*, 72 App. Div. (N. Y.) 30, 33. It has been held: that there is no such waiver by petitioning the court of bankruptcy for the appointment of a receiver when the petition sets forth that certain property in the bankrupts possession was the property of the petitioner and the bankrupt was also largely indebted to it, *Re Pierce*, C. C. A., 157 Fed. 757; nor

by attending a meeting of creditors to discuss a composition and not asserting the right of reclamation until subsequently, *Re Loll*, 162 Fed. 79. Cf. § 647, *supra*; that a lienor does not waive his lien by surrendering possession to a receiver in bankruptcy, *Re Endlar*, C. C. A., 192 Fed. 782 (a chattel mortgage); but that a lienor cannot object to the payment of a claimant to a prior lien after notice by the trustee without objection to him, *Re Torchia*, C. C. A., 185 Fed. 576; and that creditors are estopped by laches from objecting to the payment of claims under orders giving them priority, *Ibid*. But, it has been held that the lender of money to a bankrupt, for the express purpose of paying such claimants, is not entitled to be subrogated to the priority of those who are thus paid, *Re General Automobile & Mfg. Co.*, C. C. A., 133 Fed. 525; *J. P. Browder & Co. v. Hill*, C. C. A., 136 Fed. 821; *Bell v. Arledge*, C. C. A., 192 Fed. 837; even when the borrower agrees that he shall have such right of subrogation, *J. P. Browder & Co. v. Hill*, C. C. A., 136 Fed. 821. But see note 23 *infra*.

¹⁴ *Re Chase*, C. C. A., 124 Fed. 753; *Re Pattee*, 143 Fed. 994. See *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413. Where he was paid for services subsequent to the filing of the petition in bankruptcy, his commissions were adjusted in accordance with the Bankruptcy Law, and the State statute was not followed. *Re Stewart*, C. C. A., 179 Fed. 222. *Contra, Re Mays*, 114 Fed. 600.

months before the institution of the bankruptcy proceedings.¹⁵ A lawyer, who has a claim for professional advice and services rendered to an assignee in insolvency, when the assignment provides that the costs and expenses of administering the trust shall be first paid, is not entitled to prove the same as a preferential claim against the estate of the bankrupt; but, so far as the assignee might be credited for the payment of the claim, it may be preferred in the right of such assignee.¹⁶ A claim for professional services to the assignee in resisting an adjudication of involuntary bankruptcy was disallowed as a preferred claim.¹⁷ A claim for services to the bankrupt for drawing the assignment may be proved as an unsecured claim, but is not entitled to any preference.¹⁸ Orders of the State court subsequent to the adjudication, providing for the compensation of receivers in insolvency proceedings and their attorneys, will be disregarded.¹⁹ It has been held that a receiver appointed by a State court for an insolvent corporation,²⁰ or for a partnership,²¹ is not entitled to compensation for his services or disbursements, which have not benefited the estate. Allowances to the attorneys of bankrupts, and of their receivers, trustees and creditors are subsequently considered.²²

It has been held, that a parol assignment of choses in action as security by a bankrupt prior to the bankruptcy may be established by the testimony of the parties alone where such

¹⁵ *Re Carver*, 113 Fed. 138.

¹⁶ *Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165; *Re Marble Products Co.*, 199 Fed. 668.

¹⁷ *Ibid.*, *Re Stewart*, C. C. A., 179 Fed. 222.

¹⁸ *Ibid.*

¹⁹ *Re Rogers*, 116 Fed. 435; *Re Standard Fuller's Earth Co.*, 186 Fed. 578.

²⁰ *Re J. H. Alison Lumber Co.*, 137 Fed. 643. When they have been beneficial to the estate, they are allowed a preference. *Re Standard Fuller's Earth Co.*, 186 Fed. 578.

²¹ *Re Rogers & Stefani*, 156 Fed. 267. It has been held that an attorney for a creditors' committee

has no lien upon the assets for his services, although the agreement by the bankrupt made within the four months' period so provides, unless the members of the committee are insolvent; *Re Grave & Martin Co.*, C. C. A., 183 Fed. 769.

²² *Infra*, § 665. Where there was no express contract, but the insolvent and the attorney both expected that the latter would be paid for his services out of the proceeds of a foreclosure suit, it was held that that was equivalent to an equitable assignment. *Re Coney Island Lumber Co.*, 199 Fed. 803. There the attorney was allowed \$200 for collecting about \$690.

testimony is uncontradicted and credible, the witnesses are not impeached, and there are no circumstances which cast doubt upon their truthfulness; and that, in the absence of a State statute to the contrary it will be sustained.²³ It has been held; that the question whether a claimant is entitled to priority of payment, on the ground that the trustee has received money held in trust for the former by the bankrupt, is not a question to be determined by the priorities under the State insolvency law;²⁴ that where a creditor claims priority of payment of notes held by him, which are also a lien on other property not in the custody of the court, an order for the payment of his claim may be conditioned upon his transfer of the notes to the proper officer of the court for the benefit of the whole estate;²⁵ and that where the estate is insufficient to pay in full all claims entitled to a preference, the court may apportion the preferences as equity requires, with regard to the responsibility of the claimants for the depreciation of the estate.²⁶ The lienor may lose his priority for laches.²⁷ A petitioner, who united a prayer for the payment of taxes and assessments by a trustee with one for permission to foreclose a mortgage, or, in the alternative, that the trustee sell the property, was allowed to amend his petition by striking out the two latter prayers.²⁸ The cases where a trustee in bankruptcy may have liens set aside have been previously discussed.²⁹

²³ *Union Trust Co. v. Bulkeley*, C. C. A., 150 Fed. 510. For parol agreements for subrogation to the lenders of money to discharge encumbrances that have been sustained, see *Re MacDougall*, 175 Fed. 400; *Re Lee*, C. C. A., 182 Fed. 579. *Contra*, *J. P. Browder & Co. v. Hill*, C. C. A., 136 Fed. 821.

²⁴ *Smith v. Mottley*, C. C. A., 150 Fed. 266. For cases where it was held that there was no such priority, see *Block v. Rice*, 167 Fed. 693; *Clarke v. Rogers*, C. C. A., 183 Fed. 518; *Re Dorr*, C. C. A., 196 Fed. 292. For liens created by an implied trust or by a breach of trust, see *Carpenter v. Southworth*, C. C. A., 165 Fed. 423; *Re Brunings*, Tolle

& Postel, 169 Fed. 668; *Re J. M. Acheson Co.*, C. C. A., 170 Fed. 427; *Re McCord*, C. C. A., 174 Fed. 820; *Burgoyne v. McKillip*, C. C. A., 182 Fed. 452; *Re City Bank of Dowagiac*, 186 Fed. 250; *Gay v. Hudson River El. Power Co.*, 190 Fed. 773; *Re M. E. Dunn & Co.*, 193 Fed. 212; *Re Manistee Watch Co.*, 197 Fed. 455; *Re Stewart*, C. C. A., 178 Fed. 463.

²⁵ *Mansur v. Dupree*, C. C. A., 150 Fed. 329.

²⁶ *Re Grignard Lithographing Co.*, 158 Fed. 557.

²⁷ *Re Klapholz*, 113 Fed. 1002; *Re Torchia*, 185 Fed. 576.

²⁸ *Re Wellhouse*, 113 Fed. 962.

²⁹ *Supra*, § 644. Upon the bank-

§ 650. Exemptions of bankrupt property. "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."¹ This section is constitutional.² In determining the bankrupt's rights of exemption, the construction placed by the highest court of the State upon its statutes will be followed by the Court of Bankruptcy.³

ruptcy of a member of a stock exchange or other exchange, the distribution of the proceeds of his membership is distributed in accordance with the rules of the exchange. In the case of the New York Stock Exchange, they are applied, first, to the payment of the member's indebtedness thereto; next, to claims arising against him out of transactions on the floor thereof; third, to loans from members; and, lastly, to his general creditors. *Re Gregory*, C. C. A., 27 L.R.A.(N.S.), 613, 174 Fed. 629. For liens held by the customers of bankrupt stock brokers against them, see *Richardson v. Shaw*, 209 U. S. 365; *Re Jacob Berry & Co.*, C. C. A., 174 Fed. 409; *Re T. A. McIntyre & Co.*, C. C. A., 181 Fed. 955; s. c., C. C. A., 181 Fed. 960; *Re James Carothers & Co.*, 182 Fed. 501; s. c., 192 Fed. 691; *Re Brown*, C. C. A., 175 Fed. 769; s. c., C. C. A., 184 Fed. 454; s. c., 189 Fed. 432; s. c., 189 Fed. 440; s. c., 189 Fed. 442; s. c., C. C. A., 193 Fed. 24; s. c., C. C. A., 193 Fed. 30.

§ 650. 130 St. at L. 544, 548, § 6. The subsequent removal of the bankrupt from the State does not forfeit his claim to exemptions

given by the State statute to residents thereof. *Re Donahey*, 176 Fed. 458. A bankrupt is not entitled to exemptions out of property which, before the bankruptcy proceedings, he conveyed to a creditor as a preference or in fraud of creditors, although it was subsequently recovered by the trustee or surrendered to the latter. *Re Wislnefsky*, 181 Fed. 896. *Contra, Re Soper*, 173 Fed. 116. A claim to an exemption in a life insurance policy was not lost because, after the adjudication of bankruptcy, the bankrupt's wife, whom he had made the payee, obtained a divorce. *Re Orear*, C. C. A., 189 Fed. 888; nor because he bought the property which he claims as exempt in view of bankruptcy without intending to pay for the same. *Re Hammonds*, 198 Fed. 574. For the disallowance of an exemption in a home-
stead fraudulently bought in view of bankruptcy, see *Re Gerber*, C. C. A., 186 Fed. 693.

² *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113; *Hurley v. Devlin*, 151 Fed. 919.

³ *Re Sullivan*, C. C. A., 148 Fed. 815. See also *supra*, § 477; *Sellers v. Bell*, C. C. A., 94 Fed. 801; *Re*

In the absence of fraud or the insolvency of a firm at the time of its dissolution, the partner to whom its assets were transferred does not lose his right to an exemption in bankruptcy proceedings shortly thereafter instituted;⁴ but a pretended dissolution with the intention of allowing him to

Petersen, 95 Fed. 417; *Re Tilden*, 91 Fed. 500; *Re Steele*, 98 Fed. 78; *Re Pope*, 98 Fed. 722; *Re Woodard*, 95 Fed. 260; *Re McCutchen*, 100 Fed. 779; *Re Coffman*, 93 Fed. 422; *Re Smith*, 96 Fed. 832; *Re Buelow*, 98 Fed. 86; *Re Hoag*, 97 Fed. 543; *Re Jones*, 97 Fed. 773; *Re Sloan*, 135 Fed. 873; *Re Wunder*, 133 Fed. 821; *Re Renda*, 149 Fed. 614; *Re Castleberry*, 143 Fed. 1018; *Re Downing*, 148 Fed. 120; *Duncan v. Ferguson-McKinney Dry Goods Co.*, C. C. A., 150 Fed. 269; *Re Novak*, 150 Fed. 602; *Re Eash*, 157 Fed. 996. See *Re Rice*, 164 Fed. 589 (Pennsylvania); *Re Maxson*, 170 Fed. 356 (Iowa); *Re Dobbs*, 175 Fed. 319 (Georgia); *Re Johnson*, 176 Fed. 591 (Minnesota); *Re Ripa*, 180 Fed. 603 (Florida); *Re Baker*, C. C. A., 182 Fed. 392; *Re Carlon*, 189 Fed. 815 (South Dakota); *Jennings v. William A. Stanus & Son*, C. C. A., 191 Fed. 347; *Re Rainwater*, 191 Fed. 738 (Mississippi); *Re Andrews & Simonds*, 193 Fed. 776 (Michigan); *Bank of Nez Perce v. Pindel*, C. C. A., 193 Fed. 917; *Re Dicks*, 198 Fed. 293 (Georgia); *Re I. S. Vickerman & Co.*, 199 Fed. 589 (South Dakota). It has been held: that the Federal court is not bound by a statement in the opinion of a State court, which is not essential to the decision, *Re Sullivan*, C. C. A., 148 Fed. 815; and that a provision in a State statute, "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt," will

be followed. *Holden v. Stratton*, 198 U. S. 202, 49 L. ed. 1018, reversing *Re Holden*, C. C. A., 114 Fed. 650. It has been held that the State statutes authorizing exemptions of life insurance are not invalidated by the provisions of the Bankruptcy Law (§ 70a, subd. 5) upon that subject. *Re Johnson*, 176 Fed. 591; *Re Carlon*, 189 Fed. 815. See authorities cited *supra*, § 643. Where the State statute provided that no property "while in the hands of the vendee" should be exempt from execution for debts contracted for the purchase thereof, the bankrupt, who held the property at the time of the institution of the bankruptcy proceedings, was not allowed an exemption, although the goods were subsequently sold by the trustee. *Mullinix v. Simon*, C. C. A., 196 Fed. 775. An order of the Court of Bankruptcy upon the report of a trustee setting aside property as exempt is *res adjudicata* in the State and Federal courts, as to all creditors who had proper notice of the bankruptcy proceedings. *Re Turnbull*, 106 Fed. 667. It has been held that a judgment of the State court as to the right of exemption upon the same property is binding upon the Court of Bankruptcy, *Smalley v. Langenour*, 196 U. S. 93, 49 L. ed. 400; unless it has no jurisdiction of the case, *Re Rhodes*, 109 Fed. 117; *Re Eash*, 157 Fed. 996.

⁴ *Re Kolber*, 193 Fed. 281.

claim an exemption in bankruptcy from the firm assets,⁵ or an abandonment of the firm by the other partner without any actual dissolution,⁶ is ineffectual as against partnership creditors.⁷ The provisions of the Bankruptcy Act control as to the time and manner of the claim, award, selection, and setting apart of the exemptions.⁸ The Court of Bankruptcy has jurisdiction to determine the amount of the exemptions to which the bankrupt is entitled,⁹ but not to administer the same.^{9a} Exempt property is no part of the estate in bankruptcy and its title does not pass to the trustee,^{9b} but where process is necessary to segregate the parts which are exempt from those which are not, the Court of Bankruptcy has jurisdiction to regulate the time and manner of the same.¹⁰

It is the duty of the trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."¹¹

⁵ *Re Abrams*, 193 Fed. 271.

⁶ *Ibid.*

⁷ As to the exemptions of partners, see *Re Rutland Grocery Co.*, 189 Fed. 765; *Re I. S. Vickerman & Co.*, 199 Fed. 589. An omission by a bankrupt to keep a full account of the sales made by him in a business which the creditors permitted him to continue after the petition had been filed and before the trustee was elected, was held not to be such misconduct as to deprive him of his right to an exemption. *Re McUlta*, 189 Fed. 250. But see *Re Denson*, 195 Fed. 857.

⁸ *Re Culwell*, 165 Fed. 828; *Re Andrews & Simonds*, 193 Fed. 776.

⁹ *McGahan v. Anderson*, C. C. A., 113 Fed. 115. It has been held that, where a bankrupt dies pending the bankruptcy proceedings, seized of land in different States, the Court of Bankruptcy, in which the proceedings are pending, has exclusive jurisdiction to determine the right of the widow to dower in all such

land. *Hurley v. Devlin*, 151 Fed. 919. See *supra*, §§ 608, 613.

^{9a} *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. ed. 1061.

^{9b} *Ibid.*

¹⁰ *Bank of Nez Perce v. Pindel*, C. A., 193 Fed. 917.

¹¹ 30 St. at L. 544, 557, § 47; *Re Friedrich*, C. C. A., 100 Fed. 284; *Re Diller*, 100 Fed. 931; *Re Camp*, 91 Fed. 745; *Re Woodard*, 95 Fed. 955; *Re Grimes*, 96 Fed. 529; *Re McBryde*, 99 Fed. 686; *Re McCutchen*, 100 Fed. 779; *Re Smith*, 93 Fed. 791. It has been said that, when no trustee is appointed, the court sets apart the exemptions. *Smalley v. Laugenour*, 196 U. S. 93, 97, 49 L. ed. 400; *Re W. C. Allen & Co.*, 134 Fed. 620. This duty cannot be performed by any other party. It is wholly and entirely the duty of the trustee, and any agreement on the part of the bankrupt or the creditors that the exemptions shall be allotted in any other manner than that prescribed by the

"The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determinataion at the request of either party."¹² Where the bankrupt's land is encumbered by mortgages, it has been held that the Court of Bankruptcy may sell the same and allot the bankrupt his homestead exemption out of the proceeds,¹³ which must be paid to him and cannot be paid to the mortgagee, although the mortgage covers the homestead besides other property.¹⁴ Where the property is sold by a receiver or trustees in bankruptcy after the bankrupt has seasonably claimed his exemption¹⁵ or before he has had due opportunity to claim or select the same,¹⁶ or where the trustee has wrongfully refused to set the exemp-

bankruptcy law, or through other agencies than that of the trustee of the bankrupt, is a nullity." *Re* Grimes, 96 Fed. 529, 531, 532, per Ewart, J. "When the exemptions are formally set apart by the trustee, and affirmed by the court, the title of the bankrupts then becomes superior to that of the trustee, and absolute. After the exempt property has been designated and set apart to the bankrupts by the trustee, it has been administered, and has passed out of the possession and control of the Bankruptcy Court. The trustee has no further concern with it, nor has the court any jurisdiction to defend such property from adverse claims or liens that may or may not be extinguished by the bankruptcy proceedings." *Re*

Grimes, 96 Fed. 529, 534, per Ewart, J.

¹² General Order XVII.

¹³ *Re* Paramore & Ricks, 156 Fed. 208.

¹⁴ *Re* Paramore & Ricks, 156 Fed. 211. But see *Re* Sloan, 135 Fed. 873; *Re* Renda, 149 Fed. 614.

¹⁵ *Re* Sloan, 135 Fed. 873; *Re* Renda, 149 Fed. 614; *Dunlap Hardware Co. v. Huddleston*, C. C. A., 167 Fed. 433; *Re* Finklestein, 192 Fed. 738. In the distribution of the proceeds of the lien of a landlord or other person, it will be given priority over the claim of exemption, if this is authorized by the State law. *Re* Highfield, 163 Fed. 924.

¹⁶ *Re* Andrews & Simonds, 193 Fed. 776.

tions apart and to report thereupon,¹⁷ the bankrupt will be allowed his exemptions out of the proceeds, even when he has consented to the sale.¹⁸ After the property had been set off as an exempted homestead, it was held that the court had no power to sell the same subject to the estate of the bankrupt.¹⁹ And, in such a case, it has been held that the claims of creditors, as regards whom the bankrupt has waived his exemption,²⁰ and claims which, by the State statute, take priority to the exemptions,²¹ must first be paid out of the fund.

The exemptions should be claimed in the schedules, which the act requires to be filed within ten days after a petition in voluntary bankruptcy or an adjudication in involuntary bankruptcy.²² Otherwise they are usually waived;²³ but an amendment of the schedules may be allowed so as to cure a defect in the claim for exemptions,²⁴ and even, it has been held, to

¹⁷ *Re Finklestein*, 192 Fed. 738.

¹⁸ *Re Renda*, 149 Fed. 614. An agreement to that effect between the bankrupt and trustee was approved. *Re Hutchinson*, 197 Fed. 1021.

¹⁹ *Sullivan v. Mussey*, C. C. A., 184 Fed. 60, affirming *Re Mussey*, 179 Fed. 1007.

²⁰ *Re Sloan*, 135 Fed. 873; *Re Renda*, 149 Fed. 614.

²¹ *Re Renda*, 149 Fed. 614.

²² 30 St. at L. 544, § 7. A claim of "three hundred dollars cash from the proceeds, as provided by the exemption law of Pennsylvania, or stock to the value of three hundred dollars, to be set aside by the appraisers, as provided by law," was held to be sufficient in form where the assets consisted of merchandise. *Re Kelly*, 199 Fed. 984.

²³ *Re W. S. Jennings & Co.*, 166 Fed. 639; *Re Harrington*, 200 Fed. 1010; *Re Gerber*, C. C. A., 186 Fed. 693. Where the bankrupt failed to file his claim for exemptions within that time and before the sale of his assets, the State law requir-

ing exemptions to be claimed before such a sale; it was held that he waived the same, although he appeared and objected to the order for the sale, upon the ground that his exemptions had not been allowed to him. *Re Wunder*, 133 Fed. 821.

²⁴ *Re Berman*, 140 Fed. 761, where the State statute required a description of the property, as to which an exemption was claimed, and it was held that, after a sale, the bankrupt might amend his schedules so as to claim the exemption from the proceeds. It has been held that, when a general claim of an exemption is made, the failure of the bankrupt to specify the articles, which he claimed to be exempt, did not prejudice him. *Burke v. Guarantee Title & Trust Co.*, C. C. A., 134 Fed. 562, where the claim was that he should be allowed, under a state statute, \$300, to be set off from the stock in trade of his business, consisting of "shoes and slippers, and men's, women's and children's shoes and slippers, as set out in schedule B, No. 2, under head

insert an exemption not previously claimed,²⁵ but not after the discharge.²⁶ The withdrawal of a claim to an exemption is a waiver of the same, which cannot subsequently be revoked,²⁷ except under the most extraordinary circumstances. It has been held that the trustee may except, on behalf of the creditors, to an allowance for an exemption on the ground of fraud, which, under the State statute, is a ground for forfeiting the same.²⁸ A bankrupt, as well as the creditors, has the right to except to the trustee's report.²⁹ After the expiration of the twenty days of limitations prescribed by the general order, objections cannot be filed, and it has been held that objections previously filed cannot be amended by adding additional grounds to the same.³⁰ It seems that the exceptions to the report of the trustee setting aside the exceptions need not be verified. The burden of proof to establish that an article is exempt ordinarily rests upon the bankrupt.³¹ It was held that the acceptance, by the bankrupt, of so much of a referee's order as allowed him exemptions of personal property did not preclude him from appealing from another by the same order, which affected his right to the exemption of a homestead.³² It has been held that exempt property may be charged with the actual expenses for the storage of the same,³³ and also for the statutory fees,³⁴ pending the proceedings necessary for its separation from the assets of the estate.³⁵ It has been held that a bankruptcy may

of C;" *Re Maxson*, 170 Fed. 356, a homestead exemption; *Re Irwin*, 177 Fed. 284.

²⁵ *Re Maxson*, 170 Fed. 356.

²⁶ *Re Irwin*, 174 Fed. 642, reversing 177 Fed. 284, where, after the allowance of exemptions which did not equal the full statutory amount, assets were subsequently discovered. A waiver by the bankrupt as regards certain creditors, of his right to exemptions, does not put the property originally exempt within the jurisdiction of the Court of Bankruptcy. *Re Anderson*, 110 Fed. 141.

²⁷ *Re Baughman*, 183 Fed. 668.

²⁸ *Re Rice*, 164 Fed. 589; *Re Cul-*

well, 165 Fed. 828; *Re Rice*, 164 Fed. 589.

²⁹ *Re Finklestein*, 192 Fed. 738.

³⁰ *Re Cotton & Preston*, 183 Fed. 190.

³¹ *Re Campbell*, 124 Fed. 417; *Re Rainwater*, 191 Fed. 738. See *Re Denson*, 195 Fed. 857.

³² *Re Letson*, C. C. A., 157 Fed. 78.

³³ *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. ed. 1061; *Re Edwards*, 156 Fed. 794.

³⁴ *Re Grimes*, 96 Fed. 529. But see *Re Le Vay*, 125 Fed. 990.

³⁵ *Re Bean*, 100 Fed. 262; *Re Castleberry*, 143 Fed. 1021. But see *Re Le Vay*, 125 Fed. 990.

claim his exemption out of property recovered by the trustee or returned to him as a preference,³⁶ or because of its fraudulent conveyance by the bankrupt.³⁷ It has been held that liens upon exempt property, which would be invalidated by the bankruptcy if the property were not exempt, are abrogated by the proceedings.³⁸

Where creditors hold a waiver of the bankrupt's exemptions, there should be a reasonable postponement of the discharge of the bankrupt, in order that the creditors may have an opportunity to take such proceedings in the State courts as are necessary to make their rights effective,³⁹ and they may be allowed to withdraw their claims for that purpose.⁴⁰ Where the bankrupt sells goods between the time when the petition is filed and

³⁶ *Re Osborn*, 104 Fed. 780; *Re Tollett*, C. C. A., 106 Fed. 866; *Re Falconer*, C. C. A., 110 Fed. 111; *Bashinski v. Talbott*, C. C. A., 119 Fed. 337; *Remington on Bankruptcy*, § 1095. *Contra, Re White*, 109 Fed. 635; *Re Long*, 116 Fed. 113; *Re Evans*, 116 Fed. 909.

³⁷ *Re Tollett*, C. C. A., 54 L.R.A. 222, 106 Fed. 866; *Re Thompson*, 115 Fed. 924.

³⁸ *Re Arnold*, 94 Fed. 1001; *Re Bolinger*, 108 Fed. 374; *Re McCartney*, 109 Fed. 621; *Re Tune*, 115 Fed. 906; *Re Beals*, 116 Fed. 530; *Re Downing*, 139 Fed. 590. But see *Re Weaver*, 144 Fed. 229; *Remington on Bankruptcy*, § 1100. It has been held that pension money, after it has been received by the bankrupt, is exempt. *Re Bean*, 100 Fed. 262. *Contra, Re Jones*, 166 Fed. 337; *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739; *Crane v. Linneus*, 77 Me. 59.

³⁹ *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. ed. 1061; *Re W. C. Allen & Co.*, 134 Fed. 620; *Re Castleberry*, 143 Fed. 1018. The proof, as an unsecured claim, of a bankrupt's note containing a waiver of homestead exemption, was held

not to be a waiver of the creditor's right to subject the homestead to the payment of the balance of his debt after crediting his dividends in bankruptcy. *Re Loden*, 184 Fed. 965. It has been held: that a Court of Bankruptcy has no authority to hold in custody the exempt property of a bankrupt to await the determination of an action in tort against him in a State court, *Re Hartsell & Son*, 140 Fed. 30; and that where the bankrupts failed to make a full disclosure of their personal property, but the amount of the concealment could not be ascertained, the trustee should not allow their personal property exemptions until all of the personal property had been accounted for, except on the order of the court, *Re Ansley Bros.*, 153 Fed. 983.

⁴⁰ *Re Strickland*, 167 Fed. 867. Where the bankrupts converted \$100, which was derived from the sale of goods between the time of the filing of the petition for adjudication and the time when property was taken into custody by the deputy marshal, such sum should be deducted from the bankrupt's exemptions, *Re Ansley Bros.*, 153 Fed.

that when the property is taken into custody by an officer of the Court of Bankruptcy, the sum that he receives from such sale should be deducted from his statutory exemption.⁴¹

§ 651. Exemption of bankrupt from arrest. "A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim for which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a Court of Bankruptcy or engaged in the performance of a duty imposed by this act."¹ "The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. . And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."² "If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose

983. Where personal property which the bankrupts were entitled to claim as exempt was sold at the bankrupts' request that cash be allowed them, instead of the property, the bankrupts should be charged with their percentage of the difference between the proceeds of the property and its appraised value as against the amount of their exemptions, *Ibid.* Where a minor, though having contributed to the capital of a firm, did not participate in the assignment which constituted the act of bankruptcy, nor take any

part in any of the firm's transactions, and was not a partner as to creditors, he was not allowed an exemption out of the personal property of the estate, *Re W. J. Floyd & Co.*, 154 Fed. 757.

⁴¹ *Re Ansley Bros.*, 153 Fed. 983; *Re McUlla*, 189 Fed. 250, holding that the burden of proof that he sold more than he admitted was upon the creditors. But see *Re Denison*, 195 Fed. 857.

§ 651. 130 St. at L. 544, 549, § 9.

² General Order XII.

custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.”³ It has been held that the bankrupt cannot be arrested, even upon a debt which is not affected by the bankruptcy, during the entire period from the adjudication until his discharge, or, if he is not discharged, until the time limited for his discharge has expired.⁴ He may be discharged when he was arrested before his bankruptcy.⁵ Protection from arrest applies to process from any Court of the United States, as well as to process from a State court.⁶ It has been held that the Court of Bankruptcy will not discharge a bankrupt from arrest for a contempt of court, even when he has been committed for disobedience to an order in proceedings supplementary to execution, until the payment of a fine, of the amount of the judgment, upon which those proceedings are founded.⁷ The

³ General Order XXX.

⁴ *Re Lewensohn*, 99 Fed. 73. But see *Re Baker*, 96 Fed. 954. Cf. *Barrett v. Prince*, C. C. A., 143 Fed. 302.

⁵ *People ex rel. Taranto v. Erlander*, 132 Fed. 883; *Turgeon v. Emery*, 182 Fed. 1016.

⁶ *Re Wenham*, 153 Fed. 910.

⁷ *Re Fritz*, 152 Fed. 562. But see *Re Houston*, 94 Fed. 119. The Bankruptcy Act does not prevent Fed. Prac. Vol. II.—140.

the arrest and imprisonment of a judgment debtor upon proof of the fraudulent removal or concealment of his property, under the Pennsylvania Act of July 12, 1842, p. 339, in either the State courts or the circuit court of the United States. *Ex parte Crawford*, C. C. A., 154 Fed. 769. Motion for leave to file petition for writ of *habeas corpus* denied, 206 U. S. 561, 51 L. ed. 1189.

discharge from arrest may be conditioned upon the filing of a bond not to depart from the jurisdiction.⁸ An injunction against the prosecution of a suit against a surety upon the bankrupt's bail bond was denied when the latter's personal liability was not threatened.⁹

§ 652. Declaration and payment of dividends. "(a) Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured. (b) The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided*, that the first dividend shall not include more than 50 per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: and provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared. (c) The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends. (d) Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a Court of Bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts. (e) A claimant shall not be entitled to collect from a bank-

⁸ *Re Lewensohn*, 99 Fed. 73; *Re Dresser*, 124 Fed. 915.

⁹ *Re Franklin*, 106 Fed. 666.

rupt estate any greater amount than shall accrue pursuant to the provisions of this act.”¹

“(a) Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. (b) Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, that in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends.”² “The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.”³ Where a creditor has security for a claim that can be proved in the bankruptcy proceedings, and another that cannot, he may marshal his security against the unprovable claim, and, if that exhausts the same, prove all of the other against the estate.⁴ When the security is insufficient, the creditor may charge against the principal thereof interest that has accrued

§ 652. 130 St. at L. 544, 563, § 65.

² 30 St. at L. 544, 563, § 66.

³ 30 St. at L. 544, § 57, subd. h, as amended 32 St. at L. 797. The value can be fixed, after a hearing, by the referee. *Re Davison*, 179 Fed. 750, where the bank was not required to surrender the security to the trustee after the value thereof had been deducted from the amount claimed, upon which the dividend was declared.

⁴ *Hiscock v. Varick Bank*, 206 U. S. 28, 37, 51 L. ed. 945, 951. The holder of a claim against several

parties, one or more of whom become bankrupt, may prove his claim for the full amount against the estate of each bankrupt and pursue other obligors in actions at law. He may collect dividends upon the full amount of his claim, with such interest as he may be entitled to, up to the time of the filing of the petition, against each estate in bankruptcy, until he has collected the full payment thereof from any or all sources, but no longer. *Board of County Com'rs of Shawnee County, Kan. v. Hurley*, C. C. A., 169 Fed. 92, *Re Simon*, 197 Fed. 105.

upon the debt prior to the filing of the petition;⁵ but not interest subsequently accruing,⁶ although he may charge such subsequently accruing interest against dividends and interest that accrue upon the security subsequent to the institution of the bankruptcy proceedings.⁷ Where the creditor bought his security at a foreclosure sale for less than the amount of his claim, his dividend was estimated upon the difference between the amount of his debt and the value of the property so obtained.⁸

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected, only in part." "A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion."¹⁰ Where a debt barred by the statute of limitations is included in the bankrupt's schedules, a creditor is entitled to a dividend after the payment of expenses of administration and the full amount of all other claims that are proved and allowed.¹¹ A Court of Bankruptcy has jurisdiction to determine the question whether, because of inequitable conduct, the claim of one creditor to a dividend should be postponed to that of another.¹² Where a

⁵ *Sexton v. Dreyfus*, 219 U. S. 339, 55 L. ed. 244; *Re Fabacher*, 193 Fed. 556.

⁶ *Sexton v. Dreyfus*, 219 U. S. 339, 55 L. ed. 244; reversing *Re Kessler*, C. C. A., 180 Fed. 979, 171 Fed. 751. See *Harv. Law Rev.*, XXIII, 219. Where mortgaged land, subject to mechanics' and judgment liens, was sold by the trustee free from liens, which were transferred to the proceeds, it was held that interest was payable upon the mortgage debt until the date of the payment of the principal thereof, but that this was not the case as regards the liens of

mechanics and judgment creditors. *Re Torchia*, 185 Fed. 576.

⁷ *Re Graves*, 182 Fed. 443. See *Sexton v. Dreyfus*, 219 U. S. 339, 55 L. ed. 274.

⁸ 30 St. at L., 544, § 57, subd. L, as amended 32 St. at L. 797.

¹⁰ *Re Barber*, 97 Fed. 547, 550, per *Lochren, J.*

¹¹ *Re Currier*, 192 Fed. 695.

¹² *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, explained *supra*, § 644; *Re Headley*, 97 Fed. 765; *Re Knox*, 98 Fed. 585; *Re Cannon*, 121 Fed. 582; *Re Royce Dry Goods Co.*, 133 Fed. 100; *Re Ewald*

creditor fails to prove his claim until after a dividend has been paid, it seems that he can only claim to share *pro rata* in those subsequently paid.¹³ It has been held: that exceptions to the proposed distribution of a bankrupt's estate must be filed before the final decree of confirmation is entered; and if not filed until thereafter and after the distribution of the final dividend, they will not be considered, although accompanied by a petition for review,¹⁴ and that, where a bankrupt's estate is ready for final dividend, it may be closed at any time after four months from the adjudication, upon notice to all persons scheduled as creditors or appearing as such in any way in the proceedings.¹⁵ Any surplus left after payment of the expenses of the administration and the number of the claims that are proved, should be applied to the payment of interest upon the latter.¹⁶ A secured creditor may apply securities upon the debt which subsequently after their declaration cannot be attached in the hands of the trustee in bankruptcy before their payment, although the state law permits this in the case of a trustee appointed by a State court.¹⁷

§ 653 Compositions. "(a) A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has examined in open court¹ or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts. In compositions before adjudication, the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of

& Brainard, 135 Fed. 168. It has been held that a partner who has loaned money to the firm may prove a claim for the same, but that he cannot share in the distribution of the partnership assets until all the firm creditors are paid. *Re Effinger*, 184 Fed. 728. *Contra, Re Walker*, 176 Fed. 455. See § 647, *supra*.

¹³ *Re Stein*, 94 Fed. 124; *Re Scott*, 96 Fed. 607, for claims to interest on dividends.

¹⁴ *Re Heebner*, 132 Fed. 1003.

¹⁵ *Re Eldred*, 155 Fed. 686.

¹⁶ *Re John Osborn's Sons & Co.*, C. C. A., 29 L.R.A.(N.S.) 887, 177 Fed. 184; *Johnson v. Norris*, C. C. A., 190 Fed. 459.

¹⁷ *Re Hollander*, 181 Fed. 1019; *Re Argonaut Shoe Co.*, C. C. A., 187 Fed. 784.

§ 653. ¹The term "in open court" includes proceedings before the referee. *Re Bloodworth-Stembridge Co.*, 178 Fed. 372.

estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.. (b) An application for the confirmation of a composition may be filed in the Court of Bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims,² and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. (c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. (d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. (e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.”³ “(a) The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the

² Where a majority of the creditors of individual members of a bankrupt firm failed to give their consent, the composition was not confirmed, although consent was given by a majority of the creditors of the firm, who were a majority in

number and amount of all the creditors of the firm and the individuals. *Re Ullman*, 180 Fed. 944.

³ 30 St. at L. 544, 549, § 12, as am'd 36 St. at L. 838, 839. See *Ross v. Saunders*, C. C. A., 105 Fed. 915; *Re Hilborn*, 104 Fed. 866.

confirmation of such composition.”⁴ It is the safer practice to procure an order from the judge designating the amount of the deposit and the place of the same,⁵ although it is the more usual custom for the referee to certify the requisite amount and the bankrupt to deposit the money in the regular depository.⁶ A deposit must be sufficient to pay all costs, priority claims and expenses,⁷ including taxes, as well as the consideration that is to be paid the creditors, including all claims contained in the schedules, which have not been disallowed.⁸ It has been held that the deposit need not provide for a payment of the deficiency upon secured claims, which have not been filed.⁹ It has been held that the composition must be offered to all the creditors, not merely to all whose claims have been allowed; that otherwise it may be disapproved, when accepted by a majority of those who had proved their claims when it was offered, but not by a majority of those whose claims have been allowed when the application for confirmation is made.¹⁰ It is the safer practice to present the composition to a special meeting of the creditors, called for that express purpose.¹¹ The composition must be approved by the judge;¹² but he may refer the questions that arise thereupon to a referee as special master to report his findings to the judge for final disposition.¹³ Creditors whose claims have been barred by failure to present the same within the statutory time have no standing to oppose the composition.¹⁴ The approval of the majority of creditors

⁴ 30 St. at L. 544, 550, § 13.

⁵ *Re Frear*, 120 Fed. 978; *Re Bloodworth-Stembridge Co.*, 178 Fed. 372.

⁶ *Remington on Bankruptcy*, § 2364.

⁷ *Re Rider*, 96 Fed. 808; *Re Harris*, 117 Fed. 575; *Re Harvey*, 144 Fed. 901.

⁸ *Re Flynn*, 134 Fed. 145.

⁹ *Re Harvey*, 144 Fed. 901. A creditor who refused to accept securities of a reorganized corporation, tendered in pursuance of a composition agreement, and began a suit to enforce a lien which he claimed, was denied an order therein that the se-

curities be impounded pending the suit in order that he might have them if he were unsuccessful. *York Mfg. Co. v. Merchants' Refrigerating Co.*, 168 Fed. 108.

¹⁰ *Re Rider*, 96 Fed. 808.

¹¹ *Re Rider*, 96 Fed. 808; *Re Frear*, 120 Fed. 978; *Remington on Bankruptcy*, § 2358.

¹² *Re Harvey*, 144 Fed. 901. Criticized in *Remington on Bankruptcy*, § 2367; *Re Bloodworth-Stembridge Co.*, 178 Fed. 372.

¹³ *Re Frear*, 120 Fed. 978; *Re Levy*, 172 Fed. 780.

¹⁴ *Re French*, 181 Fed. 583, holding that it is immaterial that the

creates a presumption that the composition is for the best interests of all, and the burden of proof is upon those who oppose the same.¹⁵ Confirmation of a composition may be refused, although it has been accepted by a majority in interest of the creditors, when the consideration appears to be insufficient,¹⁶ or illegal.¹⁷ For example, when it is not cash, but promissory notes or promises by the bankrupt to deliver merchandise at a future day,¹⁸ or stock,¹⁹ or obligations,²⁰ or when no provision is made for the costs of the bankruptcy proceedings;²¹ and when the consideration seems to be considerably less than the creditors would receive from the administration of the assets.²² It has been held that the burden rests upon objecting creditors to show such gross discrepancy between the offer and the amount to be reasonably expected from a sale of the assets as to justify a refusal to confirm.²³ The confirmation of a composition may be denied because the bankrupt has committed an act, which would be a bar to his discharge, although the creditors would have thereby received more than they could obtain from the regular administration of the estate.²⁴ A composition cannot be set aside when an applica-

claims have been omitted from the schedules and denying an adjournment of the proceedings because no provisions had been made for them.

¹⁵ *Re Hoxie*, 180 Fed. 508.

¹⁶ *Adler v. Jones*, C. C. A., 109 Fed. 967; *Riley v. Pope*, 186 Fed. 857. Confirmation of the composition may be refused, although it has been accepted by a majority in interest of the creditors, when the consideration appears to be insufficient. *Adler v. Jones*, C. C. A., 109 Fed. 967.

¹⁷ As when the composition is made in consideration of a promise by the creditors, that they will not prosecute the bankrupts criminally, nor furnish evidence against them in any criminal prosecution; *Re Rosenblatt*, 153 Fed. 335. A clause providing for a provisional order of adjudication was not ap-

proved when an order of adjudication that could not be attacked by the bankrupt had been previously made. *Re Linderman*, 166 Fed. 593. The court declined to review so much of the agreement as concerned the raising of funds to make payments to others than creditors in connection with the estate. *Ibid*.

¹⁸ *Re Frear*, 120 Fed. 978.

¹⁹ *Re Woodend*, 133 Fed. 593.

²⁰ *Re Rosenblatt*, 153 Fed. 335; *Re J. B. & J. M. Cornell Co.*, 186 Fed. 859.

²¹ *Re Harris*, 117 Fed. 575.

²² *Adler v. Jones*, C. C. A., 109 Fed. 967. But see *Re Weber Furniture Co.*, Fed. Cas. No. 17,330, 13 N. B. R. 529; *Re Arrington Co.*, 113 Fed. 498.

²³ *Re Waynesboro Drug Co.*, 157 Fed. 101.

²⁴ *Re Godwin*, 122 Fed. 111; *Re*

tion is made more than six months after the date of its confirmation.²⁵ A false statement in the schedules by the bankrupt, if unknown to the petitioning creditor until after the confirmation, is a ground for setting the same aside, although the order confirming it has recited that it appears that the bankrupt has not been guilty of any acts that would be a bar to his discharge.²⁶ The composition will be set aside when it was obtained through false representations, made by the trustee concerning the assets.²⁷ A secret agreement made before the composition, that one creditor shall receive more than the other, is a fraud, which cannot be enforced,²⁸ which is not a ground for relieving the promisee from the legal consequences of his failure to prove his claim,²⁹ and for which the composition may be set aside.³⁰ The trustee may recover any property that has been in pursuance thereof conveyed to the creditor, even if part of the consideration was his assistance in procuring the consent of others by the purchase of claims and otherwise.³¹

Olman, 134 Fed. 681; *Re Comstock*, 154 Fed. 747; *Re Griffin*, 180 Fed. 792; *Re B. Jacobson & Son Co.*, C. C. A., 196 Fed. 949. The fact that the objector had bought the claim against the bankrupt for the purpose of compelling, by threats of opposition to the confirmation, the settlement of a suit brought by the trustee did not influence the action or the decision of the court. *Re Comstock*, 154 Fed. 747.

²⁵ *Re Eisenberg*, 148 Fed. 325; *Re Jersey Island Packing Co.*, 152 Fed. 839; *Re Ennis*, 183 Fed. 859. It has been held: that the fact that a bankrupt has failed to perform the covenants in an agreement of composition is no ground for setting the composition aside, whatever may be its effect upon the operation of the composition as a discharge, *Re Eisenberg*, 148 Fed. 325; that, in the absence of fraud, a creditor who assents to a proposition releases his claim for damages caused by a breach of a contract, of which

breach he then was ignorant, *Fowle v. Park*, 48 Fed. 789; and that an erroneous statement of the address of a creditor made in the schedules in good faith is no reason for setting aside the confirmation of the composition, although the creditor had no notice of the proceedings and his claim was not included in the composition, *Re Rudnick*, 93 Fed. 787.

²⁶ *Re Roukous*, 128 Fed. 645.

²⁷ *Re Allen B. Wrisley Co.*, C. C. A., 133 Fed. 388.

²⁸ *Brownsville Mfg. Co. v. Lockwood*, 11 Fed. 705; *Re Starr*, 56 Fed. 142; *Fairbanks v. Amoskeag Nat. Bank*, 38 Fed. 630; *Cavanna v. Bassett*, 3 Fed. 215.

²⁹ *Re Starr*, 56 Fed. 142.

³⁰ *Brownsville Mfg. Co. v. Lockwood*, 11 Fed. 705. But see *Re Jacobson & Son Co.*, C. C. A., 196 Fed. 949.

³¹ *Fairbanks v. Amoskeag Nat. Bank*, 38 Fed. 630.

It has been held: that a creditor, who has sold his claim for a consideration, cannot maintain a petition to set aside the confirmation of a composition subsequently made, although the assignment of his claim was obtained through the fraudulent misrepresentations of the bankrupt and his trustee;³² but that the institution of an action at law against the bankrupt does not justify the dismissal of a petition, previously filed by a creditor, to set aside the confirmation of a composition.³³ An order setting aside a composition should not be granted without notice to all the creditors who have consented to the same.³⁴ It has been held: that a verification of the petition to set aside a composition may be made in the usual form of the verification to a bill in equity;³⁵ but that, where the principal allegations were made on information and belief, a verification by a joint petitioner, who had shown no personal knowledge of the facts, was insufficient;³⁶ that the petition is not demurrable for the omission of an allegation that the petitioner has restored, or offers to restore, the consideration,³⁷ nor for a failure to allege the time and manner in which the petitioner acquired knowledge of the fraud charged, when there is an allegation that it was unknown to him until after the confirmation;³⁸ and that leave to file a petition to set aside the confirmation of a composition should not be refused unless the petition, on its face, shows that, upon the facts stated, the petitioner cannot, under any circumstances, be entitled to relief.³⁹ The burden of proof rests upon the party who seeks to have the order of confirmation set aside.⁴⁰

The confirmation of a composition is, in effect, a discharge of the bankrupt.⁴¹ But a composition by a firm does not discharge the liability of the individual members for their in-

³² *Re Allen B. Wrisley Co., C. C. A.*, 133 Fed. 388.

³³ *Re Roukous*, 128 Fed. 648.

³⁴ *Re Dunn*, 53 Fed. 341. As to the rights of secured creditors under a composition, see *Flower v. Greenebaum*, 50 Fed. 190.

³⁵ *Re Roukous*, 128 Fed. 645.

³⁶ *Re Roukous*, 128 Fed. 648.

³⁷ *Re Roukous*, 128 Fed. 645.

³⁸ *Re Roukous*, 128 Fed. 645.

³⁹ *Re Allen B. Wrisley Co., C. C. A.*, 133 Fed. 388.

⁴⁰ *City Nat. Bank v. Doolittle, C. C. A.*, 107 Fed. 236.

⁴¹ *U. S. ex rel. Adler v. Hammond, C. C. A.*, 104 Fed. 862; *Ross v. Saunders, C. C. A.*, 105 Fed. 915; *Re Friend, C. C. A.*, 134 Fed. 778; *Re Cooper Bros.*, 166 Fed. 932; *Re Wilkens*, 191 Fed. 94.

dividual indebtedness.⁴² The confirmation does not deprive the referee of jurisdiction to pass on the accounts of the trustee and to direct that he be discharged and the estate closed.⁴³ "The effect of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors."⁴⁴

Unscheduled creditors, who had no notice of the bankruptcy proceedings, are not barred by the composition.⁴⁵ But they have no right to share in the same, unless they present their claims before it has been confirmed,⁴⁶ and even, it has been held, unless they present the same before the referee has made a rule nisi why the order of confirmation should not be entered.⁴⁷ It has been said that the only remedy in such a case is to set aside the confirmation for fraud.⁴⁸

§ 654. Reopening estates in bankruptcy. The bankruptcy courts have jurisdiction to "close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered."¹ It has been held that a creditor who has not proved his claim within the year cannot reopen the estate because of subsequently discovered assets.² There is no statutory limitation of the time within which a bankrupt's estate that has been closed may be reopened,³ but such an application may be denied for laches.⁴ An estate may be reopened after a trustee has been discharged, in order that a new trustee may be appointed to receive a preference.⁵

§ 655. Discharge of bankrupts. "(a) Any person may, after the expiration of one month and within the next twelve

⁴² *Re Coe*, C. C. A., 183 Fed. 745.

⁴³ *U. S. v. Sondheim*, 188 Fed. 378.

⁴⁴ *Re Rider*, 96 Fed. 808, 809, per *Coxe, J.*

⁴⁵ *Re Lockwood*, 104 Fed. 794.

⁴⁶ *Re Abrams & Rubins*, 173 Fed. 430.

⁴⁷ *Re Ennis*, 183 Fed. 859.

⁴⁸ *Re Abrams & Rubins*, 173 Fed. 430.

§ 654. 130 St. at L. 544, § 2, subd. 8.

² *Re Meyer*, 181 Fed. 904. See *supra*, § 646.

³ *Traub v. Marshall Field & Co.*, C. C. A., 182 Fed. 622.

⁴ *Vary v. Jackson*, C. C. A., 164 Fed. 840, seven years. For a case where a delay of two years was held to be no laches, see *Traub v. Marshall Field & Co.*, C. C. A., 182 Fed. 622.

⁵ *Re B. Feinberg & Sons*, 187 Fed. 283.

months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after, the expiration of the next six months.¹ "There shall be thirty days

§ 655. 130 St. at L. 544, as amended 36 St. at L. 838, 841; *Re Wheeler*, 5 Fed. 299; *Re Wolff*, 100 Fed. 430; *Re Levenstein*, 180 Fed. 957; *Lindeke v. Converse*, C. C. A., 198 Fed. 618. The bankrupt has a year and a day from the date of the adjudication, but no longer, unless he obtains an extension in accordance with the statute. *Re Holmes*, 165 Fed. 225. The court has no power to set aside an adjudication, entered upon a default in involuntary proceedings, and to make another order to the same effect in order to extend the bankrupt's time to apply for a discharge. *Re Morse*, 168 Fed. 157. After eighteen months from the adjudication in bankruptcy have expired, an order cannot be made *nunc pro tunc* granting the extension, unless an application for the same was made and orally granted within that period. *Re Wolff*, 100 Fed. 430. See *Re Anderson*, 134 Fed. 319. The filing of the petition without the leave of the court, after the expiration of a year and within the succeeding six months, is insufficient. *Re Knauer*, 133 Fed. 805. The lack of sufficient means by a bankrupt to pay an attorney, when accompanied by sickness of himself and his family, were held to be an unavoidable prevention. *Re Casey*, 195 Fed. 322. It is not the duty of the referee to notify the bankrupt when the time expires for filing the petition for discharge, *Re Knauer*, 133 Fed. 805, and the statutory peri-

od of limitations cannot be enlarged because the referee misled the bankrupt's attorney by incorrect information in that respect. *Ibid.* The delay was not unavoidable when caused by the fact that the bankrupt was in contempt of court for disobedience to an order with which he afterwards complied after its modification, *Re Geasberg*, C. C. A., 197 Fed. 896; nor because if the application had been filed within the year, it would necessarily have been denied because of his previous discharge in voluntary proceedings within six years, *Re Vaine*, 186 Fed. 535; *Re Chase*, 186 Fed. 408. It has been held that the question whether a bankrupt was unavoidably prevented from applying for a discharge within the year should be raised within the next six months. *Re Chase*, 186 Fed. 408. It seems that creditors are not entitled to notice of the application for an extension of time. *Re Churchill*, 197 Fed. 111; *Re Fritz*, 173 Fed. 560. The creditor may be estopped from moving to set aside an order of extension by laches, *Re Casey*, 195 Fed. 322; or by filing objections to the discharge. *Ibid.*; *Re Churchill*, 197 Fed. 111. The order extending the time cannot be reviewed upon the hearing of objections to the discharge. *Re Casey*, 195 Fed. 322. The petition for an extension because the bankrupt was unavoidably prevented from applying within the year is not evidence of the facts therein alleged and

notice of all applications for the discharge of the bankrupts given to creditors by mail to their respective addresses as they appear in the schedule or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing.²

"(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to

must be sustained by proof, although not formally traversed. *Re Glickman & Pisonoff*, 164 Fed. 209. The insufficiency of the evidence to establish the unavoidable prevention does not deprive the court of jurisdiction to grant the application for an extension. *Ibid.* Where the petition for the discharge was filed more than a year, but less than eighteen months, after the adjudication; it was held that it could not be impeached collaterally, since it must be presumed that an extension of time had been granted by the court. *Re Haynes & Sons*, 122 Fed. 560. But where the petition was filed after the expiration of eighteen months; it was held that a discharge, granted thereupon, was void and could be attacked collaterally. *Re Fahy*, 116 Fed. 239. *Cf. Re Wagner*, 139 Fed. 87. Where the application was filed with the referee, instead of the clerk, but was with the other proceedings before the former filed with the latter within a year after the adjudication, it was considered as properly filed, no objection having previously been made. *Re Taylor*, 188 Fed. 479. A local rule (S. D. N. Y.) was held to be valid which provided that "if the first meeting of creditors is not

called and the examination of bankrupt at such meeting begun, carried on and completed before the petition for discharge is filed, the referee is directed to certify such facts to the court, and thereupon, upon notice to the bankrupt, an application to dismiss the petition for discharge may be made." *Re Wollwitz*, C. C. A., 192 Fed. 105.

² 30 St. at L. 544, 561, § 58, as am'd 36 St. at L. 838, 841. Where the petitioners in an involuntary proceeding fails to give such notice to the creditors, it is incumbent upon the bankrupt to do so. *Re Wollwitz*, C. C. A., 192 Fed. 105. The failure to serve written notice upon the receiver of the property of the creditor when the former's name and address were disclosed by the proofs, but that of the latter was not in the schedules, was held to be no ground for setting aside the order for a discharge, where the notice was duly served by publication and there was no proof of fraud. *Re Fritz*, 173 Fed. 560. As to what is proper proof of service of notice to the creditors, see *Re Downing*, 199 Fed. 329. A discharge was not denied because, in a voluntary proceeding by Max Elkind and Boris Schwartz, the advertisement of notice of the first

conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be removed, destroyed or concealed any part of the property with intent to hinder, delay or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy, within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. Provided that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized to do so at a meeting of the creditors called for that purpose. (c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."³ "The judge may, upon the application of parties in interest who have not been

meeting of creditors described them as "Max Elkurd and Boris Schwartz." *Re Elkind*, C. C. A., 175 Fed. 64. It seems that notice of the application should be given by publication, as well as sent by mail, to the creditors. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 191, 192, 46 L. ed. 1113, 1120, 1121; *Remington on Bankruptcy*, § 2432. See *Re Sykes*, 106 Fed. 669. By Rule 7, D. C. S. D. N. Y., the application must be filed with the referee, who notifies creditors and certifies the proceedings to the clerk.

³ 30 St. at L. 544, 550, § 14b, as amended 36 St. at L. 838. See *Re Levey*, 133 Fed. 572. Neither the judge nor the referee has the power to prescribe conditions to the interposition of objection by a trustee duly authorized, such as that the

objections shall not delay settlement of the estate beyond a stated time or cause expense to the estate. *Re Churchill*, 197 Fed. 111. A creditor may oppose the discharge, although he has not proved his claim; *Re Frice*, 96 Fed. 611; *Re Barrager*, 191 Fed. 247, even, it seems, if his time to prove the same has expired, *Re Bimberg*, 121 Fed. 942; *Re Conroy*, 134 Fed. 764, 766, and although his claim is contested. *Re Conroy*, 134 Fed. 764. So, it has been held, may a creditor whose claim has been barred by the statute of limitations. *Re Westbrook*, 186 Fed. 414. After one creditor has declared his intention to abandon objections, another creditor may adopt and prosecute the same. *Re Guilbert*, 154 Fed. 676.

guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.”⁴ “The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.”⁵ “The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.”⁶ It should be verified.⁷ The petition should be filed with the clerk and not with the referee.⁸

“A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.”⁹ In such a case, the notice to the creditors should advise them of the same.¹⁰ It has been said that a petition for a discharge need not be verified.¹¹ The appearance

⁴ 30 St. at L. 544, 550, § 15; St. at L. 797.

⁵ 30 St. at L. 544, 550, § 16.

⁶ General Order XXXI. The separate petition by a member of a bankrupt firm for his discharge should recite the former proceedings by and against the partnership and pray for his separate discharge. *Re Meyers*, 97 Fed. 757. It has been held: that the petition may be amended so as to include this prayer and to state the adjudication of the bankruptcy of the copartnership; but that new notice to the creditors in the proper form must subsequently be given. *Re Meyers*, 97 Fed. 757, 759.

⁷ *Re Taylor*, 188 Fed. 479, holding

that the objection had there been waived because not made until after evidence had been taken.

⁸ *Re Taylor*, 188 Fed. 479.

⁹ General Order XXXII. A creditor is entitled to the whole of the tenth day within which to enter his appearance in opposition. *Re Bar-rager*, 191 Fed. 247. It has been held that a creditor may prosecute his objections in *forma pauperis*. *Re Guilbert*, 154 Fed. 676; *supra*, § 413.

¹⁰ *Re Meyers*, 97 Fed. 757.

¹¹ *Re Jemison Mercantile Co.*, C. C. A., 112 Fed. 966; *Remington on Bankruptcy*, § 2430. But see *Re Glass*, 119 Fed. 509.

of a creditor in opposition to a discharge may be made by a member of the bar of the court without a written power of attorney.¹² Specifications, which are not filed within the time limited by the general order, will be dismissed.¹³

It has been held: that the specifications of objections to the discharge should be verified;¹⁴ but that such an omission may be cured by amendment,¹⁵ and is waived if the bankrupt proceeds without taking the objection.¹⁶ It has been held that, where several creditors join in the same specifications, each of them, or someone in his behalf, must sign and verify the same.¹⁷ Where the creditor is absent, verification by his attorney may be permitted;¹⁸ but the reason why the creditor does not himself swear to the same should be stated.¹⁹

The specifications should show the facts which make the objector a party in interest.²⁰ An averment that the petitioners are "creditors of the bankrupt" is insufficient.²¹ It has

¹² *Re Gasser*, C. C. A., 104 Fed. 537.

¹³ *Re Abrecht*, 104 Fed. 974; *Re Clothier*, 108 Fed. 199. The judge may extend the time for a creditor's entry of appearance in opposition after the same has expired. *Re Levin*, C. C. A., 176 Fed. 177. Where an appearance was duly entered by an objecting creditor it was held that the judge might enlarge his time to file specifications or allow them to be filed *nunc pro tunc*. *Re Frice*, 96 Fed. 611. *Cf. Re Nathanson*, 152 Fed. 585.

¹⁴ *Re Glass*, 119 Fed. 509; *Re Gift*, 130 Fed. 230; *Remington on Bankruptcy*, § 2584. *Contra, Re Jamieson*, 120 Fed. 697. It has been held to be sufficient, if the oath is taken "to the best of affiant's knowledge, information and belief." *Re Milgraum & Ost*, 129 Fed. 827. *Cf. Re Jamieson*, 120 Fed. 697. But see *Re Brown*, C. C. A., 112 Fed. 49; *Re Glass*, 119 Fed. 509; *Re Nathanson*, 155 Fed. 645. The specifications should also be signed by or on be-

half of the objecting creditors. *Re Baerneopf*, 117 Fed. 975.

¹⁵ *Re Glass*, 119 Fed. 509; *Re Gift*, 130 Fed. 230; *Re Meuer*, 144 Fed. 445. *Re Hanna*, C. C. A., 108 Fed. 238; *Re Miller*, 192 Fed. 730.

¹⁶ *Re Baerneopf*, 117 Fed. 975; *Re Robinson*, 123 Fed. 844; *Godshalk v. Sterling*, C. C. A., 129 Fed. 580.

¹⁷ *Re Glass*, 119 Fed. 509. Where a partnership, which had proved a claim against a partner's estate, was dissolved pending the proceedings without a transfer of the claim to any one of the partners; it was held that objections to the discharge, in which they did not all unite, could not be sustained. *Re Hendrick*, 143 Fed. 647.

¹⁸ *Re Baerneopf*, 117 Fed. 975; *Remington on Bankruptcy*, § 2590.

¹⁹ *Re Baerneopf*, 117 Fed. 975; *Re Glass*, 119 Fed. 509; *Remington on Bankruptcy*, § 2590, *Re Randall*, 159 Fed. 298.

²⁰ *Re Servis*, 140 Fed. 222.

²¹ *Re Chandler*, C. C. A., 138 Fed.

been held that the specifications of the objecting creditors must be as specific as a criminal indictment or information;²² that they must be clear, specific, circumstantial, and distinctly allege one of the statutory grounds for refusing the discharge.²³

637. *Contra, Re Nathanson*, 155 Fed. 645.

²² *Re Hirsch*, 96 Fed. 468. But see *Re Kaiser*, 99 Fed. 689.

²³ *Re Frice*, 96 Fed. 611; *Re McCarthy*, 170 Fed. 859, holding that such a defect is not waived by the bankrupt's failure to except to the same. When the objection is the commission of an act, which is a crime under the bankruptcy law; 30 St. at L. 544, 554, § 29; quoted *infra*, § 654, the specifications must state its commission "knowingly and fraudulently." *Re Beebe*, 116 Fed. 48 (false oath); *Re Patterson*, 121 Fed. 921 (fraudulent concealment); *Kentucky Nat. Bank v. Carley*, C. C. A., 127 Fed. 686 (false oath); *Re Levey*, 133 Fed. 572 (fraudulent concealment); *Re Taplin*, 135 Fed. 861 (false oath); *Re Cohen*, 149 Fed. 908 (false oath). Except the transfer, removal, destruction or concealment of property, or permission that the same be done, within four months before the filing of the petition, with intent to hinder, delay or defraud creditors, in which case the word "knowingly" may be omitted; *Re Gift*, 130 Fed. 230. But, it has been held that such an omission is waived by going to trial upon the merits without objections; *Re Osborne*, C. C. A., 115 Fed. 1; but see *Re Taplin*, 135 Fed. 861, and that it may be cured by amendment. *Re Kanszak*, 151 Fed. 503. The following allegations have been held to be insufficient: that he had "concealed a part of his effects from the court," and had, "in contemplation

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of becoming bankrupt, made payments, transfers and assignments of his property for the purpose of preferring a creditor;" *Re Hixon*, 93 Fed. 440; that the bankrupt had "not offered to surrender his property for the benefit of all his creditors," and was "withholding property from his creditors;" *Re Hirsch*, 96 Fed. 468; that he had concealed from the assignee "certain papers" relating to judgments obtained against him prior to adjudication; *Re Carrier*, 47 Fed. 438; that he had, for the purpose of preventing his property from coming into the hands of his assignee, suffered certain judgments to be entered against him upon notes and checks which had previously been paid, there being no allegations that the judgments were collected from the estate in bankruptcy; *Ibid.*; that at the time of filing his petition he was the owner of a stock of drugs and general merchandise, no part of which was ever delivered to the trustee in bankruptcy, and that the bankrupt now has possession thereof, with no allegation that he concealed the same, or in any manner prevented the trustee from taking possession thereof; *Re Taplin*, 135 Fed. 861; and that he "with a fraudulent intent, has failed to include in his schedules property belonging to him;" *Re Adams*, 104 Fed. 72. A specification of objection to a bankrupt's discharge that he wilfully, knowingly and fraudulently, &c., made a false oath in his examination before the referee, wherein he testified that he last saw

They must set forth the particular facts on which the opposition is based,²⁴ must not be vague, nor general, nor contain mere conclusions of law.²⁵ They must allege the essential facts which constitute the bar to the discharge.²⁶ Allegations in the language of the statute are insufficient,²⁷ except when the objection is that the bankrupt has failed to keep any books of account or records.²⁸ Where the statute provides that the

his books on the desk when he left his place of business, and that they consisted of one book, well knowing the same to be untrue, was objectionable for indefiniteness as to whether the falsehood related to the existence of books, or to the witness's statement as to when or where he last saw them, or that they consisted of one book, unless the creditor intended to charge that there were, in fact, no books, and, if so, that should be made plain; *Re Nathanson*, 155 Fed. 645. Specifications of objections in a bankrupt's discharge that he falsely testified before the referee that he did not keep a ledger and an expense book were objectionable for failure to specify that he did keep a ledger and an expense book, if those were the issues sought to be raised; *Ibid.* A specification of objection to a bankrupt's discharge, alleging that he wilfully, &c., falsely testified before the referee, "I did not keep books, I kept a book," well knowing the answer to be false and untrue, was objectionable for failure to state that the bankrupt did not keep even a single book, if that was the particular in which the testimony was alleged to be untrue. *Ibid.* It was held under the Act of 1867; that a specification of a failure to keep proper books of account could not sustain a finding that the books were kept upon an incorrect theory. *Re Graves*, 24 Fed. 550.

²⁴ *Re Hixon*, 93 Fed. 440.

²⁵ *Re Holman*, 92 Fed. 512.

²⁶ *Re Kaiser*, 99 Fed. 689.

²⁷ *McNeil v. U. S.*, C. C. A., 150 Fed. 82, 18 Am. B. R. 21; *Remington on Bankruptcy*, § 2608. *Re Mintzer*, 197 Fed. 647. It has been held: that the specification of the objection that the bankrupt has obtained property or credit from any person upon a materially false statement in writing must set out the false representations, and the name of the person so alleged to have been defrauded. *Re Levey*, 133 Fed. 572. Several grounds of opposition may be included in the same specifications, but they must be separately stated. *Re Wetmore*, 102 Fed. 200. In such a case, the discharge will be denied if any one of them is sustained. *Hudson v. Mercantile Nat. Bank*, C. C. A., 119 Fed. 346. In these cases, the proper remedy is a motion to make the specifications more definite and certain, *Re Mintzer*, 197 Fed. 647; and if that is delayed until after evidence has been taken, a motion to amend them to conform to the proof will usually be granted, *Ibid.* It was held that such a motion, not made until after the witnesses were called, was properly denied with leave to renew after the testimony had been taken. *Re Mintzer*, *Ibid.*

²⁸ *Re Patterson*, 121 Fed. 921; *Godshalk v. Sterling*, C. C. A., 129 Fed. 580; *Re Ginsburg*, 130 Fed. 627; *Re Randall*, 159 Fed. 298. See

offenses must have been committed within a specified time before the bankruptcy, the specifications must show their commission within the period of limitation.²⁹ It has been said that a bankrupt may avail himself upon the hearing of the insufficiency of allegations in the specifications,³⁰ and that objections to the form of specifications cannot be raised for the first time upon appeal.³¹ The specifications may be once amended by permission of the judge;³² but not, it has been held, by permission of the referee alone.³³ Amendments have been allowed after the expiration of the time for filing specifications;³⁴ but an amendment was refused where the specifications merely alleged the words of the statute.³⁵ New objections to the discharge cannot be added by amendment after the original time to file specifications has expired.³⁶ A motion for the discharge should not be granted until disposition has been made of the specifications to the objections.³⁷ It has been held: that a petition may be dismissed for want of prosecution, when no specifications of objections have been filed and the

Re Lewis, 163 Fed. 137. But where the allegation was that he failed to keep such books of account or records as would enable his financial condition to be ascertained, it was held that the particulars in which the failure consisted should be pleaded. *Re Peck*, 120 Fed. 972. Evidence should not be pleaded *Re Troeder*, C. C. A., 150 Fed. 710. That allegations that he did not keep some necessary books, and that the books kept were insufficient to show the course or condition of his business, did not justify the objection that some particular transactions were not entered. *Re Smith*, 16 Fed. 465.

²⁹ *Re Steed & Curtis*, 107 Fed. 682.

³⁰ *Re Crist*, 116 Fed. 1007. *Contra*, *Re Osborne*, C. C. A., 115 Fed. 1; *Re Baldwin*, 119 Fed. 796. But see *Re Servis*, 140 Fed. 222; *Troe-*

der v. Lorsch, C. C. A., 150 Fed. 710.

³¹ *Re Osborne*, C. C. A., 115 Fed. 1.

³² *Re Holman*, 92 Fed. 512; *Re Carley*, C. C. A., 117 Fed. 130; *Re Gift*, 130 Fed. 230; *Re Hendrick*, 138 Fed. 473. See *Re Mudd*, 105 Fed. 348.

³³ *Re Kaiser*, 99 Fed. 689.

³⁴ *Re Morgan*, 101 Fed. 982; *Re Osborne*, C. C. A., 115 Fed. 1; *Re Nathanson*, 152 Fed. 585. An amendment may be allowed after a reference; *Re Hendrick*, 138 Fed. 473, but not, it has been held, after the proofs are closed. *Re Smith*, 16 Fed. 465. But see *Re Pierce*, 103 Fed. 64.

³⁵ *Re Peck*, 120 Fed. 972. *Cf. Re Gift*, 130 Fed. 230. But see *Re Glass*, 119 Fed. 509.

³⁶ *Re Gift*, 130 Fed. 230; *Re Johnson*, 192 Fed. 356.

³⁷ *Re Randall*, 159 Fed. 298.

bankrupt takes no proceedings for a year;³⁸ but that, when specifications of objections have been filed, the only remedy of the creditors is to set the matter down for a hearing upon the petition and objections,³⁹ and that objections may be disregarded when the objector does not appear upon the hearing of the application for a discharge.⁴⁰ The right of the bankrupt to discharge must be decided by the judge, not by a referee;⁴¹ but the judge may refer the hearing upon the objections to a referee, either in his official capacity or as a special United States commissioner, to take the evidence and report his findings and recommendations.⁴² Where a creditor holds notes containing a waiver of exemption, the discharge may be stayed for a reasonable time, in order to enable him to assert his right in a State court.⁴³ In the Eastern District of New York, it has been held to be the duty of the creditors to bring the discharge to a hearing.⁴⁴ Upon the hearing on a petition for discharge

³⁸ *Re Lederer*, 125 Fed. 96. Where, upon an appeal from an order denying a discharge, there was no opposition by the creditors, the abandonment of the opposition was held to be entitled to weight and to be considered, but not conclusive. *Re Hammerstein*, C. C. A., 189 Fed. 37.

³⁹ *Re Wolff*, 132 Fed. 396.

⁴⁰ *Re Chase*, 186 Fed. 408.

⁴¹ *Re Elby*, 157 Fed. 935.

⁴² *Re Kaiser*, 99 Fed. 689; *Re Meyers*, 100 Fed. 775; *Re Gillardon*, 187 Fed. 289. "Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts." General Order XII. In the Western District of Kentucky, it seems to be the custom to refer the objections and specifications to the

referee, no matter how frivolous they may be. *Re Daugherty*, 189 Fed. 239. But this extraordinary practice is not the rule in most districts. The referee has no jurisdiction to hear such an application unless there has been a special reference to him. *Re Taylor*, 188 Fed. 479; *Re Randall*, 159 Fed. 298. The previous taking of testimony by the referee upon the subject is an irregularity; *Re Goodhile*, 130 Fed. 782, but such testimony may be allowed to stand as if subsequently taken, provided that both parties were then represented. *Ibid*.

⁴³ *Re Mitchell*, 175 Fed. 877. It has been held that a sub-contractor who has intervened in the bankruptcy proceedings against a contractor is not entitled to a stay of the discharge until he can prosecute his claim to judgment, so as to enable him to enforce a mechanic's lien under the State statute. *Re Goodrich*, 192 Fed. 746.

⁴⁴ *Re Fritz*, 173 Fed. 560.

and the specifications of objection thereto, the testimony of the bankrupt given at the first meeting of creditors is admissible, but the testimony of other witnesses taken at such time is not.⁴⁵ Where an application for a bankrupt's discharge was referred to the referee, as special master, to hear the facts and report his conclusions, and specifications of objection filed by creditors were not sufficiently specific, it was held to be the master's duty merely to report back to the court that nothing had been filed with him in the way of objections requiring the taking of testimony.⁴⁶ The bankrupt's attendance before the referee on hearing of objections to his application for discharge demanded by creditors was held to be indispensable.⁴⁷ It has been held that the referee has power to rule upon the sufficiency of the specifications, and that he should exclude evidence offered in support of specifications that are clearly defective.⁴⁸ The burden of proof is upon the objecting creditors to support their specifications.⁴⁹ They are not obliged to prove the truth

⁴⁵ Ibid. *Re Walder*, 152 Fed. 489. *Shaffer v. Koblegerd Co.*, C. C. A., 183 Fed. 71. The adjudication of bankruptcy cannot be attacked unless the court had no jurisdiction to make the same. *Re Walrath*, 175 Fed. 243, where it was held too late to raise the objection that an infant was not within the class subject to bankruptcy. Where, in prior proceedings, it had been determined that the bankrupt was guilty of concealment of bonds, such determination was held to be *res adjudicata* in support of such an objection to the discharge. *Re Krall*, 196 Fed. 402. Findings of fact in a suit in the State court by the trustee against the bankrupt and his wife are not admissible when no judgment was entered upon the same, although the evidence therein, if otherwise competent, might be offered. *Re Borg*, 184 Fed. 640. It seems that the rules concerning the admission and exclusion of testimony taken upon a former trial of the same action apply to

testimony taken upon a former unsuccessful application for a discharge in the same bankruptcy proceedings. *Re Brockway*, 12 Fed. 69. Evidence of concealment, although irrelevant as direct proof of any specification, may be competent on the question of intent. *Re Isaacson*, 175 Fed. 292.

⁴⁶ *Re Hendrick*, 138 Fed. 473.

⁴⁷ *Re Shanker*, 138 Fed. 862.

⁴⁸ *Re Kaiser*, 99 Fed. 689. *Contra*, *Re Knaszak*, 151 Fed. 503. See *supra*, § 639. Evidence may be disregarded which tends to prove objections to a discharge that have not been pleaded. *Re Bouck*, 199 Fed. 453. A creditor who had filed specifications only in his capacity as a creditor of an individual partner was not permitted to offer evidence as to defects in the books of the firm, although he was also a firm creditor. *Re Smith*, 16 Fed. 465. For circumstantial evidence held to be sufficient. See *Re Reed*, 191 Fed. 920.

⁴⁹ *Re Wetmore*, 99 Fed. 703; *Re*

of the allegations in their specifications beyond a reasonable doubt.⁵⁰ When objections are dismissed, the bankrupt may be allowed costs against the objector;⁵¹ but it has been said that this will not be done when the opposition was not frivolous or vexatious.⁵² The referee's findings of fact upon conflicting evidence will usually be confirmed.⁵³ When confirmed by the district judge, they will very rarely be disturbed upon appeal.⁵⁴

The insanity of a bankrupt, which arises pending the proceedings and prevents his examination by his creditors, is not a bar to his discharge.⁵⁵

After a discharge had been refused upon the merits, a second application at a subsequent term was denied, although in the meanwhile a grand jury had refused to indict the bankrupt upon a charge of the same offense that had been held to be a bar to his discharge.⁵⁶

§ 656. Grounds for refusing discharge. A discharge in bankruptcy will be refused if the applicant has "(1) committed an offense punishable by imprisonment as herein provided; ¹

De Leeuw, 98 Fed. 408; *Re Idzall*, 96 Fed. 314; *Re Hirsch*, 96 Fed. 468; *Re Dews*, 96 Fed. 181; *Re Freund*, 98 Fed. 81; *Re Cornell*, 97 Fed. 29; *Re Corn*, 106 Fed. 143; *Re Gaylord*, 106 Fed. 833; *Re Hamilton*, 133 Fed. 823; *Re Walder*, 152 Fed. 489; *Troeder v. Lorsch*, C. C. A., 150 Fed. 710; *Re Griffin Bros.*, 154 Fed. 537. But when they have made out a *prima facie* case, such as the existence of assets and their disappearance a short time before the institution of the proceedings in bankruptcy, the burden is shifted to the bankrupt, who must then explain the facts which are peculiarly within his knowledge, or else his discharge will be refused. *Re Meyers*, 96 Fed. 408; *Re Wood*, 98 Fed. 972; *Re O'Gara*, 97 Fed. 932; *Re Ablowich*, 99 Fed. 81. But see *Re Idzall*, 96 Fed. 314.

Fed. 710; *Re Delmour*, 161 Fed. 589.

⁵¹ *Re Miers*, 193 Fed. 288.

⁵² *Ibid.*

⁵³ *Re Harr*, 143 Fed. 421; *Re Wheeler*, C. C. A., 165 Fed. 188.

⁵⁴ *Boyd v. Arnold*, Loucheim & Co., C. C. A., 149 Fed. 187. See *McDonald v. Campbell*, C. C. A., 151 Fed. 743.

⁵⁵ *Re Miller*, 133 Fed. 1017.

⁵⁶ *Re Royal*, 113 Fed. 140.

§ 656. 1 "(a) A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly, and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee. (b) A person shall be punished, by imprisonment for a period not to exceed two

⁵⁰ *Re Greenberg*, 114 Fed. 773; *Troeder v. Lorsch*, C. C. A., 150

or (2) with intent to conceal his financial condition destroyed, concealed, or failed to keep books of account or records from

years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money, or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings. (c) A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do. (b) A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the in-

formation is filed in court within one year after the commission of the offense." 30 St. at L. 544, 554, § 29. There can be no indictment for a concealment of the assets when they were not concealed after the appointment of the trustee. *U. S. v. Young & Holland Co.*, 170 Fed. 110. Larceny against the objector, not accompanied by any act made a crime by the bankruptcy law, is no ground for a denial. *Re Wolf*, 159 Fed. 299. A discharge has been denied because of a false statement in the verified schedules of the bankrupt, *Re Becker*, 106 Fed. 54; *Re Eaton*, 110 Fed. 731; *Re Young*, 140 Fed. 728; and of a false statement in an affidavit upon a motion to dismiss the proceedings, *Re Young*, 140 Fed. 728; but not for a false statement in a verified answer, which was filed too late for its consideration by the court, *Re Young*, 140 Fed. 728; nor for false statements in the testimony of the bankrupt in insolvency proceedings, which were by stipulation read in evidence in the proceedings in bankruptcy, *Re Goldsmith*, 101 Fed. 570; nor for a false oath in other bankruptcy proceedings, in which the petitioner for the discharge was not the respondent, *Re Blalock*, 118 Fed. 679; criticised in *Remington on Bankruptcy*, § 2531. The fact that the false testimony related to the existence of property, which could not have been recovered by the creditors, does not relieve the bankrupt, *Re Becker*, 106 Fed. 54; *Re Royal*, 112 Fed. 135; *Re Conroy*, 134 Fed. 764. But see *Re Chamberlain*, 180 Fed. 304. A subsequent correction or retraction of the false

which such condition might be ascertained;² or (3) obtained property or credit from any person upon a materially false

testimony does not obviate the objection, *Re Wolf*, 156 Fed. 543; *Re Marcus*, 192 Fed. 743; *Re Doyle*, 199 Fed. 247; except in so far as it tends to show that the untruth was inadvertent, *Re Marcus*, 192 Fed. 743; *Re Doyle*, 199 Fed. 247. Nor is it obviated when, after the creditors had discovered the fraudulent omission from the schedules, he amended the same, *Re Eaton*, 110 Fed. 731; *Re Breiner*, 129 Fed. 155; although this may be considered as a circumstance tending to prove good faith, *Re Wolf*, 156 Fed. 543. Evasive, *Re Cohen*, 149 Fed. 908; *Re Fanning*, 155 Fed. 701; and disrespectful, *Re Fanning*, 155 Fed. 701; answers upon the bankrupt's examination were held to be no reasons for refusing a discharge. The fact, that a grand jury has refused to indict the bankrupt for perjury, *Re Royal*, 113 Fed. 140; or that he could not be convicted criminally, *Re Gaylord*, C. C. A., 112 Fed. 668; for a false statement under oath in the bankruptcy proceedings will not prevent the denial of discharge because of the same.

² The mere failure to keep books is insufficient, unless it appears that this was done with the intent to conceal his financial condition. *Re McCrea*, C. C. A., 161 Fed. 246; *Re Tanner*, 192 Fed. 572; *Re Brown*, 199 Fed. 356. It has been said that the burden of proof is upon the creditor to show that the failure of the bankrupt to keep books was done with the intent to conceal his financial condition, *Re Garrison*, C. C. A., 149 Fed. 178; but where a bankrupt, who had had considera-

ble business experience, failed to keep any books whatever, from which his financial condition could be ascertained; it was presumed that he did so in order to conceal the same. *Re Bragasa*, 103 Fed. 936; *Re Alford*, 135 Fed. 236. The keeping of misleading books, *Re Feldstein*, C. C. A., 115 Fed. 259; or books without any entries concerning alleged debts, upon which the bankrupt claimed to have made payments, is a ground for refusing a discharge, *Re Greenberg*, 114 Fed. 773; but omissions, *Van Ingen v. Schophofen*, C. C. A., 129 Fed. 352; or false entries, *Re Hamilton*, 133 Fed. 823; when made solely for the purpose of concealing financial assistance or a preference, were held not to be. A discharge was granted when the bankrupt kept a cash book without any day book, blotter or register, *Re Allendorf*, 129 Fed. 981; and when the nature of the bankrupt's business did not require the keeping of ordinary books, his failure so to do did not prevent his discharge, *Sellers v. Bell*, C. C. A., 94 Fed. 801; *Re Corn*, 106 Fed. 143; *Re Prager*, 134 Fed. 1006; *Re Keefer*, 135 Fed. 885. The destruction of a check book and pass book at a time when the bankrupt's debts were small, *Re Studebaker*, C. C. A., 127 Fed. 591; the destruction of a salesman's slips of memoranda after the amount of the same had been written in the cash book, *Re Allendorf*, 129 Fed. 981; and the alteration and mutilation of immaterial parts of the old records of a corporation, of which the bankrupt was a bookkeeper, *Bauman v. Feist*, C. C. A., 107 Fed. 83;

statement in writing made to such person for the purpose of obtaining such property on credit from such a person;³ or

were held to be grounds for refusing a discharge. For cases of omissions from books, which were held to justify a denial of the application, see *Re Brod*, 166 Fed. 1011; *Re Pomerantz & Hopkins*, 168 Fed. 444; *Re Schachter*, 170 Fed. 683; *Re Koelle*, 171 Fed. 257; *Re Kyte*, 174 Fed. 867; *Re Berger*, 200 Fed. 325, where the bankrupt transacted business through a corporation which he owned. For cases where they did not, see *Re Barthier*, 188 Fed. 394; *Re Sabsevitz*, 197 Fed. 109; *Re Marcus*, C. C. A., 203 Fed. 29. It has been held that if the intent to conceal the financial condition exists, the discharge should be denied, whether such intent was fraudulent or not, *Re Hanna*, C. C. A., 168 Fed. 238; but an intent to conceal must exist, *Re Marcus*, 192 Fed. 743; although it may be proved by circumstantial evidence. *Re Schachter*, 170 Fed. 683. For a disappearance of the books which caused a denial, see *Re Wiedmann*, 188 Fed. 684; *Baylor v. Rawlings*, C. C. A., 200 Fed. 131. But see *Re Mintzer*, 197 Fed. 647; *Garry v. Jefferson Bank*, C. C. A., 186 Fed. 461. The destruction of the books of a partnership, of which the bankrupt was formerly a member, was held to be a bar to his discharge. *Re Conley*, 120 Fed. 42. In the case of a partnership, the burden is upon each partner to show that he was innocent of participation in such concealment. *Re Schachter*, 170 Fed. 683. Where the bankrupt lived in New York, he was not refused a discharge because a firm in Michigan, of which he was a member, did not keep proper books for

a short period of time, there being no proof of his knowledge thereof. *Re Garrison*, C. C. A., 149 Fed. 178. *Cf. Re Ablowich*, 99 Fed. 81; *Re Warne*, 10 Fed. 377; *Re Kamsler*, 97 Fed. 194; *Re Bragasa*, 103 Fed. 936; *Bragassa v. St. Louis Cycle Co.*, C. C. A., 107 Fed. 77; *Re Bemis*, 104 Fed. 672; *Ablowich v. Stursberg*, C. C. A., 105 Fed. 751; *Re Spear*, 103 Fed. 779; *Re Corn*, 106 Fed. 143. The actual effect upon the creditors of the bookkeeping is immaterial. *Re Schachter*, 170 Fed. 683.

³ The right to object to a discharge because the bankrupt has obtained property or credit upon a materially false statement in writing is not confined to the person defrauded, but may be interposed by any creditor. *Re Harr*, 143 Fed. 421; *Re A. B. Carton & Co.*, 148 Fed. 63. But see *Re Allendorf*, 129 Fed. 981; *Re Dresser & Co.*, 144 Fed. 318. The property need not have been thus obtained for the benefit of the bankrupt, if it was thus obtained upon his credit as principal or surety. *Re Aldridge*, 168 Fed. 93. The obtaining of a loan by means of the materially false statement is sufficient, *Re Louisville Banking Co.*, C. C. A., 158 Fed. 403; *Re Gilpin*, 160 Fed. 171. *Contra, Re Pfaffinger*, 154 Fed. 528; and so is the obtaining of credit by a corporation, in which the bankrupt owned a majority of the stock, *Re Dresser & Co.*, 144 Fed. 318. It has been held that the obtaining of a bond of indemnity or a surety bond is not, *Re Tanner*, 192 Fed. 572. Services have been held not to be property within the meaning of this section

(4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed or concealed or permitted to be removed,

of the statute. *Gleason v. Thaw*, C. C. A., 185 Fed. 345; s. c., C. C. A., 196 Fed. 359, *certiorari* granted. Drafts drawn upon an account where there are no funds, are not false statements in writing. *Firestone v. Harvey*, C. C. A., 174 Fed. 574. The preponderance of authority is that false statements to a commercial agency are not. *Re Russell*, C. C. A., 176 Fed. 253; *Re Foster*, 186 Fed. 254; *ser.*, C. C. A., 146 Fed. 383, 76 C. C. A. 655; *Re Pincus*, 147 Fed. 621; *Re Carton & Co.*, 148 Fed. 63; *Re Kyte*, 174 Fed. 867. It does not avail the bankrupt that he paid in full for the first property that he received upon the faith of the false statement. *Ragan, Malone & Co. v. Cotton & Preston*, C. C. A., 200 Fed. 546. *Cf. Re Terens*, 172 Fed. 938. But see *Re Cotton & Preston*, 183 Fed. 181; *Re Sabsevitz*, 197 Fed. 109; *Re O'Callaghan*, 199 Fed. 662; *Re Braverman*, 199 Fed. 863. The fact that credit was extended to a firm and not to the bankrupt member thereof, is immaterial. *Re Terens*, 172 Fed. 938. It has been held: that a false statement, made by an agent of the bankrupt within the scope of his authority, will justify a refusal of the discharge, *Re Goodhile*, 130 Fed. 782; *Re Dresser*, C. C. A., 146 Fed. 383. See *Re Hardie & Co.*, 143 Fed. 607; *Re Reed*, 191 Fed. 920; in the case of a partnership, that such a statement by one of the firm is a ground for refusing a discharge to him and to the firm, *Re Neyland & McKeithern*, 184 Fed. 144; *Ragan, Malone & Co. v. Cotton & Preston*, C.

C. A., 200 Fed. 546; but not the discharge of a partner who did not participate in or authorize the same. *Ragan, Malone & Co. v. Cotton & Preston*, C. C. A., 200 Fed. 546, affirming 183 Fed. 181; *Hardie v. Swafford Bros. Dry Goods Co.*, C. C. A., 20 L.R.A.(N.S.) 785, 165 Fed. 588. The false statement must have been made either with knowledge of its falsity, or so recklessly as to justify a finding of fraud. *Re Collins*, 157 Fed. 120. Where the statement was false in fact, but made in good faith through a mistake on the part of the bankrupt, his discharge was denied. *Re Shaffer*, 169 Fed. 724. See *Re Terens*, 172 Fed. 938. *Contra*, *W. S. Peck Co. v. Lowenbein*, C. C. A., 178 Fed. 178; *Re Mintzer*, 197 Fed. 647; *Re O'Callaghan*, 199 Fed. 662. For evidence held to be sufficient to show that the statement was intentionally false, see *Re Taft & Conyers*, 182 Fed. 899; *Shaffer v. Kohlegard Co.*, C. C. A., 183 Fed. 71; *Re Puschkin*, 183 Fed. 882; *Re Miller*, 192 Fed. 730; *Re Ellerbee*, 198 Fed. 952. The denial of the discharge operates as to all claims and is not limited to that of the objector. *Re Miller*, 192 Fed. 730. A creditor can make the objection, although the discharge would not release the bankrupt from the debt thus incurred. *Re Reed*, 191 Fed. 920. An agreement by a creditor for a valuable consideration, by which he canceled and agreed to surrender certain written statements, upon which the bankrupt obtained credit, and conceded that any inaccuracies therein were inadvertent, was held to estop him

destroyed or concealed any of his property, with intent to hinder, delay or defraud his creditors,⁴ or (5) in voluntary proceedings been granted a discharge in bankruptcy, within

from using the same as a ground of objection to the discharge. *Re Russell*, C. C. A., 176 Fed. 253.

⁴It has been held that concealment at a time when no trustee was appointed is no ground of objection. *Re Adams*, 171 Fed. 599. But see *U. S. v. Comstock*, 161 Fed. 644; *Radin v. U. S.*, C. C. A., 189 Fed. 568. The advice of counsel may be considered when determining whether the concealment was fraudulent. *Re Alleman*, 162 Fed. 693; *Klein v. Powell*, C. C. A., 174 Fed. 640. It has been held that the word "conceal" means a continuous concealment, and the fact that the first concealment was prior to the four months' period is no excuse if continued. *Re Quackenbush*, 102 Fed. 282; *Re Toothaker Bros.*, 128 Fed. 187; *U. S. v. Cohn*, 142 Fed. 983; *Re Jacobs & Verstandig*, 147 Fed. 797. A discharge will not be denied because of an omission of assets from the bankrupt's schedules, caused by inadvertence or a mistake of fact or law, *Re Scott*, 11 Fed. 133; *Re Crenshaw*, 95 Fed. 632; *Re Hirsch*, 96 Fed. 468; *Re Morrow*, 97 Fed. 574; *Re McAdam*, 98 Fed. 409; *Re McBryde*, 99 Fed. 686; *Re Wetmore*, 99 Fed. 703; *Re Neely*, 134 Fed. 667; nor, it has been held, because of the omission of a leasehold, where there is no evidence that it has any value, *Re Hirsch*, 97 Fed. 571; nor because of the omission of an interest in property, which has been pledged, when there is no evidence that it is worth more than the debt due the pledgee, *Re Hirsch*, 96 Fed. 468. It has been held that

a preference, which does not amount to a fraudulent concealment, is not a bar to a discharge. *Re Pierce*, 103 Fed. 64; *Re Brown*, 140 Fed. 383; *Re Maher*, 144 Fed. 503. The pledge by a stockholder of securities owned by his customers to secure a loan to himself is not such a transfer of property with intent to defraud his creditors as will prevent his discharge, although it is property on which he has a lien, *Re Jacob, Berry & Co.*, 146 Fed. 623. It seems that a transfer of property in fraud of creditors when made by a bankrupt's general agent with complete control of the same will bar a discharge, although the bankrupt did not know it was made. *Ibid.*; *Re James*, C. C. A., 181 Fed. 476, affirming 175 Fed. 894. See § 621, *supra*. *Cf. Johnson v. U. S.*, C. C. A., 18 L.R.A.(N.S.) 1194, 163 Fed. 30. *Contra, Warren v. U. S.*, C. C. A., 199 Fed. 753. Where, prior to the six months, the bankrupt parted with the title and all control to the property, there is no such concealment as is described in the statute. *Re Hammerstein*, C. C. A., 189 Fed. 37. *Cf. Re Boner*, 169 Fed. 727. For cases where it was held that there was such a fraudulent concealment, see *Re Skinner*, 97 Fed. 190; *Re Kamsler*, 97 Fed. 194; *Re Roy*, 96 Fed. 400; *Re Lewin*, 103 Fed. 852; *Re Becker*, 106 Fed. 54; *Re Lowenstein*, 106 Fed. 51; *Re Bemis*, 104 Fed. 672; *U. S. v. Young & Holland Co.*, 170 Fed. 110; *Re Wright*, 177 Fed. 578; *Re McCann*, 179 Fed. 575; *Re Margolis*, 181 Fed.

six years;⁵ or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."⁶ A discharge was denied where there were no dischargeable debts.⁷

In computing the time which has intervened since the bankrupt was discharged in involuntary proceedings, the six years are counted back from the time of the hearing on the application for the second discharge, and not from the time of the filing of the second voluntary petition in bankruptcy.⁸ A bankrupt cannot be discharged in involuntary proceedings if he has, within the previous six years, obtained a discharge in bankruptcy upon a voluntary petition.⁹ It has been held that a bankrupt, who failed to apply for his discharge within the time limited by the present bankruptcy law, cannot thereafter file a

591; *Re Taylor*, 182 Fed. 187; *Re Sussman*, 183 Fed. 331; *U. S. v. Stern*, 186 Fed. 854; *Re Graves*, 189 Fed. 847; *Re Sussman*, 190 Fed. 111; *Re Doyle*, 199 Fed. 247; *Re Berger*, 200 Fed. 325. For cases holding that there was not, see *Re Alleman*, 162 Fed. 693; *Johnson v. U. S., C. C. A.*, 18 L.R.A.(N.S.) 1194, 163 Fed. 30; *Re Boner*, 169 Fed. 727; *Re Reed*, 191 Fed. 920; *Re Mintzer*, 197 Fed. 647; *Re Doyle*, 199 Fed. 247. It seems that money borrowed to pay the expenses of the bankruptcy proceedings need not be put in the schedules. *Sellers v. Bell, C. C. A.*, 94 Fed. 801. The advice of counsel is no excuse for the omission of assets from the schedule, unless the bankrupt gave him a full disclosure of the facts; but, in such a case, it may have weight with the court. *Re Kyte*, 174 Fed. 867; *Re Alleman*, 162 Fed. 693; *Re Nelson*, 179 Fed. 320. A preferential payment, in the absence of fraud, does not bar the discharge. *Re Friedrich*, 199 Fed. 193; *Re Doyle*, 199 Fed. 247; *Re Bouck*, 199 Fed. 453.

⁵ *Re Chase*, 186 Fed. 408. A

creditor, who held a provable claim under the former proceeding, is not estopped from raising his objection to the bankrupt's discharge in a subsequent proceeding, although he proved his claim therein, when the bankrupt scheduled no assets not exempt. *Re Bacon, C. C. A.*, 193 Fed. 34.

⁶ 30 St. at L. 544, 550, § 14. As to time, see *Re Wolff*, 100 Fed. 430; *Re Wheeler*, 5 Fed. 299.

⁷ *Re Gulick*, 190 Fed. 52.

⁸ *Re Jordan*, 142 Fed. 292; *Re Haase*, 155 Fed. 553.

⁹ *Re Neely*, 134 Fed. 667; *Re Seaholm, C. C. A.*, 136 Fed. 144. The discharge of a firm in former bankruptcy proceedings is no bar to the subsequent discharge of another co-partnership within the six years, although one of the partners of the former was a member of the latter. *Re Neyland & McKeithen*, 184 Fed. 144, where the former order of discharge, although purporting to discharge the individual partners also, was construed as a discharge of the partnership only, since there had been no adjudication against the individuals.

second petition and obtain a discharge from the debts which were scheduled and provable in the previous bankruptcy;¹⁰ but it was held otherwise when the first proceeding was under the act of 1867, and the debt then proved had been kept alive by a judgment.¹¹

It has been held: that the failure of a bankrupt to apply for a discharge, and the approval of the record by the court without granting a discharge, constitutes a judgment by default in favor of his creditors, then existing, and a conclusive adjudication in their favor that he is not entitled to a discharge from their claims;¹² and that the proof of their claims upon his second application does not estop them from pleading such adjudication;¹³ and that the dismissal of a bankrupt's petition for want of prosecution, and the denial of his motion to reinstate his application, has the same effect.¹⁴ An order refusing to confirm a composition is not a bar to a subsequent discharge.¹⁵

§ 657. Obligations released by discharge. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations,¹ or for wilful and malicious in-

¹⁰ *Re Silverman*, C. C. A., 157 Fed. 675.

¹¹ *Re Herrman*, 134 Fed. 566.

¹² *Re Elby*, 157 Fed. 935; *Re Bramlett*, 161 Fed. 588; *Re Bacon*, C. C. A., 193 Fed. 34; *Re Springer*, 199 Fed. 294. The failure of the bankrupt to apply for a discharge during the statutory period is a conclusive determination that he is not entitled to the same and precludes him, in a subsequent proceeding, from obtaining a discharge from debts previously incurred. *Re Von Borries*, 168 Fed. 718; *Re Westbrook*, 186 Fed. 414; *Re Stone*, 172 Fed. 947. In the latter proceeding, the court should limit the discharge so as to exclude claims prior to the former petition. *Re Westbrook*, 186 Fed. 414; *Pollet v.*

Cosel, C. C. A., 30 L.R.A.(N.S.) 1164, 179 Fed. 488; *Re Pullian*, 171 Fed. 595.

¹³ *Re Elby*, 157 Fed. 935.

¹⁴ *Re Kuffler*, 144 Fed. 445.

¹⁵ *Re McVoy Hardware Co.*, C. C. A., 200 Fed. 949.

§ 657. ¹ A discharge in bankruptcy does not release a debt caused by fraudulent and material misrepresentations, *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723; *Packer v. Whittier*, C. C. A., 91 Fed. 511; *Re Wollock*, 120 Fed. 516; or contracted when the debtor knew that he was insolvent and intended not to pay it, *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951. It has been held that the word "property" does not include the services of an attorney. *Re Thaw*, 180 Fed. 419, *aff'd. Gleason v. Thaw*, C. C. A., 185

juries to the person or property of another,² or for alimony due or to become due,³ or for maintenance or support of wife or child,⁴ or for seduction of an unmarried female, or for criminal conversation;⁵ (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy;⁶ or (4) were created

Fed. 361; *Gleason v. Thaw*, C. C. A., 196 Fed. 359, *certiorari* issued but not yet argued. See *Gleason v. O'Mara*, C. C. A., 180 Fed. 417. The word "false" means fraudulent. *Gilpin v. Merchants' Nat. Bank*, C. C. A., 20 L.R.A.(N.S.) 1023, 165 Fed. 607. But an indebtedness thus incurred through the false representation of one partner will not be barred by the discharge of the other. *Frank v. Michigan Paper Co.*, C. C. A., 30 L.R.A.(N.S.) 623, 179 Fed. 776. It has been held that the cause of action for the fraudulent representations is waived by an action for conversion. *Re Ennis & Stoppani*, 171 Fed. 755; *Maxwell v. Martin*, 130 App. Div. (N. Y.) 80. *Contra*, *Kavanaugh v. McIntyre*, 128 App. Div. (N. Y.) 722; s. c., 74 Misc. (N. Y.) 222; or by filing a claim for the goods sold, *Standard Sewing Mach. Co. v. Kattell*, 132 App. Div. (N. Y.) 539; see *Standard Varnish Works v. Haydock*, C. C. A., 143 Fed. 318; *Harv. Law Rev.*, Dec. 1909; and in such cases it is barred. But see *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. —, cited *infra*, note 16; but that opposition to the bankrupt's discharge does not, *Talcott v. Friend*, C. C. A., 179 Fed. 676, although the opposition was based upon the ground that the bankrupt had incurred the debt through fraud and the court found that that was not the fact, *Ibid*.

² It has been held that forcible dispossession, *Re Munro*, 197 Fed. 450 (where there was no evidence of express malice); it has been held that conversion of stocks by a broker are wilful and malicious injuries which are not barred by a discharge. *Kavanaugh v. McIntyre*, 128 App. Div. (N. Y.) 722; s. c., 74 Misc. (N. Y.) 222; *Maxwell v. Martin*, 130 App. Div. (N. Y.) 80. *Contra*, *Re Ennis & Stoppani*, 171 Fed. 755; and other cases.

³ This includes a judgment for alimony entered in one State upon a decree of divorce entered in another. *Matter of Williams*, 152 App. Div. (N. Y.) 385.

⁴ Including a judgment in a bastardy proceeding, *Re Baker*, 96 Fed. 954.

⁵ A judgment for damages for breach of a promise, accompanied by seduction, is not discharged. *Re Warth*, C. C. A., 200 Fed. 408, reversing 196 Fed. 571.

⁶ *Miller v. Guasti*, 226 U. S. 170, 57 L. ed. —; *Bergmann v. Manes*, 141 App. Div. (N. Y.) 102. Debts not duly scheduled are not discharged unless the creditor had notice or actual knowledge of the proceedings in bankruptcy. Where partnership debts of a firm, to which the bankrupt belonged, were not properly described in the schedules attached to a petition for individual bankruptcy; it was held that they were not discharged. 30

by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”⁷

The enumeration of debts in the exceptions does not enlarge the class of debts which are provable under the subsequent section of the statute,⁸ nor authorize the proof of liabilities for tort disconnected with any contract.⁹ Debts, which are not provable, are not released by a discharge.¹⁰ It has been held that an unliquidated debt may be discharged.¹¹ Since judgments are provable, a judgment for a tort not of the class specified in this section of the bankruptcy law is released by the discharge in bankruptcy.¹² So is a judgment for breach of promise

St. at L. 544, 550, § 17, quoted *supra*; *Re Monroe*, 114 Fed. 398; *Re Faun*, 96 Fed. 592. Where it is known that the debt has been assigned, its description in the schedules simply by the name of the assignor is insufficient. *Columbia Bank v. Birkett*, 174 N. Y. 112, 102 Am. St. Rep. 478; s. c., *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231. The rule is otherwise when the bankrupt had no notice of the assignment. *Lent v. Farnsworth*, 180 N. Y. 503. It is sufficient to procure the discharge of a stockholder's liability, when the schedules name the receiver appointed in the suit to enforce the same. *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231.

“Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends.” *Birkett v. Columbia Bank*, 195 U. S. 345, 350, 49 L. ed. 231, per McKenna, J.

730 St. at L. 544, 550, § 17; 32 St. at L. 797.

⁸ *Brown & Adams v. United But-ton Co.*, C. C. A., 8 L.R.A. (N.S.) 961, 149 Fed. 48; *Re N. Y. Tunnel Co.*, C. C. A., 159 Fed. 688; *supra*, § 647.

⁹ *Ibid.*

¹⁰ *Dunbar v. Dunbar*, 190 U. S. 340, 350, 47 L. ed. 1084; *Re Moore*, 111 Fed. 145. Such are: a fine imposed by a State court for a criminal contempt, *Re Hall*, 170 Fed. 721; a suit to compel a corporation to issue a certificate of stock, *Re Clipper Mfg. Co.*, C. C. A., 179 Fed. 843. So it has been held a “put” or agreement to take a certain number of shares of stock at a specified price, at the option of the plaintiff, at any time prior to a specified date, *Phoenix Nat. Bank v. Waterbury*, 197 N. Y. 161; and a judgment in favor of the People of the State upon an appeal bond. *People of the State of New York v. Smith*, N. Y. Sup. Ct., Sp. Tm., Erlanger, J., N. Y. L. J. April 25, 1912, and cases cited.

¹¹ *Re Hilton*, 104 Fed. 981.

¹² *Burnham v. Pidcock*, 58 App. Div. (N. Y.) 273, 5 Am. B. R. 590, affirming 5 Am. B. R. 42.

to marry, which was not accompanied by seduction.¹³ It has been held that, where a judgment is not discharged, the judgment debtor's liability upon a recognizance to pay the same also remains in force.¹⁴ It has been said that a contractual relation, which has not become merged in a provable claim, is not discharged.¹⁵ Liabilities mentioned in the second subdivision of this section of the statute are not discharged, whether they have been reduced to judgment or not.¹⁶ It has been said: that, in order to except the debt from the discharge, the false representations need not have been made in writing;¹⁷ nor need the bankrupt have known their falsity, if he made them recklessly;¹⁸ and that they may have been made to a mercantile agency in order to obtain credit, and not to any particular creditor.¹⁹ It has been held that the bankrupt's liability to the trustee of another bankrupt for the value of property, which he obtained from the other, in fraud of the latter's creditors, is not released by a discharge.²⁰

¹³ *Re McCauley*, 101 Fed. 223.

¹⁴ *Re Colaluca*, 133 Fed. 255.

¹⁵ *Remington on Bankruptcy*, § 2729; citing *Watson v. Merrill*, C. C. A., 136 Fed. 359. Judge Sanborn said: "One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations." *Watson v. Merrill*, C. C. A., 69 L.R.A. 719, 136 Fed. 359, 363. But see *supra*, § 647.

¹⁶ *Mackel v. Rochester*, 135 Fed. 904; *Thompson v. Judy*, C. C. A., 169 Fed. 553. It has been held: that the waiver by the plaintiff of the tort and his proof and acceptance of the dividend upon the claim, *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. —; or obtaining judgment thereupon, as an implied contract, *Mackel v. Rochester*, 135 Fed. 904; but see *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762; does not make a claim dischargeable; and that the overruling of an objection to the discharge on the ground of fraud in creating the debt is not *res adjudicata* in an action for the balance after deducting therefrom the dividend received, *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. —.

¹⁷ *Katzenstein v. Reid* (Texas Ct. App.), 16 Am. B. R. 740.

¹⁸ *Ibid.*

¹⁹ *Ibid.* See also *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed.

²⁰ *Mackel v. Rochester*, 135 Fed. 904.

It has been said: that the words "wilful and malicious injuries" do not imply express malice; but that the word "malicious" is used in its ordinary legal sense.²¹

Liabilities for assault and battery,²² false imprisonment,²³ malicious prosecution,²⁴ libel,²⁵ and alienation of affections not accompanied by seduction²⁶ are not released by a discharge. A debt for medical attendance furnished to the wife or child of the bankrupt at his request, while they were living together, is discharged.²⁷ A judgment or order in bastardy proceedings is not.²⁸ The discharge releases a debt due by a stock broker,²⁹ or cotton broker,³⁰ or factor,³¹ or attorney,³² for the conversion of money or other property of his principal, and the obligation of a trustee of an implied trust,³³ or of a pledgee who has converted the proceeds of collateral, given him as security for his debt,³⁴ but not, it has been held, the mutual obligations of partners.³⁵ It has been held that the discharge in bankruptcy of a firm from firm debts does not relieve the individual mem-

²¹ *McChristal v. Clisbee*, 190 Mass. 120.

²² *Re Colaluca*, 133 Fed. 255; *McChristal v. Clisbee*, 190 Mass. 120.

²³ *McChristal v. Clisbee*, 190 Mass. 120, 3 L.R.A. (N.S.) 702.

²⁴ *McChristal v. Clisbee*, 190 Mass. 120, 3 L.R.A. (N.S.) 702.

²⁵ *McDonald v. Brown*, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659.

²⁶ *Re Maples*, 105 Fed. 919; *Leicester v. Hoadley*, 66 Kansas, 172, 65 L.R.A. 523.

²⁷ *Re Ostrander*, 139 Fed. 592.

²⁸ *Re Baker*, 96 Fed. 954. See *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390.

²⁹ *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565; *Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 362; *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147; *Barrett v. Prince*, C. C. A., 143 Fed. 302.

³⁰ *Knott v. Putnam*, 107 Fed. 907.

³¹ *Chapman v. Forsyth*, 2 How. Fed. Prac. Vol. II.—142.

ard, 202, 11 L. ed. 236; *Bills v. Schliep*, C. C. A., 127 Fed. 103; *Re*

Adler, C. C. A., 152 Fed. 422; *Mathieu v. Goldberg*, 156 Fed. 541;

Re Gulick, 186 Fed. 350.

³² *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931.

³³ *Chapman v. Forsyth*, 2 How. ard, 202, 11 L. ed. 236; *Noble v.*

Hammond, 129 U. S. 65, 32 L. ed. 621; *Fleitas v. Richardson*, 147 U.

S. 550, 37 L. ed. 276 (the liability of a husband for his wife's par-

aphernal property under the law of Louisiana); *Re Harper*, 133 Fed.

970, affirmed as *Harper v. Rankin*, C. C. A., 141 Fed. 626; *Mulock v.*

Byrnes, 129 N. Y. 23; *Reeves v. McCracken*, 69 N. J. L. 203, 13 Am.

B. R. 680.

³⁴ *Hennequin v. Clews*, 111 U. S. 676; 28 L. ed. 565; *Palmer v. Hus-*

sey, 119 U. S. 96, 30 L. ed. 362; *Re* *Adler*, C. C. A., 144 Fed. 659.

³⁵ *Re Walker*, 176 Fed. 455; *Haggerty v. Badkin*, (N. J. Ch.) 66 Atl. Rep. 420.

bers of the firm from liability for firm debts, where no individual adjudication was had.³⁶

It has been said that the words "fiduciary capacity" imply one that exists independently of the particular transaction, out of which the debt arises.³⁷ "The words, in the fourth division of section 17, 'while acting as an officer, or in any fiduciary capacity,' extended to 'fraud, embezzlement, misappropriation, as well as 'defalcation.'"³⁸ "The word 'fraud' means moral turpitude or intentional wrong."³⁹ It has been held: that the fraud itself must be "the foundation of the right and of the recovery;"⁴⁰ and that, within the meaning of this section of this statute, it does not consist simply in fraudulent conveyances to defeat the collection of the debt.⁴¹ The word "officer" in the phrase "while acting as an officer" has been held to include officer of a private corporation, such as a national bank.⁴²

It has been held that the recital, in a judgment, of the nature of the cause of action does not control the Court of Bankruptcy.⁴³ It has been held: that the discharge of a corporation will not release its directors or stockholders from any liability that they may have incurred;⁴⁴ that a limited judgment may be taken for that purpose against the corporation;⁴⁵ but that otherwise a corporation is entitled to as complete a discharge as an individual.⁴⁶

§ 658. Revocation of discharge. "The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come

³⁶ *Re Neyland & McKeithen*, 184 Fed. 144.

³⁷ *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931; *Re Harper*, 133 Fed. 970, affirmed as *Harper v. Rankin*, C. C. A., 141 Fed. 626.

³⁸ *Tindle v. Birkett*, 205 U. S. 183, 186, 51 L. ed. 762, 764, per Fuller, C. J.

³⁹ *Re Blumberg*, 94 Fed. 476, 479.

⁴⁰ *Re Blumberg*, 94 Fed. 476, 479.

⁴¹ *Re Blumberg*, 94 Fed. 476.

⁴² *Re Harper*, 133 Fed. 970, affirmed as *Harper v. Rankin*, C. C. A., 141 Fed. 626; *Re Gulick*, 186 Fed. 350, a private corporation. But see *Re Floyd, Crawford & Co.*, 15 Am. B. R. 277.

⁴³ *Knott v. Putnam*, 107 Fed. 907.

⁴⁴ *Re Marshall Paper Co.*, 95 Fed. 419.

⁴⁵ *Re Marshall Paper Co.*, C. C. A., 102 Fed. 872.

⁴⁶ *Ibid.*

to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."¹ A creditor who has not proved his claim, and whose time to prove the same has expired, may apply for the revocation of a discharge;² but, it has been held, that the assignee of a claim affected by the discharge of a subsequent creditor, cannot.³ It seems that, in a proper case, the bankrupt himself may move for the vacation of the decree discharging him;⁴ but leave was denied him when he applied for the purpose of amending his schedules, so as to include an omitted creditor, after the expiration of the time for proving the latter's claim, and without notice to such creditor.⁵ It has been said that the court may, of its own motion, vacate the discharge within the statutory time.⁶ It has been held that the trustee of the bankrupt cannot make a motion to reopen⁷ the estate.⁷ Where, through mistake, certain debts had been omitted from the schedules, a motion was granted when made by the bankrupts to set aside the discharge and to permit them to amend their schedules by including both the creditors' claim and their counterclaim.⁸ An order of discharge may be amended at any time before the proceedings are closed, so as to discharge the bankrupt from his debts as a member of a firm, as well as from his individual liabilities. The petition for the revocation of a discharge must state specifically that the discharge was obtained through the fraud of the bankrupt.⁹ It has been held that a discharge may be revoked because of the subsequent discovery of articles fraudulently concealed by the bankrupt;¹⁰ because of the withdrawal without notice, for a consideration, of objections filed by certain creditors, upon whose opposition the others relied;¹¹ and because he intentionally gave an erroneous address of a creditor,

§ 658. 130 St. at L. 544, 550,
§ 15.

² *Re Binberg*, 121 Fed. 942.

³ *Re Chandler*, C. C. A., 138 Fed. 637. See *supra*, § 653, 655.

⁴ *Re Hawk*, C. C. A., 114 Fed. 916; *Re Shaffer*, 4 Am. B. R. 728; *Remington on Bankruptcy*, § 2812.

⁵ *Re Hawk*, C. C. A., 114 Fed. 916.

⁶ *Re Binberg*, 121 Fed. 942.

⁷ *Re Paine*, 127 Fed. 246.

⁸ *Re McKee*, 165 Fed. 269.

⁹ *Re Diamond*, C. C. A., 149 Fed. 407.

¹⁰ *Re Hoover*, 105 Fed. 354. It must set forth grounds which, if sustained, would result in the denial of the discharge. *Re Wright*, 177 Fed. 578; *Re Downing*, 109 Fed. 329.

¹¹ *Re Meyers*, 100 Fed. 775.

in order to obtain the discharge without the latter's knowledge.¹² The petition should show that knowledge of the fraud was first obtained by the applicant since the discharge was granted;¹³ but where such an allegation appeared in an affidavit annexed to the creditor's petition, an amendment was allowed.¹⁴ It has been held that the petition should also make a substantial showing of facts to prove the absence of undue laches.¹⁵ It has been held that notice of the fraud to the trustee, previous to the discharge is notice to all the creditors.¹⁶ "It must further appear in order to justify the court in vacating the order of discharge 'that the actual facts did not warrant the discharge.'" ¹⁷ The hearing upon an application for the revocation of a discharge must be before the judge; but he may refer the same to the referee as special master, to report the evidence and facts with his opinion.¹⁸ Where no proceedings were taken before the referee after his request for a deposit to cover the costs of the hearing, the petition was dismissed by the costs of the petitioners for want of prosecution.¹⁹

§ 659. Costs and fees. The Courts of Bankruptcy have power "to tax costs wherever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties and estates in proceedings in bankruptcy."¹ When a petition in involuntary bankruptcy is "dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed

¹² *Re Dietz*, 97 Fed. 563.

¹³ *Re Roosa*, 119 Fed. 542.

¹⁴ *Re Hoover*, 105 Fed. 354; *Re Oleson*, 110 Fed. 796; *Re Upson*, 124 Fed. 980.

¹⁵ *Re Oliver*, 133 Fed. 832. Leave was refused to amend the petition by adding a new objection after the expiration of a year from the discharge. *Re Wright*, 177 Fed. 578.

¹⁶ *Re Oleson*, 110 Fed. 796. But see *supra*, § 653. A delay of ten months, *Re Mauzy*, 163 Fed. 900; and of eight months was held to

constitute such laches. *Re Downing*, 199 Fed. 329.

¹⁷ *Re Hansen*, 107 Fed. 252.

¹⁸ *Re Oliver*, 133 Fed. 832.

¹⁹ *Re Meyers*, 100 Fed. 775.

²⁰ *Re Lasch*, 142 Fed. 277.

§ 659. 130 St. at L. 544, 546, § 2; *Re Carolina Cooperage Co.*, 96 Fed. 604. Where the bankrupt is penniless, the court will not tax the costs of a successful opposition to his discharge against him. *Re Kyte*, 189 Fed. 531.

and allowed by the court, and paid by the obligors in such bond." ² When the respondent has not been deprived of the possession of his property, no counsel fees are allowed ³ where no seizure has been made and no bond given no costs, counsel fees or damages will be awarded upon the dissolution for want of jurisdiction of an injunction against the payment of money. ⁴ "In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner." ⁵ No costs were awarded to the alleged bankrupts when petitions in an involuntary bankruptcy were dismissed for want of jurisdiction, in the case of an individual because he had not resided a sufficient length of time in the district, ⁶ and in the case of a corporation because it was not a member of the class subject to bankruptcy. ⁷ It has been held that the bankrupt must file his bill of costs with the clerk and give to the petitioning creditors, notice of taxation, together with the amount of his bill. ⁸ Costs of summary applications cannot be taxed personally against parties who do not appear. ⁹ It has been

² 30 St. at L. 544, 547, § 3. In such a case it has been held: that the costs and expenses of the receivership should be charged against the petitioners, *Beach v. Macon Grocery Co.*, C. C. A., 125 Fed. 513; *Re Lacov*, C. C. A., 142 Fed. 960; *supra*, § 634; but that where the bankruptcy proceedings are not dismissed, the petitioning creditor should not be obliged to pay to the trustee a deficit caused by unsuccessful opposition, instigated by such creditor, against the claims of a mortgagee, *Re Metals Extraction & Refining Co.*, C. C. A., 195 Fed. 226. It has been said that there is no liability upon the bond except for the usual costs, unless the petitioners acted without probable cause and maliciously, and in such a case the

remedy is a suit in the nature of a suit for malicious prosecution. *Re Mochs & Rechnitzer*, 174 Fed. 165; In *Re Wentworth Lunch Co.*, 25 Am. B. R. 612; decided by Stanley W. Dexter, Special Master, where the receiver had by his services largely increased the estate, the expenses of the administration, including reasonable allowance to the receiver and his counsel, were charged to the fund.

³ *Re Morris*, 115 Fed. 591.

⁴ *Re Williams*, 120 Fed. 34.

⁵ General Order XXXIV.

⁶ *Re Williams*, 120 Fed. 34.

⁷ *Re Philadelphia & Lewes Transp. Co.*, 127 Fed. 896.

⁸ *Re Haeseler-Kohlhoff Carbon Co.*, 135 Fed. 867.

⁹ *Havens & Geddes Co. v. Pierck*,

held that the costs of contesting claims before the election of a trustee, which were incurred in an attempt to control the election, are not chargeable to the estate.¹⁰ The expense of determining the title to, and of protecting the property subject to a lien may, in a proper case, be charged against the proceeds of the same.¹¹ The cases in which costs can be charged against property, which is exempt, have been previously considered.¹² A creditor cannot be allowed his counsel fees upon the re-examination of a claim, which is again allowed; but when he resided at a distance, his reasonable traveling and hotel expenses were allowed him.¹³ "The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."¹⁴

"In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to

C. C. A., 120 Fed. 244. Where a reclamation proceeding was dismissed, the trustee was allowed to tax, as part of the costs, the charges and expenses of the preservation of the property during its pendency. *Re Schocket*, 177 Fed. 583.

¹⁰ *Re Mercantile Co.*, 95 Fed. 123; *Re Worth*, 130 Fed. 927; *Re Fletcher*, 10 Am. B. R. 398, by Referee Miller.

¹¹ *Re Goldville Mfg. Co.*, 123 Fed. 579. See *Re Gaskill*, 130 Fed. 235; *Re Erie Lumber Co.*, 150 Fed. 817, 825.

¹² *Supra*, § 650.

¹³ *Re George Watkinson & Co.*,

130 Fed. 218. Claimants to property in the possession of the trustee, when successful, are not allowed their costs and expenses, unless it appears that the defense made by the trustee was capitious, or unwarranted. *Re Stewart*, 178 Fed. 463.

¹⁴ 30 St. at L. 514, 562, § 62. It has been held that the cost and expenses of the administration are entitled to priority of payment over taxes due the State. *State of New Jersey v. Lovell*, C. C. A., Third Ct., 179 Fed. 321. *Contra*, as to taxes due the United States, *Re Weiss*, S. D. N. Y., 159 Fed. 295. See § 649, *supra*.

do so, may order his petition to be dismissed.”¹⁵ “Before incurring any expense in publishing or mailing of notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.”¹⁶ The filing fees are not repaid the bankrupt.¹⁷ The affidavit by the petitioner of his inability to pay the filing fees is not conclusive.¹⁸ He may be obliged to pay them as a condition to the filing of a petition of voluntary bankruptcy, although all of his property is exempt from execution.¹⁹ The costs of administration include the fees and mileage of witnesses,²⁰ but not additional compensation to expert witnesses.²¹ They also include “one reasonable attorney’s fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow;”²² and “the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.”²³ The referee may, “upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of

¹⁵ General Order XXXV.

¹⁶ General Order X.

¹⁷ *Re Matthews*, 97 Fed. 772.

¹⁸ *Re Collier*, 93 Fed. 191. See *supra*, § 413. It has been held that a trustee, who has no funds in his hands, cannot be obliged to advance money to pay the disbursements of the bankrupt in opposing an application to compel him to turn over property, although the bankrupt testifies that he himself is without means. *Re Goldstein*, 155 Fed. 695.

¹⁹ *Re Collier*, 93 Fed. 191; *Re Bean*, 100 Fed. 262; *Re Hines*, 117 Fed. 790; *Re Mason*, 181 Fed. 899.

²⁰ 30 St. at L. 544, 563, § 64; *Re Carolina Cooperage Co.*, 96 Fed. 604; *supra*, § 419.

²¹ *Re Carolina Cooperage Co.*, 96 Fed. 604.

²² 30 St. at L. 544, 563, § 64; *infra*, § 665.

²³ 32 St. at L. 797.

stenographers at the expense of the estates for a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.”²⁴ In the absence of such an order, stenographers’ fees cannot be taxed, except upon a written stipulation between the attorneys.²⁵

§ 660. Clerk’s fees. “Clerks shall respectively (1) account for, as for other fees received by them, the clerk’s fee paid in each case and such other fees as may be received for certified copies of record which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they had been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.”¹ “Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except where a fee is not required from a voluntary bankrupt.”² Where the members of a partnership seek a discharge of themselves and of the partnership, the clerk is entitled to separate fees for each partner and for the partnership, as if they were distinct proceedings.³ “The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other

²⁴ *Re Todd*, 109 Fed. 265; *Re Mammoth Pine Lumber Co.*, 116 Fed. 731. Where the stenographer furnished three copies, his compensation was reduced to forty cents a page, his charge of one dollar a page being held to be unreasonable. *Re Elliott El. Co.*, 196 Fed. 400.

²⁵ 30 St. at L. 544, § 38a, subd. 5; *supra*, § 420.

§ 660. 130 St. at L. 544, 558, 559, § 51. See § 586, *supra*.

² 30 St. at L. 544, 559, § 52.

³ *Re Farley*, 115 Fed. 359.

officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers."⁴ It has been held: that a clerk can charge his expenses for postage, stationery and clerical work, in sending out notices to creditors of a petition for a discharge; but that a fee of twenty-five cents for each notice is improper.⁵

§ 661. Marshal's fees. "Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals."¹ Where the rules require that a paper be served by the marshal, he may charge a reasonable fee for such services, although no fee for the same is specified in the Revised Statutes.² A fee of two dollars for the service by him of a petition and two dollars for the service by him of an order to show cause, with the accompanying affidavits, was held to be proper, although all the papers were pinned together under one cover.³ The marshal is also entitled to reasonable compensation, in addition to his disbursements, when he seized property of the bankrupt under the order of the Court of Bankruptcy.⁴ In one case, twenty dollars for seventeen days was held to be reasonable compensation.⁵ In another, deputy marshals were allowed two dollars and a half a day, besides their mileage and other necessary disbursements, exclusive of the cost of their board and lodging, and including one dollar a day for a watchman, who was also employed.⁶ When marshals are appointed to take charge of the property of bankrupts after the filing of the peti-

¹ General Order XXXV.

² *Re Dunn Hardware & Furniture Co.*, 134 Fed. 997.

§ 661. 130 St. at L. 544, 559, § 52; *supra*, § 418; *Re Woodard*, 95 Fed. 955; *Re Scott*, 99 Fed. 404; *Re Adams Sartorial Art Co.*, 101 Fed. 215; *Re Damon*, 104 Fed. 775.

³ *Re Damon*, 104 Fed. 775.

⁴ *Re Damon*, 104 Fed. 775, 777.

⁵ *Re Adams Sartorial Art Co.*, 101 Fed. 215. See *Re Scott*, 99 Fed. 404.

⁶ *Re Adams Sartorial Art Co.*, 101 Fed. 215.

⁷ *Re Scott*, 99 Fed. 404.

tion until the dismissal thereof or the qualification of the trustee, they are entitled to the same fees as receivers in like cases.⁷ When the business of bankrupts is conducted by a marshal in accordance with the orders of the court under the bankruptcy law he may be allowed the same compensation that may be allowed to trustees and receivers in like cases.⁸

§ 662. Referee's fees. "(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition. (b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees. (c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commission shall be paid to the referee."¹ "Neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act."² "The compensation of referees, prescribed by the act, shall be in full com-

⁷ 30 St. at L. 544, 558, § 48d, *infra*, § 664.

⁸ *Ibid.*, § 48c.

§ 662. 130 St. at L. 544, 556, § 40; 32 St. at L. 797. See *Re Ft. Wayne, etc. Corp.*, 94 Fed. 109; *Re Carolina Cooperage Co.*, 96 Fed. 950; *Re Barber*, 97 Fed. 547; *Re Tebo*, 101 Fed. 419; *Re Troth*, 104 Fed. 291. It has been held that the court has no power to allow a trustee any additional compensation for extraordinary services. *Re Meadows*, 199 Fed. 304. Where the ref-

eree continued the bankrupt's business in order to complete Government contracts, it was held that they were not entitled to any additional compensation by a percentage calculated upon the amount which they raised and expended for that purpose, or otherwise. *Bray v. Johnson*, C. C. A., 166 Fed. 67. See, also, *Re Meadows*, 199 Fed. 304.

² 30 St. at L. 544, § 72; 32 St. at L. 797; *Re Mammoth Pine Lumber Co.*, 116 Fed. 731. A practice prevails in the Second Circuit of

compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge."³ It has been held that a referee cannot receive an extra allowance, even by the consent of all the parties in interest.⁴ It has been held that, when a referee is appointed special master, he may be allowed additional compensation.⁵ It has been held that the referee is allowed his commissions upon the payments to creditors with a priority,⁶ including secured creditors;⁷ but, that he is not entitled to a commission upon that part of the proceeds of property sold by him, which is applied to satisfy a lien.⁸ Where a lien is foreclosed in a State court, the commissions of the referee are to be computed only on the amount received by the trustee and disbursed to creditors, not upon the whole proceeds of the sale.⁹ It is usual to allow the referee compensation for office rent, clerk hire and incidental expenses, and in order to provide for this, to authorize a charge by him of ten cents for each notice served.¹⁰ By special order, the referee

referring to the referee special issues in a bankruptcy proceeding as a special master and allowing him compensation for the same. See *Re Tracy*, C. C. A., 179 Fed. 366; § 638; *supra*. In the Sixth Circuit it has been held, that this cannot be done. *Re Sweeney*, C. C. A., 168 Fed. 612.

³ General Order XXXV.

⁴ *Dressel v. North State Lumber Co.*, 119 Fed. 531.

⁵ *Re Grossman*, 111 Fed. 507; *Fel-lows v. Freudenthal*, C. C. A., 102 Fed. 731, 42 C. C. A., 607. *Contra*, *Re Troth*, 104 Fed. 291; *Re Wilcox*, 156 Fed. 685. See *Re Goldville Mfg. Co.*, 123 Fed. 579, 587.

⁶ *Re Alison Lumber Co.*, 137 Fed. 643; *Re Cramond*, 145 Fed. 966, 17 Am. B. R. 22, 30; *Re Coffin*, 2 Am. B. R. 344, by Referee Dillard; *Re*

Gerson, 2 Am. B. R. 352, by Referee Mason.

⁷ *Re Cramond*, 145 Fed. 966, 17 Am. B. R. 22; *Re Erie Lumber Co.*, 150 Fed. 817.

⁸ *Re Mammoth Pine Lumber Co.*, 116 Fed. 731, 743; *Re Goldville Mfg. Co.*, 123 Fed. 579, 587; *Re Anders Push Button Telephone Co.*, 136 Fed. 995. *Contra*, *Re Sanford Furniture Mfg. Co.*, 126 Fed. 388; *Re Barber*, 97 Fed. 547.

⁹ *Re Iowa Falls Mfg. Co.*, 140 Fed. 527.

¹⁰ *Remington on Bankruptcy*, § 3032. Citing *Re Dunn Hardware & Furniture Co.*, 134 Fed. 997. For an allowance for stationery, see *Re Dixon*, 114 Fed. 675. As regards the salary of his clerk, see *Re Tebo*, 101 Fed. 419.

may be allowed his traveling and hotel expenses when necessary for the discharge of his duties.¹¹ The court will review an allowance by the referee of fees to himself.¹²

§ 663. Trustee's fees. "(a) Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them as may be allowed by the courts, not to exceed six per centum on the first \$500 or less; four per centum on moneys in excess of \$500 and less than \$1,500, two per centum on moneys in excess of \$1,500 and less than \$10,000, and one per centum on moneys in excess of \$10,000, and in case of the confirmation of a composition after the trustee has qualified the court may allow him as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition. (b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to. (c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause."¹ "(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in

¹¹ *Re Daniels*, 130 Fed. 597.

¹² *Re Allert*, 173 Fed. 691.

§ 663. 130 St. at L. 544, 557, 558, § 48; 32 St. at L. 797, 36 St. at L. 838. Where a trustee, who had secured the appointment by so-

liciting claims, was removed for cause, he was not allowed his personal expenses or commissions. *Re Leverton*, 155 Fed. 931. *Of*. § 640, *supra*.

excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars; *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition; *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.”² Courts of Bankruptcy are allowed to “authorize the business of bankrupts to be conducted for limited periods by receivers, and the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services.”³ “Neither the referee nor the trustees shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act.”⁴ “The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.”⁵ It has been held that a trustee is not entitled to commissions nor attorneys’ fees out of the proceeds of property sold by him which is owned by and returned to an adverse claimant.⁶ Before the amendment of 1910, previously quoted, which allows the trustee commissions on moneys turned over to lien holders, the preponderance of authority held that, where the trustee sold property subject to a lien, his commissions should be estimated upon the balance after the lienor had been paid principal and interest and not upon the whole purchase price.⁷ Where a creditor

² 30 St. at L. 544, § 48e, as amended by 36 St. at L. 838.

³ 30 St. at L. 544, § 2, subdivision 5; 32 St. at L. 797.

⁴ 30 St. at L. 544, § 72; 32 St. at L. 797; *Re Screws*, 147 Fed. 989.

⁵ General Order, XXXV.

⁶ *Gillespie v. J. C. Piles & Co.*, 8 C. A., 178 Fed. 886.

⁷ *Re Meadows*, 109 Fed. 304; *supra*, § 642. *Contra*, *Re Utt*, 105 Fed. 754, 45 C. C. A. 32; *Re Mammoth Pine Lumber Co.*, 116 Fed. 731; *Re Sanford Furniture Mfg.*

buys in the property and applies the dividend to the payment of the purchase price, the amount of such dividend is included in the estimation.⁸ It has been held that a trustee cannot be allowed, in addition to his usual commissions, duplicate commissions upon the amounts disbursed by him in conducting the business of the bankrupt, pursuant to the order of the court.⁹ A trustee, who is an attorney at law, cannot be allowed compensation for legal services rendered by him to the estate.¹⁰ A trustee was allowed his counsel fees out of the fund involved in litigation, which he instituted to reduce the number of claimants to a special fund belonging primarily to mortgage creditors.¹¹ It has been said that a trustee should not be allowed reimbursement for a premium paid to a surety company for furnishing his official bond;¹² but such disbursements are frequently allowed and seem not to be improper. The trustee is allowed the fees of an auctioneer employed by him for a sale.

§ 664. Receiver's fees. "(d) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in ex-

Co., 126 Fed. 888. See *Re Anders Push Button Telephone Co.*, 136 Fed. 995; *Re Zehner*, 193 Fed. 787. It was held that the expense of the care of property subject to a lien, unless incurred with the consent of the lienor, could not be allowed to the trustee. *Re Vulcan Foundry & Mach. Co.*, C. C. A., 180 Fed. 671. But see *Re Stewart*, 193 Fed. 791.

⁸ *Re Morse Iron Works & Dry Dock Co.*, 154 Fed. 214.

⁹ *Re Cambridge Lumber Co.*, 136 Fed. 983; *Re Kirkpatrick*, C. C. A., 148 Fed. 811. *Contra, Re Pequod Brewing Co.*, N. Y. L. J. April 19, 1907, per Dexter, referee. *Cf. Remington on Bankruptcy*, § 2116.

¹⁰ *Re George Halbert Co.*, C. C. A., 134 Fed. 236.

¹¹ *Re Waterloo Organ Co.*, C. C. A., 154 Fed. 657.

¹² *Re Hoyt*, 119 Fed. 987; *Remington on Bankruptcy*, § 2038.

cess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.”¹

The bankruptcy law further provides that Courts of Bankruptcy may “authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services.”² Where the business is so conducted by receivers, they may be allowed the same compensation that may be given to trustees in similar cases.³ In all other matters it seems that the court has full discretion as to the amount of fees that shall be given to a receiver.⁴ Where a receiver turns over property

§ 664. 130 St. at L. 544, § 48d, as amended by 36 St. at L. 838. For the former rule as to notice, see *Re Martin Borgeson Co.*, 151 Fed. 780.

² 30 St. at L. 544, § 2, subd. 5; 32 St. at L. 797. See *Re George W. Shiebler & Co.*, C. C. A., 174 Fed. 336; *Re Charles Knosher & Co.*, C. C. A., 197 Fed. 136.

³ 30 St. at L. 544, 558, § 48e, quoted *supra*, § 663. As to what is conducting business, see *Re Charles Knosher & Co.*, C. C. A., 197 Fed. 136.

⁴ *Re Scott*, 99 Fed. 404; *Re Sully*,

142 Fed. 895; *Re Kirkpatrick*, C. C. A., 148 Fed. 811; *Re Martin Borgeson Co.*, 151 Fed. 780. *Contra*, *Re Richards*, 127 Fed. 772; *Re Cambridge Lumber Co.*, 136 Fed. 983. The court appointing an ancillary receiver has power to fix his fees and provide for their payment and that of his expenses, out of any funds in its hands belonging to the estate. *Fidelity Tr. Co. v. Gaskell*, C. C. A., 195 Fed. 805, 874. Where the receiver has been negligent, he may be denied any commissions. *Re Schoenfeld*, C. C. A., 183 Fed.

in bulk without having converted it to money, it seems that his commissions may be allowed him upon the value of the same.⁵ The receiver's fees are not to be deducted from the compensation of the trustee.⁶ A receiver is not entitled to compensation for services rendered by the attorney for the petitioners in instituting the bankruptcy proceedings and obtaining his appointment.⁷ Where the receiver and his counsel had acted according to their best judgment and with some justification, it was held that their expenses should be allowed, although the receivership caused more than was justified by the necessity of the case.⁸

§ 665. Attorney's fees. The bankruptcy law, after providing for the payment of taxes, directs that the order of payments of debts that have priority shall be: "(1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein described, and to the bankrupt in voluntary cases, as the court may allow."¹ It further provides that the costs of administration shall include "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow;" "the

219. It has been said that receivers should, in no case, receive more compensation than the trustee. *Remington on Bankruptcy*, § 2119; see *Dunlap Hardware Co. v. Huddleston*, C. C. A., 167 Fed. 433; see *Re Leonard*, 177 Fed. 503.

⁵ *Re Cambridge Lumber Co.*, 136 Fed. 983.

⁶ *Re Richards*, 127 Fed. 772. Where a receiver is afterwards appointed trustee, his compensation

for services in both capacities may be adjusted at the same time. *Re James Carothers & Co.*, 182 Fed. 501.

⁷ *Re Oppenheimer*, 146 Fed. 140.

⁸ *Re Krause*, 155 Fed. 702.

⁹ For the former rule as to notice, see *Re Martin Borgeson Co.*, 151 Fed. 780.

§ 665. 130 St. at L. 544, 563, § 64. See *supra*, § 487.

filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery."² It has been held that, where there is a deficit, the attorney's fees take precedence over a lienor upon the fund.³ The amounts allowed attorneys are paid directly to them, and there is no necessity for the payment of an attorney's bill by a trustee or receiver before the allowance thereof to the attorney.⁴ It has been held that notice to creditors of applications for the allowance of an attorney's fee is not necessary, unless a rule of court otherwise directs.⁵ An attorney cannot be allowed pay for clerical work which he has performed.⁶ The attorney for the bankrupt may charge for consultations concerning the filing of a petition of voluntary bankruptcy and the preparation of the schedules,⁷ and also for an application for the appointment of a receiver or injunction to protect the estate before a trustee is elected.⁸ The amounts paid to the bankrupt's attorney

² 30 St. at L. 544, 563, § 64; 32 St. at L. 797.

³ *Re Erie Lumber Co.*, 150 Fed. 817. It has been held otherwise as regards a successful adverse claimant to the property or the proceeds thereof. *Gillespie v. J. C. Piles & Co.*, C. C. A., 178 Fed. 886.

⁴ *Re McKenna*, 137 Fed. 611. But see *Re Young*, 142 Fed. 891, 893.

⁵ *Re Stotts*, 93 Fed. 438; *Re Felson*, 139 Fed. 275. *Contra*, *Re Young*, 142 Fed. 891, 893. S. D. N. Y. Rule 22, "All applications before referees for allowances to receivers, appraisers, trustees or attorneys shall be heard on notice sent by mail to the creditors by the referee." It is the better practice to have the claims for attorneys' fees filed with the referee and notice thereof given to the trustee and to all parties who have appeared by attorneys in the proceedings. *Re Huddleston*, 167 Fed. 428; Fed. Prac. Vol. II.—143.

Re Stoddard Bros. Lumber Co., 169 Fed. 190.

⁶ *Re Connell & Sons*, 120 Fed. 846. See *Re Payne*, 151 Fed. 1018.

⁷ *Re Kross*, 96 Fed. 816. For attending with the bankrupt before the referee. *Re Duran Mercantile Co.*, 199 Fed. 961.

⁸ *Re Burrus*, 97 Fed. 926. He is not entitled to compensation for services in attempting to sustain a claim to an exemption, *Re O'Hara*, 166 Fed. 384; nor, upon a contested application, to confirm a composition, *Re Fogarty*, 187 Fed. 773; *Re Stolp*, 199 Fed. 488; nor for his resistance to involuntary bankruptcy proceedings, *Pratt v. Bothe*, C. C. A., 130 Fed. 670; *Ingraham v. National Salt Co.*, C. C. A., 130 Fed. 676; nor for unsuccessful resistance to proceedings against the bankrupt for the fraudulent concealment of property, *Re Felson*, 139 Fed. 275. It has been held that he is not

vary in different districts and are also dependent upon the nature of the case and the amount involved.⁹ The attorney for the petitioners in involuntary proceedings is entitled to compensation for all services performed by him for the benefit of the estate before the election of the trustee.¹⁰ The amount of

entitled to compensation for services in procuring the bankrupt's discharge. *Re Brundin*, 112 Fed. 306; *Re Gillardon*, 187 Fed. 289; *Re Duran Mercantile Co.*, 199 Fed. 961. *Contra, Re Christianson*, 175 Fed. 867, allowing \$20 for such a service. Where, after the discharge of the bankrupt, his attorney, after considerable labor, discovered additional assets, he was allowed compensation for the same. *Re Irwin*, 177 Fed. 284. Where an attorney immediately before the bankruptcy proceedings obtained a reduction of \$350 in taxes, which were a lien upon the estate, he was allowed \$75 for his services, which included a journey of fifty miles to examine the records, thus occupying two days, and subsequent consultations with the district attorney. He was also allowed \$25 for obtaining a stay order against the prosecution of an attachment suit pending at the time of the filing of the petition. *Re Duran Mercantile Co.*, 199 Fed. 961.

⁹ In the Southern District of New York, where the assets are small and the schedules simple, it has been held that \$30 will be a reasonable fee to the attorney for the bankrupt for the preparation of the petition and schedules, and \$20 for procuring the discharge. *Re Kross*, 96 Fed. 816. This same rule seems to prevail in the districts of North Carolina. *Re Carolina Coöperage Co.*, 96 Fed. 950; *Re Smith*, 108 Fed. 39; *Re Morris*, 125 Fed. 841, and in

Hawaii; *Re Stratemeyer*, 14 Am. B. R. 120. In North Dakota, \$35. *Re Christianson*, 175 Fed. 867. In a case in North Carolina, only \$20 was allowed. *Re Talton*, 137 Fed. 178. See *Re Covington*, 132 Fed. 884, where there was an allowance of \$50. In New Mexico, where the assets amounted to \$4,500, \$50 were allowed for the preparation of the schedules, the court saying that, were the assets less, \$25 would be sufficient. \$25 was allowed for attending the bankrupt on several days before the referee, the court being of the opinion that no more than one day's attendance was necessary, since there was no attack upon the bankrupt's good faith. *Re Duran Mercantile Co.*, 199 Fed. 961.

¹⁰ *Re Curtis*, C. C. A., 100 Fed. 784. Where there are several attorneys for petitioning creditors, the amount will not be increased, but there will be a division instead of a multiplication thereof. *Re Coney Island Lumber Co.*, 199 Fed. 197. Where there was a consolidation of two proceedings, but one attorney's fee was allowed, which was equitably divided among the different attorneys who had appeared. *Re McCracken & McLeod*, 129 Fed. 621. Attorneys who filed a defective petition in involuntary bankruptcy were not allowed fees after an adjudication made upon a second petition by other creditors through other attorneys. *Re Fischer*, C. C. A., 175 Fed. 531. An attorney, who files a successful demurrer to a pe-

compensation awarded varies in the different districts and is largely dependent upon the amount involved and the benefit to the estate derived from the attorney's services.¹¹ It has been intimated that it should not be as much as the compensation paid to the attorneys for the plaintiff in a creditor's bill.¹² In an extraordinary case, when they have rendered services beneficial to the estate, counsel for creditors are entitled to compensation;¹³ but not for the continuance of such services after the appointment of a trustee and his engagement of other counsel, unless the trustee abandons the litigation.¹⁴ The petitioner's attorney cannot ordinarily be paid for his services upon an examination of the bankrupt;¹⁵ nor for objections to claims of other creditors, which were made for the purpose of controlling the election of a trustee;¹⁶ nor for any services rendered after

tition in involuntary bankruptcy and also a second petition on behalf of other creditors, was not allowed to share in the compensation, where the first petition was amended and an adjudication made upon the same, the second being ignored. *Frank v. Dickey*, C. C. A., 139 Fed. 744.

¹¹ In the Eastern District of North Carolina, it is the rule to pay the attorney for the petitioners a fee, not exceeding \$50, for preparing the petition, superintending the filing of the same, issuing the subpoena and preparing the schedules. No further fees ordinarily paid him when there is no contest and he takes no steps to recover assets. *Re Carr*, 117 Fed. 572; *Re Talton*, 137 Fed. 178. In Missouri \$75. *Re Mercantile Co.*, 95 Fed. 123. In Virginia \$75. *Re Woodard*, 95 Fed. 955. Where the assets amounted to \$100,000, and the only contest arose out of an alleged estoppel against the petitioners, in which the decision of the District Court was affirmed upon an appeal to the Circuit Court of Ap-

peals; it was held that \$2,000 was an adequate allowance for the petitioners' attorney. *Re Curtis*, C. C. A., 100 Fed. 784. In a case where, after a long litigation, the attorneys recovered \$2,500, the petitioners' attorneys were allowed \$1,000. *Smith v. Cooper*, C. C. A., 120 Fed. 230. Where the attorneys for the petitioners collected \$2,600 by a suit in another district, in which they advanced initiatory costs, secured testimony and paid the expenses of the litigation, they were allowed \$150. *Re Evans*, 117 Fed. 574.

¹² *Re Mercantile Co.*, 95 Fed. 123. Where an unsuccessful litigation was instituted by the attorneys for the petitioners; it was held that no compensation for this should be allowed them. *Re Goldville Mfg. Co.*, 123 Fed. 579, 583.

¹³ *Re Medina Quarry Co.*, 182 Fed. 508. See *Re Gillaspie*, 190 Fed. 88; § 421, *supra*.

¹⁴ *Re Medina Quarry Co.*, 182 Fed. 508.

¹⁵ *Re Rozinsky*, 101 Fed. 229.

¹⁶ *Re Mercantile Co.*, 95 Fed. 123.

a trustee has been elected, although he has rendered valuable services in co-operation with the trustee's attorney.¹⁷ But in a case where the trustee refuses to act, and an action or appeal is prosecuted in his name, or otherwise, by the attorneys for creditors, which results in increasing the assets, the attorney's fees will usually be allowed to them.¹⁸ A judgment creditor who set aside fraudulent conveyances, within four months before the bankruptcy proceedings, was allowed a preference for his costs and expenses, although he lost his lien.¹⁹ It has been held that the petition for an allowance to the attorney for creditors should be made by the creditors themselves and not by the attorney.²⁰ The attorneys for the trustee²¹ and receiver²² are entitled to

¹⁷ *Re Felson*, 139 Fed. 275.

¹⁸ 30 St. at L. 544, 563, § 63; 32 St. at L. 797. See *Re Little River Lumber Co.*, 101 Fed. 558.

¹⁹ *Re Lesser*, 100 Fed. 433.

²⁰ *Re Young*, 142 Fed. 891, 892, 893, per Purnell, D. J.: "The statute does not authorize the payment of any fee to an attorney, but expressly says, to the petitioning creditors, to the bankrupt while performing the duties in involuntary cases and in voluntary cases, as the court may allow. The allowance evidently is intended to reimburse the petitioning creditors and the bankrupt, and not to encourage a speculative practice of the law. Throwing or forcing a citizen or a firm into bankruptcy is more serious than many attorneys who file these petitions seem to think. It frequently breaks up a happy home, and places a stigma on a good name it has required years to establish. It was never intended either should be done on speculative principles."

²¹ *Re Byerly*, 128 Fed. 637; *Re McKenna*, 137 Fed. 611; *Page v. Rogers*, C. C. A., 149 Fed. 194; *Re Huddleston*, 167 Fed. 428. For a case where the attorney for the trustee

was refused compensation, at the expense of creditors, for labor and services for an unsuccessful litigation in an attempt to increase the assets, see *Re Rozinsky*, 101 Fed. 229. Where the receiver was afterwards appointed trustee, a settlement of the fees of his counsel was determined in connection with the compensation awarded him for fees in the latter capacity. *Re James Carothers & Co.*, 182 Fed. 501. It is misconduct on the part of a receiver and his attorneys, to agree to divide the fees between themselves or with the attorney for the bankrupt, and the receiver may be removed therefor and no fees allowed to him or his attorney in consequence thereof. *Re Oshwitz*, 183 Fed. 990. For a case where \$300 out of an estate of \$900 was awarded to attorneys for the receivers, see *Re Huddleston*, 167 Fed. 428. \$1,000 was allowed an attorney in a case which resulted in the collection of \$2,500. *Smith v. Cooper*, C. C. A., 120 Fed. 230, 56 C. C. A., 578, reversing the court below. See *Re Huddleston*, 167 Fed. 428, 431. Where fire insurance was due partly to a trustee in bankruptcy and partly to lienholders and the lienholders consented to its collec-

compensation out of the estate for their professional services; but, it has been held that the attorney for the receiver is not entitled to compensation for services in instituting the bankruptcy proceedings and obtaining the receivership.²³ The attorney for the trustee is entitled to reimburse for his services and expenses in investigating the claims of creditors and resisting those which the trustee deems to be improper.²⁴

§ 666. Review by Circuit Courts of Appeals. The Circuit Court of Appeals and the Supreme Courts of the Territories in vacation in chambers as well as during their respective terms, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the "Courts of Bankruptcy from which they have appellate jurisdiction in other cases."¹ "Appeals, as in equity cases, may be taken in bankruptcy proceedings from the Courts of Bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;² (2) from a judgment granting or denying a discharge;³ and (3) from a judgment allowing or rejecting a debt

tion by the trustee, the attorney's fee for the collection was charged against the proportioned share of the lienholders. *Re Holmes Lumber Co.*, 189 Fed. 178. Where the proceeding are dismissed for want of jurisdiction, the attorney for the trustee was only allowed his actual disbursements and compensation for services rendered in the necessary preservation of the estate. *Re Eagle Steam Laundry Co.*, 184 Fed. 949.

²² *Re Oppenheimer*, 146 Fed. 140; *Re Erie Lumber Co.*, 150 Fed. 817; *Re Martin Borgeson Co.*, 151 Fed. 780; *Re Krause*, 155 Fed. 702.

²³ *Re Oppenheimer*, 146 Fed. 140.

²⁴ *Re Lewensohn*, C. C. A., 121 Fed. 538.

¹ § 666. 130 St. at L. 553, § 24.

² It has been held that orders refusing to vacate an adjudication, *Brady v. Bernard & Kittinger*, C.

C. A., 170 Fed. 576, and adjudging an individual to be a member of a bankrupt partnership, *Francis v. McNeal*, C. C. A., 170 Fed. 445, are not appealable. A judgment adjudging, or refusing to adjudge, the defendant a bankrupt when there was no jury trial is appealable, although only questions of law are involved. *C. C. Taft Co. v. Century Sav. Bank*, C. C. A., 141 Fed. 369; *Cook Inlet Coal Fields Co. v. Caldwell*, C. C. A., 147 Fed. 475.

³ It has been held that orders adopting "as the opinion, conclusions and judgment of the court," the report of a master to whom a contested application for a discharge had been referred, *Ragan, Malone & Co. v. Cotton & Preston*, C. C. A., 195 Fed. 69; refusing to confirm a composition, *Re McVoy Hardware Co.*, C. C. A., 200 Fed. 949; denying

ing motions to dismiss an application for a discharge, *Lindeke v. Converse*, C. C. A., 198 Fed. 618; and to dismiss an application for the revocation of a discharge, *Thompson v. Mauzy*, C. C. A., 174 Fed. 611; are not appealable. An order dismissing a petition for a discharge is appealable, *Re Kuffler*, C. C. A., 127 Fed. 125, although the dismissal is for want of prosecution. *Re Kuffler*, C. C. A., 127 Fed. 125. A judgment confirming a composition is, in effect, a grant of a discharge and is consequently appealable. *Re Friend*, C. C. A., 134 Fed. 778. See *Mulford v. Fourth Street Nat. Bank*, C. C. A., 157 Fed. 897.

⁴ *Postlethwaite v. Hicks*, C. C. A., 165 Fed. 897; *Re Irwin*, C. C. A., 174 Fed. 642. It has been held that orders are appealable which direct the payment of claims that are allowed as liens, *Bell v. Arledge*, C. C. A., 192 Fed. 837, and which require a bankrupt to account for a payment received in contemplation of bankruptcy, *Re Raphael*, C. C. A., 192 Fed. 874; but that orders are not appealable which disallow a claim "for the present, especially as to voting, without prejudice to the claimant's right to present the claim hereafter;" *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 301, 54 L. ed. 1047, 1048; or which allow a claim as a general debt, but, disallow a claim of priority to an appeal thereof, *Gaudette v. Graham*, C. C. A., 164 Fed. 311; See *Re Cale*, C. C. A., 191 Fed. 31; or which reject charges against a receiver in bankruptcy for expenses incurred under his orders, *O'Brien v. Ely*, C. C. A., 195 Fed. 64; or which disapprove the action of a receiver in surrendering property to a creditor, *Re Strobel*, C. C. A., 160 Fed. 916, or direct such creditor to pay the value of the

same to the trustee. *Ibid.* Appeals from orders in interventions to establish a lien are not governed by this section of the statute. *Knapp v. Milwaukee Tr. Co.*, 216 U. S. 545. It has been said: that the words "debt or claim," an order or judgment, allowing which is appealable, refer only to claims that are presented for proof against estates in bankruptcy. *Holden v. Stratton*, 191 U. S. 115, 118; 48 L. ed. 116, 118. It has been held that the following note is appealable: An order granting or disallowing claims for fees to counsel on behalf of creditors, *Ohio Valley Bank Co. v. Switzer*, C. C. A., 153 Fed. 362. But see *Pratt v. Bothe*, C. C. A., 130 Fed. 870; or to trustees, *Davidson v. Friedman*, C. C. A., 140 Fed. 853; approved in *Remington on Bankruptcy*, § 2907; *contra*, *Gray v. Grand Forks Mercantile Co.*, C. C. A., 138 Fed. 344, 347; and an order denying an application to require a trustee to account to creditors for the rental value of property, of which he permitted the bankrupt to remain in possession; *Bank of Clinton v. Kondert*, C. C. A., 159 Fed. 703. A decree or order upon a petition asserting a lien upon a fund in the hands of the trustees is not the subject of a separate appeal, *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179; *Euclid Nat. Bank v. Union Trust & Deposit Co.*, C. C. A., 149 Fed. 975, although it might be reviewed as incident to an appeal on the proof of the debt which the lienor claimed was due him; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179; *Cunningham v. German Ins. Bank*, C. C. A., 101 Fed. 977. It has been said that it is not appealable if the lienor is not a creditor of the bankrupt. *Re Columbia Real Estate Co.*, C. C. A., 112 Fed. 643.

or claim ⁴ of five hundred dollars ^{4a} or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be." ⁵ "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior Courts of Bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." ⁶

An order disallowing a claim above the jurisdictional amount for a failure to surrender a preference is appealable. *Livingstone v. Heineman*, C. C. A., 120 Fed. 786; *Dickson v. Wyman*, 111 Fed. 726, 49 C. C. A. 574. A claim to a right of priority of payment, when the debt for which priority is claimed is disputed, may also be reviewed upon an appeal from the proof; *Re Cosmopolitan Power Co.*, C. C. A., 137 Fed. 858. But, it has been held, that where the debt is admitted, and the right to priority alone is in dispute, there can be no appeal. *Re Rouse, Hazard & Co.*, C. C. A., 91 Fed. 96; *Re Worcester County*, C. C. A., 102 Fed. 808, 814. *Contra*, *Cunningham v. German Ins. Bank*, C. C. A., 103 Fed. 932, 935; *Re Roche*, C. C. A., 101 Fed. 956; *Re Soudan Mfg. Co.*, C. C. A., 113 Fed. 804; *Re Doran*, C. C. A., 154 Fed. 467; see *Ritchie County Bank v. McFarland*, C. C. A., 183 Fed. 715. An order allowing a claim as a general debt, but disallowing a claim to a lien or priority for a part thereof. *Gaudette v. Graham*, C. C. A., 164 Fed. 311. Orders disallowing claims for a failure to surrender preferences, *Livingstone v. Heineman*, C. C. A., 120 Fed. 786; *Dickson v. Wyman*, 111 Fed. 726, 49 C. C. A., 574; *Re First Nat. Bank of Louisville*, C. C. A.,

155 Fed. 100, and rejecting or allowing set offs, *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, are appealable. So, it has been held, is an order establishing the lien of a third party upon property claimed by the bankrupt as exempt, *Burow v. Grand Lodge*, C. C. A., 133 Fed. 709, but not an order granting or disallowing the claim of a bankrupt to property in the possession of the referee, which he claims is exempt. *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45.

^{4a} See *Re Irwin*, C. C. A., 174 Fed. 642. The pecuniary limit, namely five hundred dollars, to the debts or claims, judgments allowing or rejecting which are appealable, has reference to the amount that is allowed or rejected; and where a claim, which exceeds five hundred dollars, is allowed in part and rejecting which are appealable, has once nor the rejection reaches the prescribed amount, there can be no appeal. *Gray v. Grand Forks Mercantile Co.*, C. C. A., 138 Fed. 344. *Cf. Re Cosmopolitan Power Co.*, C. C. A., 137 Fed. 858; *Union Nat. Bank v. Neill*, C. C. A., 149 Fed. 720.

⁵ 30 St. at L. 553, § 25.

⁶ *Ibid.*, § 24. For appeals to the Court of Appeals of the District of

"Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."⁷ Circuit Courts of Appeals may review the decisions of the Courts of Bankruptcy in three ways: by writ of error, by appeal and by summary supervision. The words "bankruptcy proceedings" are used in the statute in contradistinction to controversies arising out of the settlement of the estates of bankrupts.⁸ By "controversies arising in bankruptcy proceedings" are meant, those independent of plenary suits, which concern the bankrupt's estate and arise by intervention, or otherwise, between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors.⁹ Independent plenary

Columbia, see D. C. Code, § 226; *supra*, § 69.

⁷ General Order XXXVI.

⁸ First Nat. Bank of Denver v. Klug, 186 U. S. 202, 46 L. ed. 1127; First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 49 L. ed. 1051.

⁹ *Re Mueller*, C. C. A., 135 Fed. 711. See *Hinds v. Moore*, C. C. A., 134 Fed. 221; *Re Friend*, C. C. A., 134 Fed. 778; *Knapp v. Milwaukee Tr. Co.*, 216 U. S. 545, an intervention to establish a lien; *Barnes v. Pampel*, C. C. A., 192 Fed. 525. But see *Re Lee*, C. C. A., 182 Fed. 579. An appeal is the proper method of reviewing a decree in a suit in equity brought by a trustee in bankruptcy in a District or Circuit Court of the United States to recover property fraudulently or preferentially transferred by the bankrupt. *Re Jacobs*, C. C. A., 99 Fed. 539; *Re Hamilton Automobile Co.*, C. C. A., 198 Fed. 856; *Kirkpatrick v. Harnesberger*, C. C. A., 199 Fed. 886; or a proceeding be-

gun by a petition, which is in effect a suit in equity, instituted to set aside a transfer in fraud of creditors, or preferences, *Doroshov v. Ott*, C. C. A., 134 Fed. 740; *McCarthy v. Coffin*, C. C. A., 150 Fed. 307; *Thomas v. Woods*, C. C. A., 173 Fed. 585; *Barnes v. Pampel*, C. C. A., 192 Fed. 525; *Re Raphael*, C. C. A., 192 Fed. 874, or to enjoin a third person from interfering with the possession by the trustee of property claimed by both parties; *Stelling v. G. W. Jones Lumber Co.*, C. C. A., 116 Fed. 261 (brought in the District Court); *Re Rusch*, C. C. A., 116 Fed. 270, a proceeding, instituted in the Court of Bankruptcy by a claimant, to enforce his lien upon property in the possession of the court; *Dodge v. Norlin*, C. C. A., 133 Fed. 363; *Re First Nat. Bank*, C. C. A., 135 Fed. 62; *Re Doran*, C. C. A., 154 Fed. 467; a proceeding, whether instituted by petition or bill in equity, begun by an adverse claimant, to recover property from the possession of the trustee; *Houghton v. Burden*,

suits have also been said to be controversies arising in bankruptcy.¹⁰ The words "proceedings in bankruptcy," cover questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate.¹¹ In controversies arising in bankruptcy proceedings, and in plenary suits by and against trustees in bankruptcy, the Circuit Courts of Appeal, take jurisdiction by appeal or by writ of error, as the case may be, in the same manner that they take juris-

228 U. S. 161; *Security Warehousing Co. v. Hand*, C. C. A., 143 Fed. 32; *Smith v. Means*, C. C. A., 148 Fed. 89; but see *Re Whitener*, C. C. A., 105 Fed. 180; *Mound Mines Co. v. Hawthorne*, C. C. A., 173 Fed. 882; *Nauman Co. v. Bradshaw*, C. C. A., 193 Fed. 350; a proceeding brought to determine the priority of liens upon lands belonging to the bankrupt; *Hendricks v. Webster*, C. C. A., 150 Fed. 927; and a proceeding to marshal the assets in the hands of a trustee, in which a dispute arose between the creditors of the copartnership and the creditors of an individual partner concerning the right to the proceeds of the sale of certain assets; *Burleigh v. Foreman*, C. C. A., 125 Fed. 217, have been held to be controversies arising in bankruptcy proceedings, the final orders or decrees in which were reviewable by appeal. It has been intimated that an order directing the removal of a proceeding in bankruptcy from one district to another can only be reviewed by appeal. *Kyle Lumber Co. v. Bush*, C. C. A., 133 Fed. 688, 693.

¹⁰ *Walter, Scott & Co. v. Wilson*, C. C. A., 115 Fed. 284; *Security Warehousing Co. v. Hand*, C. C. A.,

143 Fed. 32; *McCarty v. Coffin*, C. C. A., 150 Fed. 307. But see *Thomas v. Sugarman*, 218 U. S. 129.

¹¹ *Re Friend*, C. C. A., 134 Fed. 778, 780; *Schuler v. Hassinger*, C. C. A., 177 Fed. 119; *Re Charles Knosher & Co.*, C. C. A., 197 Fed. 136. Such are: a claim for the payment of the amount of a lien, *Matter of Loving*, 224 U. S. 183; see *Re Lee*, C. C. A., 182 Fed. 579; a petition for a summary order to direct a State receiver to deliver property to a trustee, *Hecox v. Rolleston*, C. C. A., 164 Fed. 823; an application for the revocation of a bankrupt's discharge, *Thompson v. Mauzy*, C. C. A., 174 Fed. 611; but not, it has been said, a proceeding to punish the bankrupt for a contempt of court, *Morehouse v. Pacific Hardware & Steel Co.*, C. C. A., 177 Fed. 338. An order directing a bankrupt to pay to the trustee a sum of money within a specified time, and in default thereof that he be committed to jail until he obeyed the order of the court, was reviewed upon a petition of revision, *Re Cole*, C. C. A., 144 Fed. 392, 75 C. C. A. 330; s. c., C. C. A., 163 Fed. 180, 90 C. C. A., 50; but it has been said that an order committing a party

diction of other Federal questions.¹² A writ of error is the proper method of reviewing a judgment in an action at law, brought by a trustee in bankruptcy in a District Court of the United States to recover property,¹³ and a judgment adjudging the defendant an involuntary bankrupt after a trial by jury.¹⁴ The grant of jurisdiction over appeals and petitions of review are mutually exclusive, and a case which is appealable is not reviewable by petition.¹⁵ It was previously held that, in the absence of objection, the Circuit Court of Appeals might take jurisdiction by petition of a case that was appealable.¹⁶ In controversies in bankruptcy proceedings, no appeal will lie, except from a final order or decree,¹⁷ or an interlocutory order in a plenary suit granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction,¹⁸ and probably such an order

for contempt is not; *Morehouse v. Pacific Hardware & Steel Co.*, C. C. A., 177 Fed. 337, 339.

¹² See *infra*, § 693.

¹³ *Delta Nat. Bank v. Easter-Brook*, C. C. A., 133 Fed. 521. Where the only issue upon an adjudication of involuntary bankruptcy was, whether the creditors were estopped from filing the petition, and no jury was asked for; it was held that the proper method of review was of appeal.

¹⁴ *Simonson v. Sinsheimer*, C. C. A., 100 Fed. 426; *Elliott v. Toeppner*, 187 U. S. 327, 47 L. ed. 200; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 203 U. S. 502, 51 L. ed. 292; *Duncan v. Landis*, C. C. A., 106 Fed. 839; *Lennox v. Allen-Lane Co.*, C. C. A., 167 Fed. 114. But see *Lockman v. Lang*, C. C. A., 128 Fed. 279.

¹⁵ *Matter of Loving*, 224 U. S. 183, 56 L. ed. 725; *Re Mueller*, C. C. A., 135 Fed. 711; *Re Good*, C. C. A., 99 Fed. 389; *Re Worcester County*, C. C. A., 102 Fed. 808, 811; *First Nat. Bank v. State Nat. Bank*, C. C. A., 131 Fed. 430, 433; *Re Friend*,

C. C. A., 134 Fed. 778, 781; *Re Mueller*, C. C. A., 135 Fed. 711; *Dickas v. Barnes*, C. C. A., 140 Fed. 849. See *Re Egger*, C. C. A., 102 Fed. 735; *Re Dickson*, C. C. A., 111 Fed. 726; *Union Nat. Bank v. Neill*, C. C. A., 149 Fed. 720. *Contra*, *Dodge v. Norlin*, C. C. A., 133 Fed. 363; *Re McKenzie*, C. C. A., 142 Fed. 383; *Re Holmes*, C. C. A., 142 Fed. 391; *Stevens v. Nave-McCord Mercantile Co.*, C. C. A., 150 Fed. 71.

¹⁶ *Re Endlar*, C. C. A., 192 Fed. 762.

¹⁷ *Re Columbia Real Estate Co.*, C. C. A., 112 Fed. 643; *Walter Scott & Co. v. Wilson*, C. C. A., 115 Fed. 284. See *infra*, § 695. It has been held that proper method of review was by appeal from the dismissal of a petition of intervention, filed by a lienor, who is not a creditor, to contest an adjudication in bankruptcy, *Re Columbia Real Estate Co.*, C. C. A., 112 Fed. 643, and an order overruling exceptions to a master's report and approving the same, *Walter Scott & Co. v. Wilson*, C. C. A., 115 Fed. 284.

¹⁸ *Doroshew v. Ott*, C. C. A., 134

in a plenary suit appointing a receiver of property claimed by a stranger to the bankruptcy proceedings;¹⁹ but it has been held that an order granting an injunction in proceedings in bankruptcy, such as one preventing interference with property in the custody of the court,²⁰ and, that an order enjoining the prosecution of a suit of replevin which refers the plaintiff's claim to a referee in bankruptcy,²¹ are not appealable.

It has been held that an order in a summary proceeding in bankruptcy directing a third person,²² or the bankrupt,²³ to deliver property to the trustee, or the bankrupt to sign a paper, such as the endorsement of a license,²⁴ is reviewable by petition for a supervision and not by appeal, although the jurisdiction of the court to make the order is contested. An order dismissing a petition in bankruptcy for want of jurisdiction is a judgment refusing to adjudge the defendant a bankrupt and is appealable.²⁵ It has been held that the District Court has jurisdiction to determine whether a corporation is principally engaged in manufacturing and mercantile pursuits, and for that reason subject to be declared an involuntary bankrupt; and that, consequently, an appeal from a decision thereupon lies to the Circuit Court of Appeals and not to the Supreme Court of the United States.²⁶

Orders and decrees in bankruptcy proceedings, which are not appealable, can be reviewed by a petition of review to the Circuit Court of Appeals.²⁷ It has been held that such

Fed. 740; *O'Dell v. Boyden*, C. C. A., 150 Fed. 731; *supra*, § 300.

¹⁹ See *supra*, § 325.

²⁰ *O'Dell v. Boyden*, C. C. A., 150 Fed. 731.

²¹ *Re Russell*, C. C. A., 161 Fed. 248.

²² *First Nat. Bank v. Chicago Title & Trust Co.* 198 U. S. 280, 49 L. ed. 1051. It was so held of a summary proceeding against a State receiver. *Hecox v. Rolleston*, C. C. A., 164 Fed. 823.

²³ *Fisher v. Cushman*, C. C. A., 103 Fed. 860; *Re Mertens*, C. C. A., 142 Fed. 445.

²⁴ *Fisher v. Cushman*, C. C. A., 103 Fed. 860.

²⁵ *Stevens v. Nave-McCord Mercantile Co.*, C. C. A., 150 Fed. 71. *Contra, Re New England Breeders' Club*, C. C. A., 169 Fed. 586.

²⁶ *Columbia Iron Works v. National Lead Co.*, C. C. A., 127 Fed. 99.

²⁷ It has been held that the following orders can only be revised by a petition of review: a summary order requiring an adverse party, *First Nat. Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 49 L. ed. 1051. *Contra, Hinds v. Moore*, C. C. A., 134 Fed. 221, or the bankrupt,

a petition will not lie to review orders or decrees in plenary suits.²⁸

Errors in deciding questions of fact cannot be reviewed by a petition of review.²⁹ Decisions as to matters within the discre-

Fisher v. Cushman, C. C. A., 103 Fed. 860; *Re Mertens*, C. C. A., 142 Fed. 445, in possession of property or a fund, to deliver or pay the same to the trustee; an order directing members of a bankrupt partnership to schedule and surrender their individual property; *Dickas v. Barnes*, C. C. A., 140 Fed. 849; an order granting or denying a claim of exemptions; *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116; *Re Youngstrom*, C. C. A., 153 Fed. 98; an order reopening or refusing to reopen an estate that has been closed; *Re O'Connell*, C. C. A., 137 Fed. 838; an order concerning the distribution of the sale of lands made by the trustee; *Re Groetzinger & Sons*, C. C. A., 127 Fed. 124; and an order granting, *O'Dell v. Boyden*, C. C. A., 150 Fed. 731, or denying, *Clark v. Pidcock*, C. C. A., 129 Fed. 745, an injunction against the interference with assets of the estate, which is not made in a plenary suit. It has been held that the following orders may be revised by a petition for a review without an appeal; an order upon the application of a widow for her right to dower in the estate of a bankrupt, who died after the adjudication; *Re McKenzie*, C. C. A., 142 Fed. 383; an order upon the application of a trustee authorizing the sale of real estate and the bringing in of third persons asserting liens upon the same; *Re McMahon*, C. C. A., 147 Fed. 684; an order directing the distribution of the proceeds of a sale by the trustee and determining priority of different

claims upon the same; *Morgan v. First Nat. Bank of Mannington*, C. C. A., 145 Fed. 466; orders denying priority in whole, *Re Rouse, Hazard & Co.*, C. C. A., 91 Fed. 96; *Re Worcester County*, C. C. A., 102 Fed. 808, 814; *contra*, *Cunningham v. German Ins. Bank*, C. C. A., 103 Fed. 932, 935; *Re Roche*, C. C. A., 101 Fed. 956; *Re Soudan Mfg. Co.*, C. C. A., 113 Fed. 804; *Re Doran*, C. C. A., 154 Fed. 467; or in part, *Re Chandler*, C. C. A., 184 Fed. 887; to claims that have been sustained or are not disputed, and an order setting aside an allowance of a secured claim and requiring the creditor to pay to the trustee, the amount of an unlawful preference. *Re First Nat. Bank of Louisville*, C. C. A., 155 Fed. 100. It has been held that an order allowing a claim, *Re Mueller*, C. C. A., 135 Fed. 711; and an order allowing a fee to an attorney, although the same was less than \$500, *Re Irwin*, C. C. A., 174 Fed. 642, cannot be reviewed by a petition for revision. The final decision in a contempt proceeding is not the subject of a petition for revision. *Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, 339.

²⁸ *Re Jacobs*, C. C. A., 99 Fed. 539; *Re Rusch*, C. C. A., 116 Fed. 70; *Doroshov v. Ott*, C. C. A., 134 Fed. 740. *Contra*, *Delta Nat. Bank v. Easterbrook*, C. C. A., 133 Fed. 521.

²⁹ *Stevens v. Nave-McCord Mercantile Co.*, C. C. A., 150 Fed. 71; *Ryan v. Hendricks*, C. C. A., 166 Fed. 94; *Re Irwin*, C. C. A., 174

tion of the court,³⁰ such as granting leave to reopen the bankrupt's estate,³¹ will rarely be thus reviewed.

§ 667. **Practice on appeals in bankruptcy.** "Appeals from a Court of Bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."¹ An appeal from an adjudication of involun-

Fed. 642; *Re Stewart*, C. C. A., 179 Fed. 222; *Re Lee*, C. C. A., 182 Fed. 579; *Re Frank*, C. C. A., 182 Fed. 794; *Re Donnelly*, C. C. A., 187 Fed. 121; *Johansen Bros. Shoe Co. v. Alles*, C. C. A., 197 Fed. 274; although the evidence is not conflicting when different deductions or conclusions therefrom may reasonably be drawn, *Re Frank*, C. C. A., 182 Fed. 794. Such was held to be the finding that a creditor did not have reasonable ground to believe that his debtor was insolvent when he obtained security. *Elliott v. Toepfner*, 187 U. S. 327, 47 L. ed. 200; *Re Rosser*, C. C. A., 101 Fed. 562; *Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co.*, C. C. A., 101 Fed. 699; *Re Whitener*, C. C. A., 105 Fed. 180; *Re Taft*, C. C. A., 133 Fed. 511; *Samel v. Dodd*, C. C. A., 142 Fed. 68; *Re Cole*, C. C. A., 144 Fed. 392; *Re Graessler & Reichwald*, C. C. A., 154 Fed. 478; *Re Eggert*, C. C. A., 102 Fed. 735. But if the finding of the District Court is so wholly unjustified on the proofs, as would require a court of review upon a writ of error to set aside a verdict of a jury for want of any evidence to sustain it, or for any other reason kindred thereto, the Circuit Court of Appeals will review the same. *Re Cole*, C. C. A., 144

Fed. 392, 393. For cases where a dispute concerning the validity of a chattel mortgage and the denial of a motion to dismiss an application for a discharge were held to present questions of law upon undisputed facts reviewable by petition for revision, see *Re Flatland*, C. C. A., 196 Fed. 310; *Lindeke v. Converse*, C. C. A., 198 Fed. 618.

³⁰ *Re Goldman*, C. C. A., 129 Fed. 212; *Mulford v. Fourth Street Nat. Bank*, C. C. A., 157 Fed. 897; *Birch v. Steele*, C. C. A., 165 Fed. 577; *Re Fischer*, C. C. A., 175 Fed. 531; *Lindeke v. Converse*, C. C. A., 198 Fed. 618.

³¹ *Re Goldman*, C. C. A., 129 Fed. 212, or the refusal to confirm a composition; *Mulford v. Fourth Street Nat. Bank*, C. C. A., 157 Fed. 897, and concerning matters of form and administration, *Re Boston Dry Goods Co.*, C. C. A., 125 Fed. 226; *Dodge v. Norlin*, C. C. A., 133 Fed. 363; *Re McKenzie*, C. C. A., 142 Fed. 383; *Stevens v. Nave-McCord Mercantile Co.*, C. C. A., 150 Fed. 71. *Contra*, *Re Mueller*, C. C. A., 135 Fed. 711; *Dickas v. Barnes*, C. C. A., 140 Fed. 849; *Re Holmes*, C. C. A., 142 Fed. 391. See *Re Eggert*, C. C. A., 102 Fed. 735; *Re Dickson*, C. C. A., 111 Fed. 726.

§ 667. ¹General Order XXXVI.

tary bankruptcy may be taken by contesting creditors.² An appeal from the allowance of a claim may be taken by the trustee,³ and if he refuses, to take it by an objecting creditor,⁴ although it is the safer practice for the creditor to obtain permission to appeal in the name of the trustee.⁵ Before the appointment of a trustee, a creditor who has been aggrieved by an order or decree may appeal from the same.⁶ Parties may join in the appeal, although they have different interests in the proceedings below and complain of different errors.⁷ All persons interested in the proceedings must be made parties to the appeal, unless they are represented by the trustee.⁸ "Trustees shall not be required to give bond when they take

² *Re Meyer*, C. C. A., 98 Fed. 976.

³ *Re Curtis*, C. C. A., 100 Fed. 784; *Chatfield v. O'Dwyer*, C. C. A., 101 Fed. 797. It was held that, upon an appeal from a judgment allowing claims to the costs of the administration, the trustee represented the general creditors. *Gray v. Grand Forks Mercantile Co.*, C. C. A., 138 Fed. 344. A trustee may appeal from an order denying his motion to expunge a claim, unless a preference is surrendered. *Livingstone v. Heine-man*, C. C. A., 120 Fed. 786. It has been held that a trustee may sustain a petition for the revision of an order dismissing a bankruptcy proceeding for want of jurisdiction. *Re New England Breeders' Club*, C. C. A., 169 Fed. 586.

⁴ *Chatfield v. O'Dwyer*, C. C. A., 101 Fed. 797; *Re Roche*, C. C. A., 101 Fed. 956; *McDaniel v. Stroud*, C. C. A., 106 Fed. 486.

⁵ *Chatfield v. O'Dwyer*, C. C. A., 101 Fed. 797; *Re Roche*, C. C. A., 101 Fed. 956; holds that any creditor may appeal in his own name.

⁶ *Clark v. Pidecock*, C. C. A., 129 Fed. 745.

⁷ *Crim v. Woodford*, C. C. A., 136 Fed. 34; *Stevens v. Nave-McCord*

Mercantile Co., C. C. A., 150 Fed. 71.

⁸ *Gray v. Grand Forks Mercantile Co.*, C. C. A., 138 Fed. 344; *Stevens v. Nave-McCord Mercantile Co.*, C. C. A., 150 Fed. 71, 74. Upon an appeal from an order directing the payment of money, the person to whom the payment is to be made must be made respondent; *Gray v. Grand Forks Mercantile Co.*, C. C. A., 138 Fed. 344; except, it has been held, counsel and court officers, to whom an allowance was made upon the petition of the trustee, *Re Utt*, C. C. A., 105 Fed. 754. It has been held that all consenting creditors are necessary parties to an appeal from an order approving a composition. *Marshall Field & Co. v. Wolf & Bro. Dry Goods Co.*, C. C. A., 120 Fed. 815. The trustee must be made a party to an appeal by a claimant from an order disallowing his claim, even if no contest was made by the trustee below; *Ex parte Mead*, 109 U. S. 230, 27 L. ed. 914; *Mead v. Platt*, 17 Fed. 509; but not to a decision granting the fund in his hands to two or more conflicting claimants to the same. *Love v. Export Storage Co.*, C. C. A., 143 Fed. 1. Cf. § 697, *infra*.

appeals or sue out writs of error."⁹ An application for a stay pending an appeal cannot be allowed by a circuit judge.¹⁰ An assignment of errors must be filed or there may be an affirmance, without a consideration of the merits of the appeal.¹¹ No bill of exceptions is required upon an appeal.¹² A complete record of the case below must be certified by the clerk and must contain in itself, and not by reference, all papers, exhibits, testimony and other proceedings necessary to the hearing in the court of review.¹³ Appeals to the Circuit Courts of Appeals from judgments which refuse to adjudge the de-

⁹ 30 St. at L. 544, 554, § 52.

¹⁰ *Re Ironclad Mfg. Co.*, C. C. A., 190 Fed. 320. Pending an appeal from a dismissal of the petition in voluntary bankruptcy, the District Court refused to discharge a receiver previously appointed and also refused to direct that he pay for the support of the alleged bankrupt in a sanitarium, when it appeared that the latter's wife held property which her husband had transferred to her. *Re Ward*, 194 Fed. 179. It has been held that a trustee in bankruptcy may obtain a supersedeas without a bond. *Re Dresser*, 14 Am. B. R. 41, by Referee Dexter. See *infra*, § 703. A bond upon an appeal from an adjudication of involuntary bankruptcy is sufficient, although it runs to the original petitioners alone and other creditors joined in the petition before the adjudication. *Flickinger v. First Nat. Bank of Vandalia, Ill.*, C. C. A., 145 Fed. 162. It has been held that the failure to procure a citation and to file a bond are not jurisdictional requirements; and that leave to file the same after the expiration of the statutory time may be granted. *Columbia Iron Works v. National Lead Co.*, C. C. A., 64 L.R.A. 645, 127 Fed. 99; *Lockman v. Lang*, C. C. A., 132 Fed. 1. But see *Norcross v. Nave & Mc-*

Cord Merc. Co., C. C. A., 101 Fed. 796; or defects in the same may be cured by amendment after the time limited for an appeal; *Re T. E. Hill Co.*, C. C. A., 148 Fed. 832; *cf. infra*, §§ 699-702; provided that the appeal has been otherwise duly taken within the statutory period; but that the omission of a citation cannot be cured, nor new parties brought in, after the expiration of the first term, at which the appeal can be heard. *Gray v. Grand Forks Mercantile Co.*, C. C. A., 138 Fed. 344. See *Nazima Trading Co. v. Martin*, C. C. A., 164 Fed. 838.

¹¹ *Lloyd v. Chapman*, C. C. A., 93 Fed. 599; *Re Dunning*, C. C. A., 94 Fed. 709; *infra*, § 701.

¹² *Dodge v. Norlin*, C. C. A., 133 Fed. 363.

¹³ *Dodge v. Norlin*, C. C. A., 133 Fed. 363; *Cook Inlet Coal Fields Co. v. Caldwell*, C. C. A., 147 Fed. 475; § 704, *infra*. Only the material parts of the record need be certified. *Dodge v. Norlin*, C. C. A., 133 Fed. 363. Where a clerk's certificate recited that the transcript was a true copy of so much of the record and proceedings as was requested by counsel for the appellant, in the absence of anything shown to the contrary, it is presumed that the objectors to a discharge had duly appeared so as

fendant a bankrupt, which grant or deny a discharge, and which allow or reject a claim, must be taken within ten days from the time the judgment has been rendered.¹⁴ Appeals in

to support objections subsequently filed. *Shaffer v. Koblegard Co.*, C. C. A., 183 Fed. 71. When the appeal is from an order of the judge upon the certificate of a referee, the proceedings before the referee need not be certified. *Cunningham v. German Ins. Bank*, C. C. A., 103 Fed. 932. A certificate by the referee in bankruptcy is insufficient. *Cook Inlet Coal Fields Co. v. Caldwell*, C. C. A., 147 Fed. 475, 478. An appeal will not be dismissed because there is no evidence in the record, where the record does not show that any evidence was taken. *C. C. Taft Co. v. Century Sav. Bank*, C. C. A., 141 Fed. 369. The certified transcript imports absolute verity and cannot be contradicted or explained by the evidence. *Re McCall*, C. C. A., 145 Fed. 898. It seems that documentary evidence not contained in the record may be considered in support of the judgment below. *Re Ironclad Mfg. Co.*, C. C. A., 197 Fed. 280. See *Dunham v. Townsend*, 118 N. Y. 286; 3 Cyc. 178. An appeal will ordinarily be dismissed when the record does not show that the questions of law presented by the assignments of error were not presented to and ruled upon by the court below. *Fidelity Tr. Co. v. Robinson*, C. C. A., 192 Fed. 562; and, if not dismissed, such questions will not usually be considered by the appellate court. *Arctic Ice Mach. Co. v. Armstrong County Tr. Co.*, C. C. A., 192 Fed. 114, *Re Charles Knosher & Co.*, C. C. A., 197 Fed. 136; *Shaffer v. Koblegard Co.*, C. C. A., 183 Fed. 71; § 711, *infra*. Where the bankrupt is too poor to print the

record, the Circuit Court of Appeals may relieve him from that requirement. *Re Friedman*, C. C. A., 161 Fed. 260, 262. See § 413, *supra*. An application, because of the poverty of the bankrupt, for an order requiring a receiver to pay the cost of the transcript and the printing out of the proceeds of the bankrupt's estate in his hands was denied. *Herman Keck Mfg. Co. v. Lorsch*, C. C. A., 179 Fed. 485. An application for the transmission of the bankrupt's original books and records of the Circuit Court of Appeals was denied when it did not appear that they could not be transcribed or represented by photographic copies. *Herman Keck Mfg. Co. v. Lorsch*, C. C. A., 179 Fed. 485.

§ 30 St. at L. 544, 553, § 25; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. ed. 945; *Norcross v. Nave & McCord Merc. Co.*, C. C. A., 101 Fed. 796; *Postlethwaite v. Hicks*, C. C. A., 165 Fed. 897; *Brady v. Bernard & Kittinger*, C. C. A., 170 Fed. 576; *Re Brady*, 169 Fed. 152. An appeal from an order denying an application to revoke a discharge need not be taken within ten days. *Thompson v. Mauzy*, C. C. A., 174 Fed. 611. The time to appeal from a judgment adjudging a defendant a bankrupt, cannot be extended by the subsequent entry of an alias adjudication to the same effect, *Re Berkebile*, C. C. A., 144 Fed. 577. It has been held: that a Court of Bankruptcy may grant a rehearing after the time for an appeal has expired, for the purpose of renewing the right of appeal, *Re Wright*, 96 Fed. 820; *Re Hudson Clothing Co.*,

these courts in other cases must be taken within six months after the entering of judgment or order sought to be reviewed.¹⁵ Where, pending an appeal from an order dismissing a petition in involuntary bankruptcy, the respondents were adjudicated bankrupts in another district; the appeal was dismissed.¹⁶ Ordinarily, the Circuit Court of Appeals will not decide any question when the record does not show that the same was presented to the court below.¹⁷ Even jurisdictional questions that might be waived will not, in such a case, be considered.¹⁸ Jurisdictional questions which cannot be waived will be considered, even if they were not raised below,¹⁹ and the court of review has the power to notice a plain error not assigned.²⁰ Where a referee passed upon only one of a number of objec-

140 Fed. 49; *Contra*, *West v. W. A. McLaughlin & Co.'s Trustee*, C. C. A., 162 Fed. 124; *Re Goldberg*, C. C. A., 167 Fed. 808; see *Judson v. Courier Co.*, 25 Fed. 705; but that it should not do so, except under extraordinary circumstances, even when there was no stenographer present at the original hearing. *Re Hudson Clothing Co.*, 140 Fed. 49. The time to appeal does not begin to run until the order sought to be reviewed is filed in the clerk's office. *Peterson v. Nash Bros.*, C. C. A., 55 L.R.A. 344, 112 Fed. 311; *Re McCall*, C. C. A., 145 Fed. 898. The filing of a petition for a rehearing within the ten days extends the time for an appeal until the disposition of the petition. *Re McCall*, C. C. A., 145 Fed. 898. When, upon a rehearing, an order is set aside for some substantial reason other than to extend the time to take an appeal, the time to appeal begins to run anew from a subsequent order to the same effect. *West v. W. A. McLaughlin & Co.'s Trustee*, C. C. A., 162 Fed. 124. The appeal is not taken until the order allowing the same is filed in the Fed. Prac. Vol. II.—144.

office of the Clerk of the Court of Bankruptcy. *Norcross v. Nave & McCord Merc. Co.*, C. C. A., 101 Fed. 796, *infra*, § 698. The time does not begin to run until the order is actually entered, notwithstanding a prior decision in writing. *Re Hettling*, C. C. A., 175 Fed. 65. It has been held that the right to appeal is not waived by a subsequent proceeding which was denied because of the former decision. *Ibid*.

¹⁵ 30 St. at L. 829, § 11; *Boonville Nat. Bank v. Blakey*, C. C. A., 107 Fed. 891; *infra*, § 698.

¹⁶ *Re Sears, Humbert & Co.*, C. C. A., 128 Fed. 275.

¹⁷ *Re Boston Dry Goods Co.*, C. C. A., 125 Fed. 226; *Re Shoe & Leather Reporter*, C. C. A., 129 Fed. 588; *Re O'Connell*, C. C. A., 137 Fed. 838. See *Osborne v. Perkins*, C. C. A., 112 Fed. 127; *Re Koenig*, 127 Fed. 891; *Buckingham v. Estes*, C. C. A., 128 Fed. 584; *infra*, § 711.

¹⁸ *Boonville Nat. Bank v. Blakey*, C. C. A., 107 Fed. 891.

¹⁹ *C. C. Taft Co. v. Century Sav. Bank*, C. C. A., 141 Fed. 369.

²⁰ *Boonville Nat. Bank v. Blakey*, C. C. A., 107 Fed. 891.

tions filed to the discharge of the bankrupt; it was held that an appeal from an order denying a discharge brought that objection alone before the Circuit Court of Appeals.²¹ Upon an appeal, the court of review may review questions of fact, as well as of law.²² "In every case in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."²³ A question of discretion concerning the administration of the bankrupt's estate will rarely be reviewed.²⁴ Upon an appeal from a final decree or

²¹ *Vehon v. Ullman*, C. C. A., 147 Fed. 694.

²² *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, C. C. A., 101 Fed. 699; *Houghton v. Burden*, 228 U.S. 161, 57 L. ed.—; nor usually matters of discretion, *Streeter v. Lowe*, 184 Fed. 263; § 711, *infra*.

²³ General Order XXXVI, subd. 3. A request for such findings and conclusions should be made at the time of the argument. *Washington v. Tearney*, C. C. A., 197 Fed. 307; but see *Brady v. Bernard & Kittinger*, C. C. A., 170 Fed. 576.

²⁴ *Re Schulman*, C. C. A., 177 Fed. 191; *Gold v. South Side Tr. Co.*, C. C. A., 179 Fed. 210. An appeal may be decided on questions of law alone, without the consideration of any question of fact. *C. C. Taft Co. v. Century Sav. Bank*, C. C. A., 141 Fed. 369. A finding of fact made by the referee and affirmed by the District Court will usually be affirmed by the court of review; *Re Noyes Bros.*, C. C. A., 127 Fed. 286; *Buckingham v. Estes*, C. C. A., 128 Fed.

584; *Kenova Loan & Trust Co. v. Graham*, C. C. A., 135 Fed. 717; *Hussey v. Dry Goods Co.*, 148 Fed. 598, 78 C. C. A., 370, 17 Am. B. R. 511; *Thompson v. Mauzy*, C. C. A., 174 Fed. 611; *Boswell Nat. Bank v. Simmons*, C. C. A., 190 Fed. 735; but not when the District Judge differed from the special master in his conclusions, *Mason v. Wolkowich*, C. C. A., 10 L.R.A. (N.S.) 765, 150 Fed. 699. See also *Merchants' Nat. Bank of Toledo, Ohio v. Cole*, C. C. A., 149 Fed. 708; nor when there were no findings of fact by either the District Judge or the referee. *Burleigh v. Foreman*, C. C. A., 130 Fed. 13. When a decision was based upon an erroneous conclusion of law and there is no specific finding of fact that justifies the same, the Circuit Court of Appeals may, upon the reversal, direct that the facts be found by the Court of Bankruptcy. *Re Straschnow*, C. C. A., 181 Fed. 337. This was done where the question was the amount of counsel fees that should be allowed. *Re*

order, the court may review all prior orders in the proceeding, which injuriously affect the appellant;²⁵ but not those which only injuriously affect the bankrupt or another party who has taken no cross-appeal.²⁶ If the Court of Bankruptcy fails to obey a mandate of the Circuit Court of Appeals, obedience thereto may be enforced by the writ of mandamus.²⁷

§ 668. Practice upon petition for a revision. The original petition for a revision should be filed in the Circuit Court of Appeals and not in the District Court.¹ It has been held that all the parties injuriously affected need not join in the same.² It must clearly state the questions of law involved, so as to represent a distinct issue, and be accompanied by enough of the record to show the manner in which the questions arose.³ It is the safer practice to procure the allowance

Medina Quarry Co., C. C. A., 197 Fed. 308. *Of.* § 711, *infra.*

²⁵ *Stevens v. Nave-McCord Mercantile Co.*, C. C. A., 150 Fed. 71, 73. But see *Brady v. Bernard & Kittinger*, C. C. A., 170 Fed. 576. It seems that this cannot be done when the prior order was appealable. *Bray v. Johnson*, C. C. A., 166 Fed. 57.

²⁶ *McGahan v. Anderson*, C. C. A., 113 Fed. 115.

²⁷ *Ex parte Chicago Title & Trust Co.*, C. C. A., 146 Fed. 742; reversed upon mandamus without affecting the question of jurisdiction in *Ex parte First Nat. Bank of Chicago*, 207 U. S. 61, 52 L. ed. 103. *Re Lesaius*, C. C. A., 181 Fed. 690, holding that the District Court could not amend an order that had been reversed. See § 712, *infra.* A second appeal will be dismissed as frivolous when the court of review on the first appeal has passed upon the points raised by the assignments of error and no new evidence has been submitted. *Re Kehler*, C. C. A., 162 Fed. 674.

§ 668. ¹ *Re Williams*, 105 Fed. 906.

² *Re Jemison Mercantile Co.*, C. C. A., 112 Fed. 966.

³ *Re Richards*, C. C. A., 96 Fed. 935; *Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co.*, C. C. A., 101 Fed. 699; *Re Baker*, C. C. A., 104 Fed. 287. A petition unaccompanied by a transcript or any findings of fact will be dismissed. *Re Throckmorton*, C. C. A., 196 Fed. 656. The petition should set out the facts or the findings of fact, upon which the matters of law sought to be reviewed arise. *Re Taft*, C. C. A., 133 Fed. 511; *Re Pettingill & Co.*, C. C. A., 137 Fed. 840; *Steiner v. Marshall*, C. C. A., 140 Fed. 710. *Contra*, *Re Baker*, C. C. A., 104 Fed. 287; *Remington on Bankruptcy*, § 2949. It has been held that the petition will be dismissed unless the record contains a statement or finding of facts, or shows that the court did not determine the question sought to be reviewed as one of fact. *Re Pettingill & Co.*, C. C. A., 137 Fed. 840; *Landry v. San Antonio Brewing Ass'n*, C. C. A., 159 Fed. 700; *Hegner v. Am. Trust & Sav. Bank*, C.

of the petition, as if it were an appeal, *ex parte* by the judge of the District or of the Circuit Court of Appeals;⁴ but, it has been held that such allowance is not necessary.⁵ In the absence of a rule of court upon the subject, no bond or citation is required upon a petition for a revision.⁶ Reasonable notice of the hearing upon the petition should be given to the respondents.⁷

The petition for a revision does not usually bring the prior proceedings before the Circuit Court of appeals;⁸ not even, it has been held, the jurisdiction of the court below when the proceedings have been pending there for some time.⁹ Ques-

C. A., 187 Fed. 599. See *Johansen Bros. Shoe Co. v. Alles*, C. C. A., 197 Fed. 274. In the absence of findings and a transcript of the evidence, it may be presumed that the decision was justified by the facts proved. *Re Roadarmour*, C. C. A., 177 Fed. 379. Where the facts support the order, the petition will be dismissed, although the ground of the decision below was erroneous. *Davis v. Crompton*, C. C. A., 158 Fed. 735. The petition must set forth the decision, which it claims is erroneous, *Re Richards*, C. C. A., 96 Fed. 935; *Re Taft*, C. C. A., 133 Fed. 511; *Re O'Connell*, C. C. A., 137 Fed. 838; and it should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination. *Re Richards*, C. C. A., 96 Fed. 935. In *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, C. C. A., 136 Fed. 396, it was held that, in the absence of any rule of court upon the subject, the petition would not be dismissed because the transcript was not certified. It is the better practice to have the petition accompanied by a certified copy of the opinion of the court below. This is required by

the rules of some of the Circuit Courts of Appeal, which also, in some cases, regulate the practice upon these petitions. See *infra*, appendix. It is insufficient to set forth the opinion of the court below. *Re Richards*, C. C. A., 96 Fed. 935. The order must be recited in the petition or certified to the court of review. *Re Richards*, C. C. A., 96 Fed. 935. The opinion of the court below cannot be treated as a finding of matters of fact, unless it is made a part of the record, *Re Pettingill & Co.*, G. C. A., 137 Fed. 840; but it may be looked into for the purpose of ascertaining what propositions of law were determined, *Re Pettingill & Co.*, C. C. A., 137 Fed. 840; *Samel v. Dodd*, C. C. A., 142 Fed. 68.

⁴ *Re Abraham*, C. C. A., 93 Fed. 767.

⁵ *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, C. C. A., 136 Fed. 396.

⁶ *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, C. C. A., 136 Fed. 396.

⁷ *Re Abraham*, C. C. A., 93 Fed. 767.

⁸ *Re Pettingill & Co.*, C. C. A., 137 Fed. 840.

⁹ *Re New York Tunnel Co.*, C. C. A., 159 Fed. 688. See *Re Bacon*, C. C. A., 159 Fed. 424.

tions of fact¹⁰ and of discretion¹¹ cannot be thus reviewed. The statute prescribes no period of limitation within which a petition for revision must be presented.¹² This is done by the rules of some of the Circuit Courts of Appeals.¹³ In the absence of such a rule it has been held that a petition for revision may and should be filed within the time usually allowed for an appeal to the Circuit Court of Appeals, namely, six months from the date of the filing of the order below.¹⁴ It has been held that an appeal erroneously taken may be treated as a petition of review.¹⁵ The phrase "within their jurisdiction," in the grant of supervisory power to the circuit Courts of Appeals, means within their territorial jurisdiction; and they may, upon a petition for a review, reverse an

¹⁰ *Elliott v. Toepfner*, 187 U. S. 327, 47 L. ed. 200; *Re Rosser*, C. C. A., 101 Fed. 562; *Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co.*, C. C. A., 101 Fed. 699; *Re Whitener*, C. C. A., 105 Fed. 180; *Re Taft*, C. C. A., 133 Fed. 511; *Samel v. Dodd*, C. C. A., 142 Fed. 68; *Re Cole*, C. C. A., 144 Fed. 392; *Re Graessler & Reichwald*, C. C. A., 154 Fed. 478; *Re Caponigri*, C. C. A., 183 Fed. 307. See § 667, *supra*.

¹¹ *Re Goldman*, C. C. A., 129 Fed. 212; *Mulford v. Fourth Street Nat. Bank*, C. C. A., 157 Fed. 897; *Re Throckmorton*, C. C. A., 196 Fed. 656, the confirmation of a sale. Such has been held to be the appointment or removal of a referee in bankruptcy. *Birch v. Steele*, C. C. A., 166 Fed. 577.

¹² *Bacon v. Roberts*, C. C. A., 146 Fed. 729.

¹³ In the Second Circuit, the petitions must be filed and served within ten days, the transcript filed, and the cause docketed within thirty days thereafter, unless the time is enlarged by an order of the court. The order of enlargement must be filed before the expiration of the time. C. C. A. Rule 38, 2d Ct., 150

Fed. LIV, 79 C. C. A. LIV. An extension of time by stipulation is insufficient. *Re Brown*, C. C. A., 174 Fed. 339. An order of enlargement *nunc pro tunc* cannot be made except under extraordinary circumstances. *Ibid.* See *Re Strobel*, C. C. A. 160 Fed. 916.

¹⁴ *Re Holmes*, C. C. A., 142 Fed. 391; *Re Youngstrom*, C. C. A., 153 Fed. 98. See *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, C. C. A., 136 Fed. 396. See *Blanchard v. Ammons*, C. C. A., 183 Fed. 556. Laches may be a ground for refusing costs, although the petition is filed before the six months have expired. *Re Endlar*, C. C. A., 192 Fed. 762. An order directing that the petitioner be imprisoned unless he filed an account before a certain date will not be set aside upon a petition filed before that day when there appears to be no error in directing the filing of the account. *O'Connor v. Sunseri*, C. C. A., 184 Fed. 712. *Cf. Gaudette v. Graham*, C. C. A., 164 Fed. 311.

¹⁵ *Re Abraham*, C. C. A., 93 Fed. 767 (where all the parties appeared); *Chesapeake Shoe Co. v. Seldner*, C. C. A., 122 Fed. 593; *Re*

order of a District Court in bankruptcy when an objection to the jurisdiction was made below, if that was not the only objection, and the court did not ground its decision upon a want of jurisdiction.¹⁶ It has been said that they cannot thus pass upon a constitutional question raised by a petition for a revision.¹⁷

§ 669. Review by the Supreme Court of the United States. The Supreme Court of the United States is "invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia."¹ It seems that the Supreme Court of the

Williams' Estate, C. C. A., 156 Fed. 934; Bryan v. Bernheimer, 181 U. S. 188, 192, 193, 45 L. ed. 814, 815, 818; Holden v. Stratton, 191 U. S. 115, 119, 48 L. ed. 116, 118. *Contra*, Dickas v. Barnes, C. C. A., 140 Fed. 849. See *supra*, § 259. A stipulation that two petitions for a revision with the transcripts upon the same be printed in one appeal book, does not waive any legal objections to either of them. *Re Strobel*, C. C. A., 160 Fed. 916.

¹⁶ Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814; *Re Seebold*, C. C. A., 105 Fed. 910.

¹⁷ *Re Abbey Press*, C. C. A., 134 Fed. 51.

§ 669. 130 St. at L. 544, 553, 554, § 24. In any strictly issuable controversy, and perhaps in all cases, it seems that an appeal lies to the Supreme Court from the decision upon an appeal of a Circuit Court of Appeals in a controversy arising in bankruptcy proceeding, where the appellant has claimed a

title, right, privilege or immunity under the Constitution of the United States, or any treaty or law thereof, or a commission or authority exercised thereunder, and the decision was against the same, *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179; for example when a trustee in bankruptcy has claimed that full faith and credit to the satisfaction of a judgment forbade the allowance of the proof of a debt, *Ibid*. Where an action by a trustee in bankruptcy against the bankrupt and others has been removed to the District Court of the United States, because of a difference of citizenship, the decision of the Circuit Court of Appeals is final. *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. ed. 287. The Court of Bankruptcy has power to determine whether an individual, *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127, or a corporation, *Columbia Iron Works v. National Lead Co.*, C. C. A., 64 L.R.A. 645, 127 Fed. 99, is subject

United States can review decisions in bankruptcy of the Supreme Court of the District of Columbia, in the same cases in which the Circuit Courts of Appeals can review the decisions of the Courts of Bankruptcy within their jurisdiction.² "From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: 1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or, 2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."³ There is no appeal from an order by the District Court of the United States for Porto Rico rejecting a claim in bankruptcy.⁴ An order denying a claim of set off may be reviewed after its affirmance by the Circuit Court of Appeals.⁵ Controversies may be certified to

to be adjudicated a bankrupt, and whether a party in adverse possession of property asserts a claim thereto, which is merely colorable, *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405. Consequently, the decisions of the District Courts upon these questions are reviewable by the Circuit Courts of Appeals and cannot be taken immediately to the Supreme Court of the United States. *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405.

² *Andubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009; *Re Massachusetts*, 197 U. S. 482, 487, 49 L. ed. 845, 848.

³ 30 St. at L. 544, 554, § 25. See *infra*, § 692; but not from a decision upon a petition for the revision of a decree or order of a Dis-

trict Court, which does not allow or reject a claim, *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, nor where claims are rejected upon general principles of law, broad enough to sustain them, without any reference to the provisions of the bankruptcy law, where it was contended that a debt had been barred by a discharge, *Friend v. Talcott*, 228 U. S. 27. An appeal will lie where an intervenor had asserted a right to property in the possession of the trustee, *Houghton v. Burden*, 228 U. S. 161; but not from a judgment granting or denying a discharge. *James v. Stone*, 227 U. S. 410.

⁴ *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 56 L. ed. 118.

⁵ *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571.

the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.⁶ An adjudication of bankruptcy or the denial of such an adjudication, which is based upon the verdict of a jury, granted as a matter of right, can only be reviewed by writ of error and not by appeal.⁷ The time within which a writ of error to a judgment or decree of a state court may be obtained from the Supreme Court of the United States, or an appeal taken thereto from a District Court of the United States, is two years from the entry of the same; in bankruptcy as in other cases;⁸ but where the appeal is taken solely because the jurisdiction was at issue in a case in a District Court, such question must be certified at the term at which the judgment or decrees was entered.⁹ "Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any Court of Bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such

⁶ 30 St. at L. 544, 554, § 25. The judgments and orders of the Circuit Court of Appeals in all cases, and all proceedings in bankruptcy, where they are otherwise final, *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127; including decisions upon petitions for review, *Bryan v. Bernheimer*, 175 U. S. 724, 44 L. ed. 338; *Mueller v. Nugent*, 180 U. S. 640, 45 L. ed. 711; 184 U. S. 1, 46 L. ed. 405; *Louisville Trust Co. v. Cominger*, 181 U. S. 620, 45 L. ed. 1031; 184

U. S. 18, 46 L. ed. 413; *Holden v. Stratton*, 191 U. S. 115, 119, 48 L. ed. 116, 118; may be revised by *certiorari*. See *infra*, § 689.

⁷ *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 203 U. S. 502, 51 L. ed. 292.

⁸ U. S. R. S., § 1008; *infra*, § 698.

⁹ 26 St. at L. 827; *Colwin v. City of Jacksonville*, 158 U. S. 456, 39 L. ed. 1053; *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, *infra*, § 688.

appeal shall consist only of the pleadings, the Judgment or decree, the finding of facts, and the conclusion of law.”¹⁰ It seems that for the purposes of a review in this method, the different applications in bankruptcy are all treated as parts of the same proceeding, and that there can be no review of any of them by the Supreme Court of the United States upon a certificate of jurisdiction until after the bankrupt's discharge.¹¹ But where a claimant or the trustee proceeds by an original bill in equity filed in a district or Circuit of the United States, the Supreme Court may review the final decree in that suit upon a certificate that there is a question of jurisdiction.¹²

An appeal from a final decision of a Circuit Court of Appeals, allowing or rejecting a claim, must be taken within thirty days after such judgment or decree.¹³ A petition for a rehearing, filed after the expiration of that time, does not extend the time to appeal.¹⁴ No appeal lies from an order denying a petition for a rehearing.¹⁵ “A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court

¹⁰ General Order XXXVI. Where no such findings and conclusions were made or requested, the appeal should be dismissed. *Chapman v. Bower*, 207 U. S. 89, 52 L. ed. 116.

¹¹ See *Leggett v. Allen*, 110 U. S. 741, 28 L. ed. 313; *Ingersoll v. Bonroe*, 154 U. S. 645, 38 L. ed. 1091.

¹² *Re Jacobs*, C. C. A., 99 Fed. 539.

¹³ *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128.

¹⁴ *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128.

¹⁵ *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128.

upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ."¹⁶ Under former bankruptcy laws it was held that under this statute the Supreme Court might review the final judgments or decrees of a State court which refuse to give proper effect to a discharge in bankruptcy;¹⁷ which refuse to give proper effect to the statute of limitations as to suits against trustees;¹⁸ and which refuse to give proper effect to an order for a sale in bankruptcy;¹⁹ but not of a judgment or decree which erroneously gives too great effect to a discharge;²⁰ nor of a refusal to open a decree so as to allow a defendant to plead a discharge.²¹

¹⁶ U. S. R. S., § 709; *infra*, § 692. The Supreme Court of the United States may review a final judgment or decree of a State court in an action by a trustee to recover assets of the estate, *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 50 L. ed. 527; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. ed. 596; *Miller v. N. O. Acid & P. Co.*, 211 U. S. 496; but not a judgment of a State court that an order setting aside to a bankrupt certain land as exempt was *res adjudicata* in an action of ejectment by parties who had bought the same at an execution sale, made subsequent to the filing of a petition of voluntary bankruptcy. *Smalley v. Laugenour*, 196 U. S. 93, 49 L. ed. 400.

¹⁷ *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. ed. 994; *For-syth v. Wehmeyer*, 177 U. S. 177, 44 L. ed. 723; *Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 362. See *Winchester v. Heiskell*, 119 U. S. 450, 30 L. ed. 462.

¹⁸ *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467.

¹⁹ *Factors' & Tr. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582; *New Orleans S. F. & L. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244.

²⁰ *Linton v. Stanton*, 12 How. 423, 13 L. ed. 1050.

²¹ *Wolf v. Stix*, 96 U. S. 541, 24 L. ed. 640. But see *Winchester v. Heiskell*, 119 U. S. 450, 30 L. ed. 462. See also *Van Norden v. Benner*, 131 U. S. cxlv, 24 L. ed. 247; *Scott v. Kelly*, 22 Wall. 57, 22 L. ed. 729; *Boatmen's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265, 29 L. ed. 174. Under the act of 1867 it was held that the Supreme Court might review in certain cases the decision of a State court against an assignee in bankruptcy who claimed title to certain property. *Williams v. Heard*, 140 U. S. 529, 35 L. ed. 550. But see *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771.

